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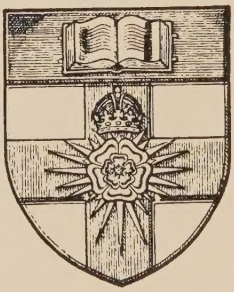

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"Considered" for this purpose means commented on judicially in such a way that the comment might be argued to affect the weight or effect of the decision commented on.

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Coats (J. & P.) Ltd. v. *Inland Revenue Comrs.* [1897] 1 Q.B. 778; 13 T.L.R. 548. Considered, LITTLEWOODS MAIL ORDER STORES LTD. *v.* INLAND REVENUE COMRS. **25**
Colina, The (1897) 82 Fed.Rep. 665. Considered, RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD. **269**
Collards' Will Trusts, In re [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821. Considered, *In re* PILKINGTON'S WILL TRUSTS **776**
Comptoir Commercial Anversois and Power, Son & Co., In re [1920] 1 K.B. 868, 878, C.A. Dictum of Bailhache J. applied, TSAKIROGLOU & CO. LTD. *v.* NOBLEE THORL G.M.B.H. **633**
Compton, In re. Powell v. *Compton* [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198, C.A. Considered, CAFFOOR *v.* INCOME TAX COMR. **794**
Connolly Brothers Ltd., In re [1911] 1 Ch. 731, C.A. Applied, THAMES LAUNCHES LTD. *v.* TRINITY HOUSE CORPN. (DEPTFORD STROND) **16**
Cooden Engineering Co. Ltd. v. *Stanford* [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A. Distinguished, ALDER *v.* MOORE **426**; CAMPBELL DISCOUNT CO. LTD. *v.* BRIDGE **596**
Cooke v. *Hughes* (1824) Ry. & M. 112. Considered, SPEIDEL *v.* PLATO FILMS LTD. **470**
Cooper v. *Wilson* [1937] 2 K.B. 309; [1937] 2 All E.R. 726; 53 T.L.R. 623. Applied, RIDGE *v.* BALDWIN **1054**
Cranfield Bros. Ltd. v. *Tatem Steam Navigation Co. Ltd.* (1939) 64 Ll.L.R. 264. Considered, RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD. **269**
Cresswell v. *Sirl* [1948] 1 K.B. 241; 63 T.L.R. 620; [1947] 2 All E.R. 730. Dictum of Scott L.J. applied, WORKMAN *v.* COWPER **386**

Davie v. *New Merton Board Mills Ltd.* [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L. Distinguished, RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD. **269**
Demarest's Settlement Trusts, In re [1940] Ch. 661; 56 T.L.R. 602. Considered, DUNN *v.* INLAND REVENUE COMMISSIONERS **769**
Dennis (J.) & Co. Ltd. v. *Munn* [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A. Distinguished, ARCHBOLDS (FREIGHTAGE) LTD. *v.* S. SPANGLETT LTD. **170**
Dilkes v. *Broadmead* (1860) 2 Giff. 113. Considered, SALIH *v.* ATCHI **969**
Dobbell (G. E.) & Co. v. *S.S. Rossmore Co. Ltd.* [1895] 2 Q.B. 408; 11 T.L.R. 501, C.A. Considered, RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD. **269**
Dona Maria Abeyesekera Hamini v. *Daniel Tillekeratne* [1897] A.C. 277. Applied, NADESAN *v.* RAMASAMY **940**
Drax, In re (1906) 22 T.L.R. 343. Followed, *In re* HOWARD'S WILL TRUSTS **821**
Dunlop Pneumatic Tyre Co. Ltd. v. *New Garage and Motor Co. Ltd.* [1915] A.C. 79; 30 T.L.R. 625, H.L. Applied, CAMPBELL DISCOUNT CO. LTD. *v.* BRIDGE **596**

Eady v. *Elsdon* [1901] 2 K.B. 460, C.A. Applied, *In re* P. C. (AN INFANT) **710**
Eastern Distributors Ltd. v. *Goldring (Murphy, Third Party)* [1957] 2 Q.B. 600; [1957] 3 W.L.R. 237; [1957] 2 All E.R. 525, C.A. Distinguished, CAMPBELL DISCOUNT CO. LTD. *v.* GALL **514**
Escoigne Properties Ltd. v. *Inland Revenue Comrs.* [1958] A.C. 549; [1958] 2 W.L.R. 386; [1958] 1 All E.R. 406, H.L. Distinguished, LITTLEWOODS MAIL ORDER STORES LTD. *v.* INLAND REVENUE COMRS. **25**
Europa, The [1908] P. 84; 24 T.L.R. 151, D.C. Considered, HONGKONG FIR SHIPPING CO. LTD. *v.* KAWASAKI KISEN KAISHA LTD. **716**
Evans v. *Evans* [1948] 1 K.B. 175; 63 T.L.R. 638; [1947] 2 All E.R. 656. Not followed, NAYLOR *v.* NAYLOR **751**
Evans, Sons & Co. v. *Cunard Steamship Co. Ltd.* (1902) 18 T.L.R. 374, 375. Considered, TSAKIROGLOU & CO. LTD. *v.* NOBLEE THORL G.M.B.H. **633**

Fairclough, Dodd & Jones Ltd. v. *J. H. Vantol Ltd.* [1957] 1 W.L.R. 137; [1956] 3 All E.R. 921, H.L. Considered, TSAKIROGLOU & CO. LTD. *v.* NOBLEE THORL G.M.B.H. **633**
Fernando v. *Fernando* (1902) 2 Browne 277. Considered, SALIH *v.* ATCHI **969**

Fisher, In re [1943] 1 Ch. 377. Not followed, *In re* BERRY, DECD. **329**
Floyd v. *Bush* [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265, D.C. Considered, NEWBERRY *v.* SIMMONDS **675**
Foundling Hospital Governors v. *Crane* [1911] 2 K.B. 367, 379. Dictum of Farwell L.J. considered, BEESLY *v.* HALLWOOD ESTATES LTD. **36**
Fry, In re [1945] Ch. 348; 61 T.L.R. 449; [1945] 2 All E.R. 205. Considered, *In re* HOWARD'S WILL TRUSTS **821**

Garforth-Bles v. *Garforth-Bles* [1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308. Applied, PURNELL *v.* PURNELL **185**
Gavin v. *Hadden* (1871) 8 Moo.P.C.(N.S.) 90. Considered, SALIH *v.* ATCHI **969**
Gelmini v. *Moriggia* [1913] 2 K.B. 549; 29 T.L.R. 486. Not followed, MARREN *v.* DAWSON BENTLEY & CO. LTD. **679**
Gillingham Bus Disaster Fund, In re [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 2 All E.R. 749; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1959] 2 All E.R. 749, C.A. Considered, *In re* WYKES, DECD. **115**
Glamorgan Quarter Sessions v. *Wilson* [1918] 1 K.B. 725; 26 T.L.R. 351. Decision approved, GROSVENOR PLACE ESTATES LTD. *v.* ROBERTS **83**
Goodman's Trust, In re (1881) 17 Ch.D. 266, C.A. Considered, COLEMAN *v.* SHANG **562**
Goodway v. *Becher* [1951] 2 All E.R. 349, 350. Dicta of Lord Goddard C.J. explained, WORKMAN *v.* COWPER **386**
Gooneratne v. *Bishop of Colombo* (1931) 32 N.L.R. 337. Approved, NADESAN *v.* RAMASAMY **940**
Gosse Millerd Ltd. v. *Canadian Government Merchant Marine Ltd.* [1929] A.C. 223, 230, 237; 45 T.L.R. 63, H.L. Dicta of Lords Sumner and Hailsham applied, RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD. **269**
Grassi, In re [1905] 1 Ch. 584; 21 T.L.R. 343. Applied, *In re* MAINFOLD, DECD. **456**
Grosvenor Place Estates Ltd. v. *Roberts* [1960] Ch. 423; [1960] 2 W.L.R. 531; [1960] 2 All E.R. 643. Decision of Danckwerts J. affirmed, GROSVENOR PLACE ESTATES LTD. *v.* ROBERTS **83**

Halsted's Will Trusts, In re [1937] 2 All E.R. 570. Considered, *In re* PILKINGTON'S WILL TRUSTS **776**
Har Prasad Singh v. *Judges of Allahabad High Court* (1931) L.R. 58 I.A. 152. Considered, ATTORNEY-GENERAL OF THE GAMBIA *v.* N'JIE **845**
Hare v. *Putney Overseers* (1881) 7 Q.B.D. 223, C.A. Distinguished, CLAYTON *v.* KINGSTON-UPON-HULL CORPN. **1**
Harpur's Will Trusts, In re [1960] 3 W.L.R. 607; [1960] 3 All E.R. 237. Considered, *In re* WYKES, DECD. **115**
Harris v. *Boots Cash Chemists (Southern) Ltd.* [1904] 2 Ch. 376; 20 T.L.R. 623. Distinguished, AYLING *v.* WADE **873**
Harrison v. *Pearce* (1858) 1 F. & F. 567. Considered, DINGLE *v.* ASSOCIATED NEWSPAPERS LTD. **523**
Hartland v. *Diggines* [1926] A.C. 289; 42 T.L.R. 262, H.L. Distinguished, WILKINS *v.* ROGERSON **102**
Hawkins v. *Express Dairy Co. Ltd.* (1940) 63 L.T. 147. Considered, DINGLE *v.* ASSOCIATED NEWSPAPERS LTD. **523**
Hawley v. *Steele* (1877) 6 Ch.D. 521. Applied, MARTEN *v.* FLIGHT REFUELLING LTD. **1018**
Hebridean Coast, The [1960] 3 W.L.R. 29; [1960] 2 All E.R. 85. Decision of the Court of Appeal affirmed, THE HEBRIDEAN COAST **48**
Hill v. *Hill* [1960] P. 130; [1959] 3 W.L.R. 828; [1959] 3 All E.R. 754. Overruled, ROSS SMITH (ORSE. RADFORD) *v.* ROSS SMITH **71**
Hill v. *Permanent Trustee Co. of New South Wales* [1930] A.C. 720, P.C. Applied, DIMBULA VALLEY (CEYLON) TEA CO. LTD. *v.* LAURIE **253**
Hobbs v. *Tinling* [1929] 2 K.B. 1; 45 T.L.R. 328, C.A. Applied, SPEIDEL *v.* PLATO FILMS LTD. **470**; DINGLE *v.* ASSOCIATED NEWSPAPERS LTD. **523**
Hogg v. *Scott* [1947] K.B. 759; 63 T.L.R. 320; [1947] 1 All E.R. 788. Considered, RIDGE *v.* BALDWIN **1054**
Hollinshead v. *Hazleton* [1916] A.C. 428, H.L. Considered, *In re* COHEN, A BANKRUPT **237**
Hopes v. *Hopes* [1949] P. 227; 64 T.L.R. 623; [1948] 2 All E.R. 920, C.A. Followed, NAYLOR *v.* NAYLOR **751**
Howarth v. *Howarth* (1886) 11 P.D. 68. Applied, HUNTER *v.* HUNTER AND WADDINGTON **691**
Howe v. *Lord Dartmouth* (1802) 7 Vesey 137. Applied, *In re* BERRY, DECD. **329**
Hoystead v. *Commissioner of Taxation* [1926] A.C. 155; 42 T.L.R. 207, P.C. Not followed, CAFFOOR *v.* INCOME TAX COMR. **794**
Huggins, Ex parte (1882) 21 Ch.D. 85, C.A. Considered, *In re* COHEN, A BANKRUPT **237**
Hyde v. *Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130. Applied, SOWA *v.* SOWA **313**

Inland Revenue Comrs. v. *Bernstein* [1960] Ch. 444; [1960] 2 W.L.R. 554; [1960] 1 All E.R. 697. Decision of Danckwerts J. affirmed **143**
Inland Revenue Comrs. v. *Collco Dealings Ltd.* [1960] Ch. 592; [1960] 2 W.L.R. 848; [1960] 2 All E.R. 44, C.A. Decision of the Court of Appeal affirmed **401**

Inland Revenue Comrs. v. *Sneath* [1932] 2 K.B. 362; 48 T.L.R. 241, C.A. Considered, CAFFOOR *v.* INCOME TAX COMR. **794**
Inland Revenue Comrs. v. *Thornton, Kelley & Co. Ltd.* [1957] 1 W.L.R. 482; [1957] 1 All E.R. 650. Applied, DIMBULA VALLEY (CEYLON) TEA CO. LTD. *v.* LAURIE **253**
Iveagh v. *Inland Revenue Comrs.* [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609. Considered, DUNN *v.* INLAND REVENUE COMRS. **769**

Jackson v. *Goldsmith* (1950) 81 C.L.R. 446. Applied, RANDOLPH *v.* TUCK **855**
James v. *Davies* [1953] 1 Q.B. 8; [1952] 2 T.L.R. 662; [1952] 2 All E.R. 758, D.C. Distinguished, T. K. WORGAN AND SON LTD. *v.* GLOUCESTERSHIRE COUNTY COUNCIL **729**
Joicey, In re [1915] 2 Ch. 115, C.A. Considered, *In re* PILKINGTON'S WILL TRUSTS **776**
Jones v. *Guardians of Newton and Llanidloes* [1920] 3 K.B. 381; 36 T.L.R. 758, D.C. Followed, NAYLOR *v.* NAYLOR **751**
Jones v. *Stevens* (1822) 11 Price 235. Overruled, SPEIDEL *v.* PLATO FILMS LTD. **470**
Justices of Court of Common Pleas of Antigua, In re (1830) 1 Knapp. 267, 268, P.C. Considered, ATTORNEY-GENERAL OF THE GAMBIA *v.* N'JIE **845**

Karthigesu v. *Parupathy* (1945) 46 N.L.R. 162. Considered, MANGALESWARI *v.* SELVADURAI **813**
Kathiresu v. *Kasinather* (1923) 25 N.L.R. 331. Considered, MANGALESWARI *v.* SELVADURAI **813**
Kent v. *Atkinson* [1923] P. 142; 39 T.L.R. 404. Considered, JACKS *v.* WILKIE AND JACKS **953**
Kersey, In re [1952] W.N. 541. Distinguished, *In re* HOWARD'S WILL TRUSTS **821**
Khoo Hooi Leong v. *Khoo Hean Kwee* [1926] A.C. 529, P.C. Considered, COLEMAN *v.* SHANG **562**
King v. *Phillips* [1953] 1 Q.B. 429, 441; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A. Dicta of Denning L.J. applied, OVERSEAS TANKSHIP (U.K.) LTD. *v.* MORTS DOCK & ENGINEERING CO. LTD. **126**
Kinnane v. *Kinnane* [1954] P. 41; [1953] 3 W.L.R. 782; [1953] 2 All E.R. 1144, D.C. Applied, NAYLOR *v.* NAYLOR **751**
Kish (J. & E.) v. *Charles Taylor, Sons & Co.* [1912] A.C. 604; 28 T.L.R. 425, H.L. Considered, HONGKONG FIR SHIPPING CO. LTD. *v.* KAWASAKI KISEN KAISHA LTD. **716**
Koettgen's Will Trusts, In re [1954] Ch. 252; [1954] 2 W.L.R. 166; [1954] 1 All E.R. 581. Considered, CAFFOOR *v.* INCOME TAX COMR. **794**
Kusmawathi v. *Weerasinghe* (1932) 33 N.L.R. 265. Explained, NADESAN *v.* RAMASAMY **940**

Lambeth Overseers v. *London County Council (The Brockwell Park Case)* [1897] A.C. 625; 13 T.L.R. 527, H.L. Distinguished, CLAYTON *v.* KINGSTON-UPON-HULL CORPN. **1**
Landau, In re [1934] Ch. 549; 50 T.L.R. 403, C.A. Distinguished, *In re* COHEN, A BANKRUPT **237**
Lang Propeller Co., In re [1927] 1 Ch. 120; 42 T.L.R. 702; 11 T.C. 46, C.A. Considered, GROSVENOR PLACE ESTATES LTD. *v.* ROBERTS **83**
Langrick v. *Langrick and Funnell* [1920] P. 90; 36 T.L.R. 308. Applied, JACKSON *v.* JACKSON AND PAVAN **58**
Lawrence v. *Howlett* [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74, D.C. Considered, NEWBERRY *v.* SIMMONDS **675**
Liesboch, The [1933] A.C. 449; 49 T.L.R. 289, H.L. Considered, OVERSEAS TANKSHIP (U.K.) LTD. *v.* MORTS DOCK & ENGINEERING CO. LTD. **126**
Liverpool Corpn. v. *West Derby Union* (1905) 92 L.T. 467. Considered, CLAYTON *v.* KINGSTON-UPON-HULL CORPN. **1**
London County Council v. *Attorney-General* [1901] A.C. 26, 43; 4 T.C. 253, H.L. Dicta of Lord Davey applied, GROSVENOR PLACE ESTATES LTD. *v.* ROBERTS **83**
London Library v. *Cane* [1960] 1 Q.B. 373; [1959] 3 W.L.R. 929; [1959] 3 All E.R. 726, C.A. Applied, ROYAL COLLEGE OF MUSIC *v.* CANE **571**
Lord Advocate v. *Edinburgh Corporation*, 1905, 7 S.C. 272. Distinguished, GROSVENOR PLACE ESTATES, LTD. *v.* ROBERTS **83**
Lorilland, In re [1922] 2 Ch. 638; 38 T.L.R. 666, C.A. Applied, *In re* MANIFOLD, DECD. **456**
Low v. *Bouverie* [1891] 3 Ch.D. 82; 7 T.L.R. 582, C.A. Dictum of Bowen L.J. applied, RANDOLPH *v.* TUCK **855**
Lowe v. *Lombank* [1960] 1 W.L.R. 196, 206; [1960] 1 All E.R. 611, C.A. Dictum of Diplock J. distinguished, CAMPBELL DISCOUNT CO. LTD. *v.* GALL **514**
Lowther v. *Bentinck* (1874) L.R. 19 Eq. 166. Considered, *In re* PILKINGTON'S WILL TRUSTS **776**

M. (An Infant), In re [1960] 3 W.L.R. 1045; [1961] 3 All E.R. 201. Decision of Cross J. affirmed **350**
M. (An Infant), In re [1961] 2 W.L.R. 350; [1961] 1 All E.R. 788, C.A. Applied, *In re* BAKER (INFANTS) **626**
Macauley v. *Judges of the Supreme Court of Sierra Leone* [1928] A.C. 344, P.C. Considered, ATTORNEY-GENERAL OF THE GAMBIA *v.* N'JIE **845**
Mahmoud and Ispahani, In re [1921] 2 K.B. 716; 37 T.L.R. 489. Distinguished, ARCHBOLDS (FREIGHTAGE) LTD. *v.* S. SPANGLETT LTD. **170**
Mailvaganam v. *Kandiah* (1930) 32 N.L.R. 211. Considered, MANGALESWARI *v.* SELVADURAI **813**
Manchester, Sheffield and Lincolnshire Railway Co. v. *Anderson* [1898] 2 Ch. 394, 404; 14 T.L.R. 489. Dictum of Chitty L.J. applied, MARTEN *v.* FLIGHT REFUELLING LTD. **1018**

Marginson v. *Blackburn Borough Council* [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273, C.A. Considered, RANDOLPH *v.* TUCK **855**
Maritime Electric Co. Ltd. v. *General Dairies Ltd.* [1937] A.C. 610; 53 T.L.R. 391; [1937] 1 All E.R. 748, P.C. Applied, SOUTHEND-ON-SEA CORPN. *v.* HODGSON (WICKFORD) LTD. **806**
Meatyard, In the Goods of [1903] P. 125. Applied, *In re* MANIFOLD, DECD. **456**
Miles v. *Chilton (orse. Miles)* (1849) 1 Rob.Eccl. 684. Applied, HAYWARD *v.* HAYWARD (ORSE. PRESTWOOD) **993**
Ministry of Pensions v. *Chennell* [1947] K.B. 250, 253; 63 T.L.R. 753; [1946] 2 All E.R. 719. Dictum of Denning J. considered, OVERSEAS TANKSHIP (U.K.) LTD. *v.* MORTS DOCK & ENGINEERING CO. LTD. **126**
Mirehouse v. *Rennell* (1833) 1 Cl. & F. 527. Considered, SHAW *v.* D.P.P. **897**
Moor Line Ltd. v. *Distillers Co. Ltd.*, 1912 S.C. 514. Considered, UNION OF INDIA *v.* COMPANIA NAVIERA AEOLUS S.A. **659**

Nash v. *Hodgson* (1855) 6 De G.M. & G. 474. Considered, *In re* FOOTMAN BOWER & CO. LTD. **667**
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National Assistance Board v. *Parkes* [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1, C.A. Followed, NAYLOR *v.* NAYLOR **751**
National Assistance Board v. *Tugby* [1957] 1 Q.B. 506; [1957] 2 W.L.R. 316; [1957] 1 All E.R. 509, D.C. Applied, CLAPHAM *v.* NATIONAL ASSISTANCE BOARD **448**
Neeld, In re [1960] Ch. 455; [1960] 2 W.L.R. 730; [1960] 2 All E.R. 33. Followed, *In re* HOWARD'S WILL TRUSTS **821**
Neenan v. *Woodside Astoria Transportation Co.* (1932) 256 New York Supp. 38. Applied, RANDOLPH *v.* TUCK **855**
Newson v. *Newson* (1934) 50 T.L.R. 399. Applied, PURNELL *v.* PURNELL **185**
Newton Abbot Co-operative Society Ltd. v. *Williamson and Treadgold Ltd.* [1952] Ch. 286; [1952] 1 W.L.R. 283; [1952] 1 All E.R. 279. Considered, MARTEN *v.* FLIGHT REFUELLING LTD. **1018**
Nicholl v. *Austin* (1935) 19 T.C. 531. Distinguished, WILKINS *v.* ROGERSON **102**
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North River Freighters Ltd. v. *President of India* [1956] 1 Q.B. 333; [1958] 2 W.L.R. 117; [1956] 1 All E.R. 50, C.A. Applied, GOVERNMENT OF CEYLON *v.* SOCIETE FRANCO-TUNISIENNE D'ARMEMENT-TUNIS **161**
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Official Receiver, Ex parte, Reed, Bowen & Co., In re (1887) 19 Q.B.D. 174; 3 T.L.R. 640, C.A. Considered, ATTORNEY-GENERAL OF THE GAMBIA *v.* N'JIE **845**
Oppenheim v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L. Considered, CAFFOOR *v.* INCOME TAX COMR. **794**

Petre, In re [1910] 1 Ch. 290. Applied, *In re* HOWARD'S WILL TRUSTS **821**
Phillips v. *Edwards* (1864) 33 Beav. 440. Considered, BEESLY *v.* HALLWOOD ESTATES LTD. **36**
Phoenix Oil & Transport Co. Ltd. (No. 2), In re [1958] Ch. 565; [1958] 2 W.L.R. 126; [1958] 1 All E.R. 158. Applied, *In re* PARAGON HOLDINGS LTD. **421**
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Poole and Clarke's Contract, In re [1904] 2 Ch. 173; 20 T.L.R. 604, C.A. Distinguished, AYLING *v.* WADE **873**
Porteus v. *Watney* (1878) 3 Q.B.D. 534, C.A. Considered, GOVERNMENT OF CEYLON *v.* SOCIETE FRANCO-TUNISIENNE D'ARMEMENT-TUNIS **161**

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R. v. *A.B.* [1941] 1 K.B. 454; 57 T.L.R. 307, C.C.A. Applied, R. *v.* MADAN **231**
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R. v. *Berg, Britt, Carré and Lummies* (1927) 20 Cr.App.R. 38, C.C.A. Approved and applied. SHAW *v.* DIRECTOR OF PUBLIC PROSECUTIONS **897**

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[COURT OF APPEAL.]

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Oct. 20, 21;
Nov. 10,

Lord Evershed M.R., Harman and Donovan L.JJ.

CLAYTON (VALUATION OFFICER) *v.* KINGSTON-UPON-HULL CORPORATION.

Rating—Rateable occupation—Art gallery—Hereditaments for use by the public as an art gallery—Exclusion of public from parts of hereditament—Whether any beneficial occupation.

Under an indenture of December 9, 1919, the Ferens Art Gallery at Kingston-upon-Hull was held by Kingston-upon-Hull Corporation upon a valid charitable trust to permit it to be used and enjoyed by the citizens of the City and County of Kingston-upon-Hull and the public generally as an art gallery for the exhibition of works of art in perpetuity. About two-thirds of the gallery building was used for the display of works of art and were open daily to the public without charge, the remaining third of the building, to which the public was not admitted, was used as offices and store rooms and for purposes ancillary to the running of the gallery. The Lands Tribunal, affirming the decision of the local valuation court, held that the gallery was not rateable on the ground that there was no beneficial occupation of it, and for rating purposes the public were the occupiers:—

Held (Donovan L.J. dissenting), that under the trusts declared of the art gallery the right of the public was not comparable to the "free and unrestricted user" by the public of an open space, and that the corporation was the occupier of the gallery which was not exempt from rating.

Hare v. *Putney Overseers* (1881) 7 Q.B.D. 223, C.A.; *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case) [1897] A.C. 625; 13 T.L.R. 527, H.L.; *Burnell* v. *Downham Market Urban District Council* [1952] 2 Q.B. 55; [1952] 1 All E.R. 601, C.A. distinguished.

Decision of the Lands Tribunal reversed.

APPEAL from the Lands Tribunal.

This was an appeal by the valuation officer from a decision of the Lands Tribunal, affirming the decision of the local valuation court for Kingston-upon-Hull and East Riding (South), that the

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Ferens Art Gallery, Victoria Square, should be entered on the valuation list for Kingston-upon-Hull county as exempt.

The hereditament had been entered in the valuation list with gross value £4,700 and rateable value £3,913. The respondents, the Kingston-upon-Hull and East Riding Corporation, contended that it should be treated as exempt because it was held on trust for public use in perpetuity so as to be irrevocably dedicated to the public and incapable by law of being beneficially occupied.

The following statement of facts is taken from the decision of the Lands Tribunal.

"The site on which the hereditament stands was conveyed to "the Mayor Alderman and Citizens of the City and County of "Kingston-upon-Hull by the Right Hon. Thomas Robinson "Ferens by an indenture of December 9, 1919, upon and subject "to trusts comprised in an indenture of the same date and made "between the same parties. Under the latter document the cor-"poration are required within five years to erect upon the site "out of funds which has been given to them by Mr. Ferens a "suitable building, and clause 5 provides: 'The Corporation shall "'hold the said piece of land conveyed by and comprised in the "'principal indenture and the said building or buildings (all of "'which are hereinafter included in the expression "The Art "'"Gallery") upon trust to permit the same to be used and "'enjoyed by the Citizens of the said City and County of Kings-"'ton-upon-Hull and the public generally as an art gallery for the "'exhibition of works of art in perpetuity.'

"Owing to the conditions consequent upon the 1914–1918 "war, the buildings were not in fact erected until 1928 and a "supplemental deed was executed on March 15, 1928, which "provided for the subsequent use of the balance of the funds "partly in defraying part of the usual costs of maintenance and "partly as a purchase fund for acquiring pictures, statuary and "works of art.

"It was not disputed that the effect of these deeds was to "constitute the respondents trustees under a valid charitable trust.

"The building which has been erected contains galleries on "the ground and first floors with lifts for the conveyance of "pictures etc. On the ground floor are two offices for the curator "and a porter's room, and on the first floor part of the balcony "gallery is used as a café and a small room is set aside for the "preparation of tea, etc., for use therein. The basement is "entirely devoted to storage of works of art, restoration of such "works, unpacking and heating and ventilating and lighting. "From all the parts other than the galleries and café the public "are excluded but it is agreed that they are all used for purposes "which are necessary and ancillary to the running of the gallery.

"The galleries are open to the public free of charge between "10 a.m. and 6 p.m. on weekdays and 2.30 p.m. and 4.30 p.m. "on Sundays (except Christmas Day and Good Friday). There

"is no public demand for earlier opening and later closing has "been found not to justify the additional expense. Organised "parties are permitted to enter after 6 p.m. by arrangement, and "facilities are provided for the public for meetings, lectures or "conducted visits in the evening by arrangement with the "director.

"The staff which consists of a director, an assistant director, "three attendants, a boiler attendant, a joiner and a waitress are "under the control of the director.

"There are no by-laws or regulations in force in respect of the "galleries but the attendants are orally instructed by the director "to take care of the works of art, to assist in the exhibition of the "works and to ensure due decorum on the part of the public. "Smoking is allowed only in the café, and singing, eating sand-"wiches and courting are discouraged. When an attendant finds "a member of the public behaving badly he is instructed to "endeavour to persuade him to leave the gallery and if he does "not do so to call the police. Since the gallery has been opened "only one or two people under the influence of drink and one "person who was shouting have had to be threatened with "ejection."

After a consideration of the decisions in *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case)[1]; *Trustees of Sir John Soane's Museum* v. *St. Giles Vestry*[2]; *Liverpool Corporation* v. *West Derby Union*[3]; *Bowes Museum and Park Trustees* v. *Cutts*[4]; *Erith Borough Council* v. *Draper*[5]; *Burnell* v. *Downham Market Urban District Council*[6]; *Burnell* v. *Terrington St. Clements Parish Council*,[7] the decision of the Lands Tribunal continued:

"So far as the exclusion of the public from certain parts of "the building is concerned, 'in the *Brockwell Park* case[8] itself "'there were certain portions of the land from which the public "'were necessarily excluded—those portions occupied by a "'keeper's lodge, the bandstand and refreshment building. But "'these exclusions were the manifestations of the duty and "'exercise of management and their total area compared with "'that of the whole park was, of course, negligible' (*per* Lord "Evershed M.R.[9]). In the present case, of course, the area is "not negligible compared to the whole, but there is no dispute "that the purposes for which they are used are necessary and "ancillary to the running of the gallery and they can therefore "properly be described as 'the manifestations of the duty and "'exercise of management.' Does therefore the fact that the "area is not negligible result in the hereditament not being

[1] [1897] A.C. 625; 13 T.L.R. 527, H.L.
[2] (1900) 83 L.T. 248.
[3] (1905) 92 L.T. 467.
[4] (1950) 43 R. & I.T. 881.
[5] (1952) 45 R. & I.T. 315.
[6] [1952] 2 Q.B. 55; [1952] 1 All E.R. 601, C.A.
[7] (1954) 47 R. & I.T. 172.
[8] [1897] A.C. 625.
[9] [1952] 2 Q.B. 55, 66.

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"occupied by the public? As the Court of Appeal pointed out in "the *Downham Market* case[10] the question is one of degree, but "it did refer to the importance of considering whether the "exclusion is 'properly ancillary to the management' for the "purpose for which the hereditament is dedicated, and whether "it involves 'any departure from strict compliance with the "'trusts.' It is, I think, obvious that if an art gallery is to be "attractive or indeed of use to the public there must be periodical "changes of the pictures, etc., on view and indeed special exhibi-"tions, and that storage and unpacking facilities must be provided "on the hereditament, and it is obvious also that from these areas "the public must be excluded. It is, I think, also obvious that "these areas must occupy in proportion to the whole a larger area "than in, for instance, the case of a public park, though even in the "case of a public park in which extensive bedding out takes "place, it may be necessary to exclude the public from substan-"tial areas used as nursery grounds. I am satisfied that the "exclusion of the public in the present case is properly ancillary "to the management of the art gallery for the benefit of the "public and involves no departure from strict compliance with "the trusts on which the hereditament is held by the respondents "and that this exclusion does not prevent the public from occupy-"ing the hereditament.

"I am satisfied therefore that the local valuation court came "to a correct decision and this appeal must be dismissed."

The valuation officer appealed. The grounds of appeal were:

"(1) that upon the facts found by it the Lands Tribunal was "wrong in law in deciding that the said hereditament was in "the occupation of the public;

"(2) that upon the said facts the said hereditament was in the "rateable occupation of the respondents;

"(3) that the principles laid down in *Lambeth Overseers* v. "*London County Council*[11] do not apply to a hereditament "consisting, or primarily consisting of buildings;

"(4) that the parts of the said hereditament from which the "public were excluded formed so great a proportion of the whole "that the Lands Tribunal was wrong in law in deciding that the "public were in occupation of the said hereditament;

"(5) that the decision of the Lands Tribunal was wrong in "law."

The following further facts had been admitted: (a) no public park or other land was attached to the hereditament; (b) the total area from which the public was excluded was approximately one-third of the total area of the hereditament.

W. Roots Q.C. and *Raymond Phillips* for the appellant, the valuation officer.

Peter Rawlinson Q.C. and *J. P. Harris* for the respondents, the Kingston-up-Hull Corporation.

[10] [1952] 2 Q.B. 55, 67. [11] [1897] A.C. 625.

The following cases were referred to by counsel in argument which are not mentioned in the judgments: *Queen* v. *London School Board*[12]; *Sheffield Corporation* v. *Tranter (Valuation Officer)*[13]; *North Riding of Yorkshire County Valuation Committee* v. *Redcar Corporation*[14]; *Doncaster Union Assessment Committee* v. *Manchester, Sheffield and Lincolnshire Ry. Co.*[15]

Cur adv. vult.

November 10. The following judgments were read.

LORD EVERSHED M.R. The claim of the appellant valuation officer in this case is that the Lord Mayor, Aldermen and Citizens of Kingston-upon-Hull—that is, the Kingston-upon-Hull Corporation—are in rateable occupation of the Ferens Art Gallery, Victoria Square, in that city. The answer of the corporation, which found favour with the Lands Tribunal, is that the obligations under which, by virtue of certain deeds made in the years 1919 and 1928 between the late Mr. Ferens and the corporation, any "occupation" by or on behalf of the corporation is in the character of mere custodians for the public; that, accordingly, the "occupation" by the corporation has no "beneficial" or other quality sufficient to attract liability to rates; and that the principle applied in *Lambeth Overseers* v. *London County Council*[1] (the *Brockwell Park* case) and *Burnell* v. *Downham Market Urban District Council*[2] to parks or open spaces is no less applicable to a public art gallery, such as the Ferens Gallery.

If the matter were free from authority and could be judged by common sense and the ordinary usages of language, I should, I confess, feel little doubt that the tests of "occupation" applicable in the case of a public park or a public open space would have little reference to a public art gallery controlled and managed as is the gallery in the present case. The facts in the case appear to have been agreed and are set out in the decision. They are such as you would expect them to be. Though no one sleeps on the premises, they are under the control of a director and assistant director responsible, with the staff necessary for the purpose, for the maintenance, repair, decoration, lighting, heating, etc., of the building and for its ordinary security. It is open to the public during certain hours in the daytime. No admission fee appears to be charged and no regulations seem to have been made or published. There is no evidence of the ownership or character of the pictures or other works of art displayed. The area open to the public is approximately two-thirds of the whole. The remaining parts of the building, to which the public are not admitted,

[12] (1886) 17 Q.B.D. 738; 2 T.L.R. 633, C.A.
[13] [1957] 1 W.L.R. 843; [1957] 2 All E.R. 583, C.A.
[14] [1943] 1 K.B. 129; [1942] 2 All E.R. 589; 59 T.L.R. 38.
[15] [1895] A.C. 133n.; 10 T.L.R. 567, H.L.
[1] [1897] A.C. 625; 13 T.L.R. 527, H.L.
[2] [1952] 2 Q.B. 55; [1952] 1 All E.R. 601.

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are used for the ordinary purposes, that is to say, as offices, store rooms, etc., normally appropriate to the use of the building as an art gallery.

On this basis of fact the question "Are the premises occupied "and if so by whom?" when applied to this art gallery would, as I have said, appear to me to yield, according to common sense and use of language, quite a different answer to that appropriate to the same question when related to a public park or open space. In the latter case the sensible answer would to my mind be—in any ordinary acceptance of language—that the park or open space is not "occupied" by anyone; the public have, when the gates are open, free and unrestricted access to the whole of it, save only such buildings or places as are reserved for the use of the park keepers or custodians. But in the case of a building, such as the present gallery, I should have thought that the sensible answer was no less certainly that it was "occupied" by those whose function it is to maintain the building in the ordinary way as such and not the less so because, during the specified hours of the daytime, members of the public are admitted to look at the works of art displayed.

It is well established that where more than one person or set of persons have rights to be in or upon a building, that person or set of persons having the control and regulation of the building is treated as the rateable "occupier" (see *Westminster City Council* v. *Southern Railway Co. & Others*,[3] *per* Lord Russell of Killowen). It is also well established that "occupa-"tion" in order to attract liability to rates must be "beneficial "occupation." But that phrase does not mean "profitable "occupation" and may be satisfied by occupation in discharge of a statutory duty or statutory power or for discharging the duties of a trustee—see for example the case cited to us of a public library, *Liverpool Corporation* v. *West Derby Union*.[4] It has also been clearly established since the case of *Jones* v. *Mersey Docks and Harbour Board Trustees*,[5] as was pointed out in the speeches in the *Brockwell Park* case,[6] that the fact of a property being held for public purposes does not deny "beneficial occupation" in the occupier.

In the *Brockwell Park* case[6]—which followed the case relating to Putney Bridge, *Hare* v. *Putney Overseers*,[7] and was in turn followed by this court in the *Downham Market* case[8] relating to a war memorial playing field—it was held by the House of Lords that the right of the public to the use and enjoyment of the park was "free and unrestricted," save only for those buildings reserved by the London County Council for the purposes of management and conservation of the park, activities purely ancillary to the general purpose of the public park and occupying together a very small area compared with that of the

[3] [1936] A.C. 511, 529, 530, H.L.
[4] (1905) 92 L.T. 467.
[5] (1865) 11 H.L.C. 443.
[6] [1897] A.C. 625.
[7] (1881) 7 Q.B.D. 223.
[8] [1952] 2 Q.B. 55.

park as a whole. It appears from the relevant Act of Parliament under which the London County Council acquired the park, that its duty to give to the public "free and unrestricted" access was perpetual and involved a denial of any right to charge an entrance fee. In the *Downham Market* case [8] this court held that the public were entitled to a similar "free and unrestricted "access"—the power of the local authority on occasion to close the field and charge an entrance fee, as for a hospital fete, being minimal in effect; and the power of the authority in certain circumstances to sell the field no more qualifying for practical purposes the "permanence" of the public right of enjoyment than the possibility of the London County Council getting a special amending Act in regard to Brockwell Park.

In their speeches in the House in the *Brockwell Park* case [9] both Lord Halsbury L.C. and Lord Herschell refer to and appear to base themselves upon the dual grounds of free and unrestricted user by the public and of the absence of any beneficial occupation in the London County Council. Lord Halsbury L.C. at the beginning of his speech, said [10]: "I do not think there is here "a rateable occupation by anybody. The 'public' is not a rateable "occupier; and I think that one sentence disposes of the case." Later, he continued: "Once it has been found, as in this case, "that the occupation cannot as a matter of law be a beneficial "occupation, there is an end of the question. I say as matter "of law, because that it does not give a beneficial occupation as "a matter of fact is nothing to the purpose. Here there is no "possibility of beneficial occupation to the County Council; they "are incapable by law of using it for any profitable purpose; "they must allow the public the free and unrestricted use of it."

Lord Herschell said [11]: "No tenant would give anything for "them"—that is to say, the park and buildings thereon—"seeing "that every part of them is dedicated to the public use, and that "the small sums of money which might be received in respect of "them would, as the case finds, be more than absorbed by the "expense of keeping them in order." On the following page he said: ". . . I am not satisfied that the county council are occupiers "of this park for rating purposes, though the legal possession is, "no doubt, vested in them. They seem to me to be merely "custodians or trustees to hold it and manage it for the use of the public."

But as pointed out by Kennedy J. in the *Liverpool Corporation* (public library) case,[12] the two things are in truth manifestations of the single, decisive, proposition, viz., that on the facts of the *Brockwell Park* case [13] the free and unrestricted user by the public was exhaustive and exclusive of any right to any occupation, or at any rate any beneficial occupation, in anyone else.

[8] [1952] 2 Q.B. 55.
[9] [1897] A.C. 625.
[10] Ibid. 629, 630.
[11] Ibid. 631.
[12] 92 L.T. 467.
[13] [1897] A.C. 625.

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By way of distinction, the Divisional Court in the *Liverpool Corporation* case [14] emphasised the absence of any statutory or other obligation to continue to allow the premises there in question to be used as a public library for any particular length of time, still less in perpetuity.

I do not say that the principles of the *Brockwell Park* case [15] cannot be applicable to a building as opposed to an open space. It may well be that if a public authority acquire a piece of land and erect upon it, say a public shelter and thereafter hold the property by virtue of some statute or of a deed of trust under the obligation to maintain it as a public shelter for all time, the public could be said to have such right of free and unrestricted user and would be exhaustive and exclude any "beneficial "occupation" in the authority. But the question here is: what is the nature and what the extent of the public rights to or in the Ferens Art Gallery? So far as I can see such rights are to be found and found only in the final words of clause 5 of the trust deed of December 9, 1919. The words are: "Upon trust to permit "the same to be used and enjoyed by the citizens of the said "City and County of Kingston-upon-Hull and the public generally "as an art gallery for the exhibition of works of art in perpetuity." True it is that the last two words impose a permanent obligation but I cannot see that a charge for admission to help towards provision for the cost of maintenance would be inconsistent with the use of the premises by the public "as an art gallery." Further, if on occasion or in some part of the building works of art were displayed which were lent for the purpose and were of very great value, I see nothing in the obligation, which I have quoted, which would prevent the making of regulations restricting the passage of the public in the rooms for the better security of the exhibits. In other words, I cannot accept the argument that in the case of premises used—in the ordinary acceptance of the word—as a public art gallery, the right of the public necessarily involves or must be comparable to the "free and "unrestricted user" by the public of an open space.

After paying therefore, as I hope, due regard to the language and reasoning in the cases binding upon us, I have nevertheless in the end come to the same conclusion that, as I stated at the beginning of this judgment, appeared to flow from the application of common sense and ordinary language.

I add one further consideration: if the question be asked, relevant in all rating cases, what, if any, rent might be payable for a tenancy of the premises subject to the obligation of the overriding trusts affecting them, I am by no means satisfied that the answer would necessarily be "nil." A great amateur of the arts might well pay a rent for the premises in order to enable him, by the exhibition of works of art belonging to or borrowed by him, to increase public interest in and appreciation of the arts.

[14] 92 L.T. 467. [15] [1897] A.C. 625.

And he would be more inclined so to do if he happened himself to be a painter or sculptor and therefore able to exhibit his own works—and offer them for sale—in one room of the premises. Similar considerations might, I conceive, apply to a person or company carrying on business as an art dealer; and the result would in neither case disqualify the premises as a public art gallery or involve any failure in observance of the terms of the trust deed.

HARMAN L.J.: The decision of the lands tribunal from which this appeal arises, if it be good law, must have important effects for it extends to public buildings held for public purposes the freedom from rateability established in regard to various open spaces by a line of cases of which the prototype is *Hare* v. *The Overseers of Putney* [16] and the leading case the *Brockwell Park* case.[17] Now in my judgment the true ratio decidendi in those cases is that no one is in occupation at all and therefore no one rateable. This is easily seen in the first case which was concerned with Putney Bridge. It would be extravagant to say that the public occupies Putney Bridge but true to say that the public has such extensive rights over it as entirely to exclude any beneficial occupation in the owners who are mere custodians. The *Brockwell Park* case [17] was perhaps a slight extension of this line of reasoning for there the London County Council did exercise some control, shutting the park at night and having certain buildings in the park which they controlled, but these powers of control were strictly ancillary to the maintenance of the park for the use of the public and the House concluded that they were not enough to make it untrue to say that the public had, as the Act of Parliament provided, free and unrestricted access. It is true that Lord Halsbury L.C. expressed the view by implication that the public was in occupation, but the following paragraph shows his true view in these words [18]: "... as "I have said I think there is no occupation at all, the county "council being merely custodians and trustees for the public." As to the further point discussed in that case namely whether there was a beneficial occupation it is clear that neither Lord Halsbury L.C. nor Lord Herschell considered that the word beneficial meant profitable. Lord Halsbury L.C. for instance says [18]: "Once it has been found, as in this case, that the "occupation cannot as a matter of law be a beneficial occupation, "there is an end of the question. I say as matter of law, because "that it does not give a beneficial occupation as matter of fact is "nothing to the purpose."

It is possible that the *Downham Market* case [19] was an extension of the principle in a different direction because there the dedication to the public was by deed and not statute, but that aspect of the matter is of no importance here.

[16] 7 Q.B.D. 223.
[17] [1897] A.C. 625.
[18] Ibid. 630.
[19] [1952] 2 Q.B. 55.

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The tribunal's decision therefore amounts to this: that this building is an unoccupied building and this seems to me clearly wrong. It is not in fact unoccupied. It is not in law occupied by the public whose only right is to enjoy the advantages of a picture gallery. It is on the other hand, in my judgment, occupied by the corporation under the deeds which my Lord has already cited.

Time was when land held for public purposes was held on that account not to be rateable, but that time has long gone by. See the speech of Lord Herschell in *London County Council* v. *Church Wardens, etc., of Erith Parish and Dartford Union Assessment Committee*[20] where he says: "The decision "of this House in *Jones* v. *Mersey Docks*[21] marks an "epoch in the law of rating. Many of the earlier decisions "are tainted with this vice, that they proceed upon the sup-"position that lands held for public purposes are on that account "not rateable. This doctrine is now exploded, your Lordships' "House having distinctly determined that the circumstance that "land is held by a public body for public purposes does not "affect its rateability."

It is not then the fact that the purposes concerned are public purposes that will absolve the occupiers, if there are any, from rates. As I have already said, I cannot think this can be treated as an unoccupied building. It is in fact actively used and occupied every day of the week. It is vested in possession in the corporation who are therefore, prima facie, the occupiers: see Ryde on Rating, 10th ed., p. 20, and cases there cited. Unless, therefore, they occupy merely as custodians or, in other words, unless the rights of the public are such as to exclude all possibility of beneficial occupation by the trustees, then the occupation on the part of the owners will be treated as beneficial for rating purposes.

The answer to this last question must rest upon the document of trust. The trusts are declared with a remarkable lack of particularity—"to permit the same"—that is, the building—"to be used and enjoyed by the citizens of . . . Hull and the "public generally as an art gallery for the exhibition of works of "art in perpetuity." I suppose that the trust has been delegated to the appropriate committee of the corporation. This body acts through its appointee, the curator and his staff, but apparently has not thought it necessary to issue any by-laws for the regulation of the gallery. There is nothing in the trust about the public enjoying free and unrestricted access. The public is entitled to enjoy the property "as an art gallery." What does this mean? It must mean, in my judgment, that the corporation is to conduct upon the property an art gallery in the usual way of such resorts. I see no reason why the public should not be charged at any rate such a sum as will supplement the inadequate upkeep fund even

[20] [1893] A.C. 562, 585; 10 T.L.R. 1. H.L.
[21] 11 H.L.C. 443.

if not sums which will augment the fund for the purchase of works of art. I see no reason why the gallery may not be closed, say on Thursdays, for the use of art students. Indeed, I see no reason why the corporation should not let or lend the gallery or specific parts of it for the exhibition of works of art on loan, whether by some body like the Arts Council or by a wealthy patron or, indeed, an impresario wishing to make a profit. In these circumstances, it seems to me that the corporation is truly the managing owner and occupier of the building, and that its position is quite unlike that of the mere custodian of an open space and much more clearly akin to the trustees of the Soane Museum who were held rateable in *Trustees of Sir John Soane's Museum* v. *St. Giles in the Fields and St. George's, Bloomsbury, Joint Vestry.*[22] For these reasons I agree with the Master of the Rolls that the appeal should be allowed.

DONOVAN L.J. This is an appeal by way of case stated from a decision of the Lands Tribunal that the Ferens Art Gallery at Hull is exempt from rating having regard to the decision of the House of Lords in *The Churchwardens and Overseers of Lambeth Parish* v. *London County Council,*[23] commonly referred to as "the *Brockwell Park* decision." The appellant valuation officer contends that that case has no application to the present.

The salient facts in the *Brockwell Park* case[23] were that the London County Council had under the London Council (General Powers) Act, 1890, power to purchase the park; and if the council exercised the power, were—under the same Act—to hold the property as a park, and maintain and preserve it as a park, for perpetual use by the public for exercise and recreation. The power to purchase was exercised and the park conveyed to the London County Council "to the use of them, their successors "and assigns for ever to the end and intent that the same might "be used as and for a public park." And as for the prescribed purposes of exercise and recreation, the council provided, inter alia, 30 lawn tennis grounds and 13 cricket pitches for the use of which, it seems reasonable to infer, some small charge was made. The previous private owner had been assessable to rates in respect of the park and a Divisional Court held that the London County Council in turn were likewise rateable. The Court of Appeal reversed that decision and its judgment was upheld in the House of Lords.

In the Court of Appeal,[24] the decision against rateability was based upon the absence of beneficial occupation. A. L. Smith L.J. pointed out that an authority discharging some public duty and having property vested in it for the purpose was still to be regarded for rating purposes as one of the hypothetical tenants. On that basis its occupation could be beneficial, for if the authority did not own the premises it might have to rent them to

[22] (1900) 83 L.J. 248.
[23] [1897] A.C. 625.
[24] [1896] 2 Q.B. 25.

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discharge the duty. But the London County Council were under no obligation to provide parks for the public; and in the case of Brockwell Park the outgoings far exceeded any possible income. Accordingly, upon the hypothesis that any tenant of the hereditament would be bound under the Act of 1890 to maintain it as a public park, such tenant would make an annual loss, and could not therefore be expected to pay any rent. The park was not, therefore, rateable.

The House of Lords agreed with this view, but decided the case on the broader ground that there was no rateable occupation by anybody. There was obviously physical occupation, for example, by the council's servants, some of whom dwelt in cottages being part of the park. But for rating purposes the public were in occupation. Lord Halsbury L.C. said[25]: "I do "not think there is here a rateable occupation by anybody. The "'public' is not a rateable occupier." And again: "It appears "to me that the nature of the occupation here is such that there "can be no rateable occupation." Lord Herschell said[26]: "Here these very lands and every part thereof, by statute, must "be held in perpetuity for the use of the public, and the question "is, whether, under these circumstances, they are rateable at all. "I think that on principle they are not."

In the case before us, one Thomas Ferens, a citizen of Hull, on December 9, 1919, conveyed to the Hull Corporation for a nominal consideration of 10s. a plot of land in Victoria Square in Hull together with a church on part of the site, to hold the same unto and to the use of the corporation, but subject to the trusts comprised in an indenture of even date made between the same parties. That indenture recites the aforesaid conveyance and further that Mr. Ferens, being desirous of providing for the erection by the corporation of an art gallery upon the said land for the use of the citizens of Hull and the public generally, had transferred certain investments to the corporation worth some £48,000.

The trusts declared in respect of these investments were that the corporation should convert the same into money when they thought fit and use the fund to erect an art gallery on the land within five years. The trusts declared in respect of the land were that the corporation should hold it and the art gallery to be erected on it "upon trust to permit the same to be used and "enjoyed by the citizens of the said City and County of Kingston-"upon-Hull and the public generally, as an art gallery for the "exhibition of works of art in perpetuity."

It is to be noted that by the same deed the corporation covenanted to demolish a public lavatory which stood upon land adjacent to that conveyed by Mr. Ferens, and the site of the lavatory was to be comprised in the site for the art gallery. I do not think that anything turns upon this. It is reasonable to

[25] [1897] A.C. 625, 630. [26] Ibid. 632.

suppose that this additional ground was a very small part of the whole.

A third deed of March 15, 1928, between the same parties after reciting that the building of the art gallery had been postponed by mutual arrangement, but that the gallery was now complete and properly fitted up, and open to the public, and that a residue remained of the original fund of £48,000, such residue amounting to upwards of £20,000, provided as follows: £22,500 was to be set aside as an endowment fund, and the income from £2,500 of this fund was to be applied towards the cost of maintenance and upkeep of the art gallery.

The income of the balance of the fund was to be applied in defraying the cost of works of art which the corporation might from time to time acquire for exhibition in the art gallery. The residue of the funds still in the hands of the corporation was to be known as "The Purchase Fund," and was to be applicable, both as regards capital and income, in defraying the costs of acquiring works of art for exhibition in the gallery.

In this way Mr. Ferens provided an art gallery for Hull to be used and enjoyed as such in perpetuity by the public. The parties agree that the effect of the aforesaid deeds was to make the corporation trustees of a valid charitable trust, and I think this is right.

From its opening in 1928 until 1958 no attempt was, we were told, made to charge rates in respect of the gallery; but the present proposal was then made to enter it in the valuation list with a gross value of £4,700 and a rateable value of £3,913.

In my opinion such a proposal is in conflict with the principle upon which the House of Lords held that Brockwell Park was exempt. That principle was that the public were in occupation of the park and therefore not rateable, and that conclusion derived in turn from the circumstance that the park and every part thereof had to be held in perpetuity for the use of the public. The same is true of the art gallery in the present case, and it can make no difference that in the one case such dedication to public use was by statute and in the other by voluntary trust. The same principle was, in my respectful opinion, applied in this court in *Burnell* v. *Downham Market Urban District Council*,[27] which dealt with a recreation ground held upon trust for the public, and is expressed in the concluding words of the judgment, namely: "the council "were mere trustees or custodians for the public and accord-"ingly . . . the real occupiers for present purposes are the public "themselves."

Mr. Roots, for the appellant valuation officer, argued that the public could not in any real sense be said to occupy a building as it could be said to occupy a park. But just as the public goes to Brockwell Park to enjoy its amenities, so the public goes to this art gallery to enjoy what it has to offer—in both cases in exercise

[27] [1952] 2 Q.B. 55, 69.

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of permanent public rights. Mr. Roots also said that the public rights in relation to Brockwell Park "exhausted" its occupation. I am not sure what this means, it may be an expression in different language of the argument with which I have just dealt.

An alternative contention for the appellant is that since the public is excluded from one-third of the hereditament the public has not "free and unrestricted" use of the gallery and is, therefore, not in occupation of it. This argument necessarily concedes that the public may be in occupation of such a building as this because otherwise the contention would be irrelevant. It is admitted, however, that this one-third is used for purposes necessary and ancillary to the running of the gallery, that is to say, storage of works of art, restoration of pictures, heating and lighting, and so on. The tribunal held that the physical exclusion of the public from this portion of the hereditament was not, in the circumstances, inconsistent with occupation of the whole by the public. I agree with this conclusion and with the reasons for it given by the tribunal.

The decision in *Liverpool Corporation* v. *West Derby Union*[28] dealing with the case of a public library is, I think, distinguishable. There the hereditament was not held in trust solely for the public. It was the corporation's own property, bought by the corporation, and if some other building were ever substituted as the library, the corporation could sell the unwanted building and use the proceeds for different corporation purposes. That was a case, in my view, of a corporation occupying its own building as a local authority for public purposes. The present is, I think, a case of a corporation occupying a building as a trustee, and managing it on behalf of the public. The distinction is no doubt a fine one, but it exists, as the *Brockwell Park* case[29] and the *Downham Market* case[30] show.

In the argument before us a further question was canvassed, namely, even assuming that the corporation were in occupation of the gallery, their occupation was of any value. To be rateable it has to be shown that "the occupation should be of "value beyond what is required to maintain the property; for "if the occupation be of so little value that the hypothetical "tenant . . . would either give no rent, or a rent which after "deducting the average annual expense of the maintenance, "would leave no overplus, there is nothing to rate." See *Jones* v. *Mersey Docks & Harbour Board Trustees*,[31] *per* Lord Blackburn. In the present case the valuation officer's figures mean that in his view the gallery would be sufficiently valuable to a hypothetical tenant that he would be willing to pay practically £4,000 a year rent for it. When it is remembered that such a hypothetical tenant would have to respect the trust upon which the building is held, this seems very unlikely. But this aspect

[28] 92 L.J. 467.
[29] [1897] A.C. 625.
[30] [1952] 2 Q.B. 55.
[31] 11 H.L.C. 443, 461.

of the matter was never canvassed before the tribunal, the parties arguing the sole question whether the corporation were in occupation at all. The question whether, if so, the occupation was beneficial depends on facts and figures not before us; and upon the questions whether a hypothetical tenant—other than the corporation—would be presumed to be with or without the income from the endowment and the purchase funds; and whether under the terms of the trust a charge could be made for admission to the gallery. If, therefore, beneficial occupation were the crucial question, I think the case would have to go back to the tribunal for a determination thereof after hearing such further evidence and arguments as the parties wished to adduce.

In my opinion, however, the tribunal's decision that the public are in occupation of the hereditament is correct, and this appeal should be dismissed. I respect the contrary opinion of my brothers and in the absence of authority might have shared it. I feel precluded from doing so, however, since all the features of the case which they regard as making the corporation occupiers here, are matched by corresponding features in the *Brockwell Park* decision[32]; and I feel that that case cannot be satisfactorily distinguished, except by tacitly accepting what was the valuation officer's principal contention: that there cannot be occupation of a building by the public where management and control of it is in some other party. I do not believe that contention to be sound. It would otherwise have provided a very short cut to the decision in *Liverpool Corporation* v. *West Derby Union*[33] and *Trustees of Sir John Soane's Museum* v. *St. Giles Vestry*,[34] which the courts deciding those cases could hardly have missed.

Appeal allowed with costs.
Declaration that the hereditament was not exempt from rating.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Town Clerk, Hull.*

B. A. B.

[32] [1897] A.C. 625.
[33] 92 L.J. 467.
[34] 83 L.T. 248.

[CHANCERY DIVISION.]

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Nov. 29.

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[1960 T. No. 550.]

Injunction—Criminal proceedings—Proceedings in High Court—Subsequent criminal proceedings in magistrates' court raising substantially same issue—Jurisdiction to restrain prosecutors from proceeding with criminal proceedings—Whether criminal proceedings vexatious—Whether injunction will issue.

On April 13, 1960, the plaintiff company issued an originating summons in the Chancery Division of the High Court which raised certain questions on the construction of the Pilotage Act, 1913, and in particular of sections 11 and 43 of that Act. On October 21, 1960, two summonses against J. W., an employee of the plaintiff company, were issued out of the Thames Metropolitan Magistrates' Court on informations laid by an employee of the defendants acting in the course of his duties and as their agent alleging that he had committed offences under sections 11 and 43 of the Act on May 18, 1960. The two summonses in the magistrates' court raised substantially the same questions of law as were raised by the originating summons in the High Court.

On a motion by the plaintiffs to restrain the defendants from further proceeding against J. W. on the two summonses in the magistrates' court until the final determination of the matter of construction raised by the originating summons:—

Held, (1) that where matters which involved substantially the same issues were raised in civil proceedings and, at a later stage, by criminal proceedings, the court had jurisdiction to restrain the prosecutors from continuing the criminal proceedings until the civil proceedings had been decided (post, p. 20).

York Corporation v. *Pilkington* (1794) 2 Atk. 302 applied.

(2) That the court would exercise that jurisdiction only if it was satisfied that it would be vexatious to allow the criminal proceedings to proceed pending the decision of the civil proceedings; and that it was vexatious for a party to institute proceedings to obtain relief in respect of a particular matter when exactly the same issue was raised by his opponent in proceedings already instituted in another court in which he was not plaintiff but defendant.

In re Connolly Brothers Ltd. [1911] 1 Ch. 731, C.A. applied.

(3) That since, in substance, the same questions of law were raised between the same parties in both sets of proceedings, in the circumstances the criminal proceedings should not be allowed to proceed until the question of construction had been decided in the Chancery Division; and that, therefore, the court would grant an injunction restraining the defendants from proceeding with the summonses against J. W. until the final determination of the questions raised by the originating summons or further order.

MOTION.

On April 13, 1960, the plaintiff company, Thames Launches Ltd., which owned passenger boats which it operated on the River Thames, issued an originating summons against the Corporation of Trinity House of Deptford Strond for declarations

(1) that on the true construction of the Pilotage Act, 1913, the plaintiff company was entitled to navigate its passenger-carrying vessels throughout the whole of the Port of London on pleasure tours operating from piers outside the London Pilotage District without being either (a) under the pilotage of a licensed pilot of the district, or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship; and (2) that, on the true construction of the Pilotage Act, 1913, the plaintiff company was entitled to navigate its passenger-carrying vessels throughout the whole of the Port of London on pleasure tours operating from piers inside or outside the London Pilotage District without being either (a) under the pilotage of a licensed pilot of the district, or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship. The summons was subsequently amended to include further claims for relief not material on the present motion.

On October 21, 1960, two summonses, based on informations laid by Sydney Rawlings Smith, the Principal of the Pilotage Department of Trinity House, were issued out of the Thames Metropolitan Magistrates' Court against J. Watson, a licensed waterman in the employment of the plaintiff company, alleging offences against sections 11 and 43 of the Pilotage Act, 1913, respectively. The first summons alleged that on May 18, 1960, Watson, being master of the m.v. *Viscountess*, navigated *Viscountess* (not being an excepted ship) in the River Thames below Tower Pier within the limits of the London Pilotage District, in circumstances in which pilotage was compulsory, *Viscountess* not being under the pilotage of either (a) a licensed pilot of the district, or (b) a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship, after a licensed pilot had offered to take charge of the ship. The second summons complained that Watson on May 18, 1960, navigated *Viscountess* (not being an excepted ship) in the River Thames below Tower Pier within the limits of the London Pilotage District in circumstances in which pilotage was compulsory but failed to display a pilot signal and to keep the signal displayed until a licensed pilot came on board.

On November 16, 1960, the plaintiff company appeared by counsel before the Thames Metropolitan Magistrate and requested him to stay all further proceedings on the two summonses until the final determination of the matters raised by the originating summons, but the magistrate declined to do so.

By a notice of motion, dated November 24, 1960, the plaintiff company asked for orders restraining the defendants from (1) further proceeding against Watson on the two summonses until the final determination of the matter of construction raised by the originating summons, and (2) proceeding against any

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licensed waterman in respect of alleged offences contrary to sections 11 and 43 of the Pilotage Act, 1913, arising out of the navigation of passenger boats in the Port of London on pleasure trips operating from piers either inside or outside the London Pilotage District until the final determination of the matter of construction raised by the originating summons.

L. A. Blundell Q.C. and *K. R. Bagnall* for the plaintiff company.

J. V. Naisby Q.C. and *Gerald Darling* for the defendants.

The following cases, not referred to in the judgment, were cited in argument: *Lord Montague* v. *Dudman*[1]; *Kerr* v. *Corporation of Preston.*[2]

BUCKLEY J. This is a motion launched by the plaintiff company in proceedings which have been commenced in this division of the High Court by originating summons seeking relief against Trinity House, the Pilotage Authority for the Port of London. The motion seeks an injunction to restrain the defendants from proceeding with certain summonses pending before the Thames Metropolitan Court magistrate pending the determination of a question of construction of the Pilotage Act, 1913, which is raised in the originating summons. I am told that those summonses are due to be heard tomorrow.

The plaintiffs own and operate pleasure steamers in the area of the Port of London, and the defendants are the Pilotage Authority for that area. Section 11 of the Pilotage Act, 1913, lays down as follows: "Every ship (other than an excepted ship) "while navigating in a pilotage district in which pilotage is "compulsory for the purpose of entering, leaving, or making use "of any port in the district, and every ship carrying passengers "(other than an excepted ship), while navigating for any such "purpose as aforesaid in any pilotage district (whether pilotage "is compulsory or not compulsory in that district) shall be either "—(*a*) under the pilotage of a licensed pilot of the district; or "(*b*) under the pilotage of a master or mate possessing a pilotage "certificate for the district who is bona fide acting as master or "mate of the ship." Subsection (2) provides that, in the event of a breach of subsection (1), the master of the ship shall be liable in respect of each offence to a fine. "Excepted ships" are defined in subsection (3), but that definition is not relevant to the present case.

Section 43 of the Act is in the following terms: "(1) The "master of a ship (other than an excepted ship) shall when "navigating in circumstances in which pilotage is compulsory "under this Act, display a pilot signal, and keep the signal "displayed until a licensed pilot comes on board. (2) The master

[1] (1751) 2 Ves.Sen. 396. [2] (1877) 6 Ch.D. 463.

"of a ship, whether navigating in circumstances in which pilotage "is compulsory or not, which is being piloted in a pilotage district "by a pilot not licensed for the district, shall display a pilot "signal and keep the signal displayed until a licensed pilot comes "on board." Subsection (3) provides that if the master of any ship fails to comply with this section, he shall be liable in respect of each offence to a fine not exceeding £20.

[His Lordship stated the facts and continued:] It is conceded that the informations were laid by the complainant in his capacity as Principal of the Pilotage Department of Trinity House and as part of and in the course of his duties in that office, and that in respect of these two summonses he is acting on behalf of Trinity House. It is also in evidence that Watson, the respondent to the summonses, is in the employ of the plaintiff company, and that as such he was acting as the master of the vessel in respect of the matters complained of in the summonses.

Mr. Blundell, who appears for the plaintiffs, says that it would be wrong in principle for the magistrates' court to proceed to deal with the summonses while the point of construction is sub judice in this court, or, at any rate, it would be wrong for the defendant corporation to press on with those proceedings while this point of construction is sub judice in this court. He says that there is jurisdiction in this court to restrain proceedings which are in their nature vexatious because they tend to multiplicity of legal proceedings relating to the same subject-matter and substantially relate to the same relief.

He has referred me to a number of authorities in that connection. The first to which I should refer is *York Corporation* v. *Pilkington*.[1] The headnote to that case is as follows: "Whilst suits are depending here, the plaintiffs indict "the defendant's agent at the sessions, where they themselves "are judges, for a breach of the peace. Lord Hardwicke made "an order to restrain the plaintiffs from proceeding at the "sessions, till the hearing of the cause, and further order." Lord Hardwicke L.C. in his judgment said[2]: "This court has "not originally, and strictly, any restraining power over criminal "prosecutions; and, in this case, if the defendant had applied "to the Attorney-General, he would have granted a noli prosequi. "For when a complaint is grounded on a civil right, for which "an action of trespass would lie, the Attorney-General of course "grants a noli prosequi. This is a complaint merely for fishing "in the river, without any actual breach of the peace, which the "mayor and corporation say, is a trespass upon them. If it "could be made appear at law, that the plaintiffs were both "judges and parties, it might come out to be coram non judice, "but it might be difficult to make out this. If actions of trespass "had been brought vi et armis, this court would have stopped "them; but though I cannot grant an injunction, yet I may

[1] (1794) 2 Atk. 302.

[2] Ibid.

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"certainly make an order upon the prosecutors to prevent the "proceeding on the indictment. Supposing it was a suit for a "right of land where entries had been made, and the bill was "brought to quiet the possession, and after that they prefer an "indictment for a forcible entry, which is of a double nature, as it "partakes of a breach of the peace, and is also a civil right, this "court would certainly stop the proceedings upon such indict-"ment. Where parties submit their right to the court, they have "certainly a jurisdiction, and may interpose. Therefore I will "make an order to restrain the plaintiffs from proceeding at the "sessions, till the hearing of the cause and further order."

I have read the whole of Lord Hardwicke's judgment because it makes it clear that the part of the headnote which refers to the corporation being themselves judges in their own cause was not really any part of his decision; and it does establish that where matters which involve substantially the same issues are raised both in civil proceedings and at a later stage by criminal proceedings, this court can restrain the prosecutors in the criminal proceedings from continuing such proceedings until the civil proceedings have been decided.

Jurisdiction of that kind, in my judgment, is very clearly a jurisdiction which must be exercised with the greatest care; and this court would be very slow to interfere with the course of criminal proceedings unless it was clear that the issues in the civil proceedings and the criminal proceedings really raised in substance the same issue and that if the civil proceedings succeeded the criminal proceedings must necessarily fail. In principle the court discourages multiplicity of litigation in any form. In other words, the court must be satisfied that to allow the criminal proceedings to be proceeded with pending the decision of the civil proceedings would really be vexatious.

In that connection I must mention *In re Connolly Brothers Ltd.*,[3] the most recent authority to which I have been referred. That was not a case of civil and criminal proceedings, but of two sets of civil proceedings, one in the High Court and one in the County Palatine Court of Lancaster. The language of the judgment of the Court of Appeal, in my view, makes it clear that the basis on which they were proceeding was that to allow the case in the Palatine Court, which was instituted at a later stage than the case in the High Court, to go on would be vexatious. Lord Cozens-Hardy M.R. said[4]: "It is enough to say that the juris-"diction of the court in a case like this undoubtedly exists and "ought to be exercised if the court comes to the conclusion that "the defendant in the High Court action, the plaintiff in the "foreign action—in this case the Palatine action—acted vexa-"tiously in instituting the proceedings in the foreign action; and "from that point of view I have no hesitation in saying that the "proceedings taken by O'Reilly in the Palatine action were

[3] [1911] 1 Ch. 731, C.A. [4] Ibid. 744.

"vexatious and unreasonable to such an extent that the court "ought to exercise the jurisdiction, which it plainly possesses "to grant an injunction." Fletcher Moulton L.J. said [5]: "It is "quite clear that the court has felt justified in exercising this "jurisdiction where it is satisfied that it would be vexatious to "let the other action proceed."

It seems to me that exactly the same principle must apply where the two sets of proceedings are a civil proceeding and a criminal proceeding as where there are two sets of civil proceedings.

I ought also to refer to *Hedley* v. *Bates*,[6] a decision of Sir George Jessel M.R. In that case "The plaintiffs and the defen-"dant were the owners in fee simple of adjoining freehold "estates. . . . The defendant, in proceeding to make certain "drainage works on his estate, proposed, by putting in force the "powers given to landowners by the Land Drainage Act, 1861 . . . "to utilise and improve for the purpose a burn or watercourse "which flowed through the plaintiffs' land. Accordingly the "defendant, on November 4, 1879, served upon the plaintiffs a "notice stating that he proposed to lay a barrel or pipe drain "from his land along and under the bed of the burn, and to make "the necessary excavations for the purpose, ultimately restoring "the bed of the burn to its original level, except in certain parts "which he proposed to deepen." Before giving the notice, the defendant had already, without the plaintiffs' leave or knowledge, entered upon the plaintiffs' land and started to carry out excavations, but as the defendant still intended to proceed in this way the plaintiffs issued a writ and moved for an injunction "to "restrain the defendant from committing any further acts of "trespass or waste upon the plaintiffs' land, and from further "interfering with the burn except pursuant to any order of the "court for restoring the same, and from taking any proceedings "whatever before the justices of the peace under his notice"—that was the notice that he had given under the Land Drainage Act—"or at all events until he should have restored the burn "pursuant to any order of the court." There was a question of whether the notices were in proper form, about which I need not trouble, and there was some debate as to whether the justices would have jurisdiction to entertain any application to them under the Act having regard to the form in which the notices were framed. Sir George Jessel said [7]: "In the first place it "must be remembered that one of the main objects of the "Judicature Act was to enable the court to decide, if possible in "one proceeding, all the questions in dispute between the same "parties relating to the same matters (Judicature Act, 1873, "s. 24, subs. (7)); and that is a very important provision. Here "is a dispute for which an action has to be brought for trespass, "and a further, or second, dispute relating to the same piece of

[5] [1911] 1 Ch. 731, 746, C.A.
[6] (1880) 13 Ch.D. 498, 499.
[7] Ibid. 501.

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"land and to the same matter—the improvement of a drain—"and both disputes are between the same parties. If I can "properly decide the second question in dispute in this action, "it is, according to my view of the Judicature Acts, my duty to "do so. Can I then properly decide the question? The defen-"dant objects, in the first instance, to the jurisdiction: he says "that the magistrates themselves have the jurisdiction to decide "whether or not this is a proper notice. Now I will take it both "ways: in the first place I will assume they have jurisdiction. "There is nothing in the Act of Parliament to say that though "the magistrates may decide the question when it comes before "them, another court may not." I think that is all he says about the first question—that is assuming they have jurisdiction—and then he goes on [8]: "The magistrates' court being an inferior "court, any person served with a bad notice may apply for a "prohibition on the ground that there is no jurisdiction, and that "prohibition may now be granted by any judge of the High "Court. If I can grant a prohibition I can of course grant an "injunction between the parties." Then he went on, in effect, to say that an injunction would be speedier and cheaper than proceedings by way of prohibition where it involved a question of the jurisdiction of the magistrates. He said of the choice of the two courses, prohibition or injunction,[9] "if I am to consider "which is the more just and convenient, I have no hesitation in "saying that it is both more just and more convenient that I "should decide subject to two appeals only,"—that is to the Court of Appeal and the House of Lords—"which I think are "amply sufficient for such a case as this. Therefore on that "ground I should decide that this court should exercise juris-"diction." In the case of proceedings taken before the magistrates, he pointed out that there would be a larger number of appeals which might have been taken.

In a later case, *Stannard* v. *Vestry of St. Giles, Camberwell*,[10] Sir George Jessel commented on what he had said in *Hedley* v. *Bates*,[11] saying [12]: "Where the legislature has pointed out a "mode of proceeding before a magistrate it is not, as a general "rule, for another court to interfere to stop that proceeding by "injunction. I refer to that more particularly because the case "of *Hedley* v. *Bates*,[13] which I decided when sitting at the Rolls, "was cited as an authority for the exercise of such a jurisdic-"tion." Then he comments upon *Hedley* v. *Bates*.[13] I do not think I need read what follows immediately, but later he says [14]: "But the whole doctrine which I laid down (as I thought clearly) "in *Hedley* v. *Bates* [15] was dependent on the fact of the court "having a case to try within its undoubted jurisdiction, if I may "say so, over and above the question which the magistrates could

[8] 13 Ch.D. 498, 502.
[9] Ibid. 503.
[10] (1881) 20 Ch.D. 190, C.A.
[11] 13 Ch.D. 498.
[12] 20 Ch.D. 190, 196.
[13] 13 Ch.D. 498.
[14] 20 Ch.D. 190, 196.
[15] 13 Ch.D. 498.

"decide." I confess that I do not quite follow myself what Sir George Jessel meant when he said[16] "over and above the "question which the magistrates could decide." As I understand it, the principle is that if two courts are faced substantially with the same question, it is desirable to ensure that that question is debated in only one of those two courts if by that means justice can be done. It does not appear to me, with all respect to Sir George Jessel, that it would make any difference whether the problems which confronted one court are of a wider and more general nature than the problems which confronted the other court. I can see that, if you have two proceedings going on in court "A" and court "B," the proceedings in court "A" relating to a number of questions only one or some of which are the subject-matter of the proceedings in court "B," there would be a strong argument for saying that the convenient course is to allow the proceedings in court "A," which will dispose of the matter raised in the proceedings in court "B," to continue, rather than the proceedings in court "B." It is quite true that in the proceedings before the magistrates questions of fact would be involved which would not arise in the proceedings in the Chancery Division. The prosecution would have to establish, unless it were admitted, that the person prosecuted had in fact committed the offence in respect of which he was prosecuted. But the question of substance to be decided in both these cases is whether or not the use which was being made of the motor vessel *Viscountess* was in law one which involved compulsory pilotage. That is precisely the question raised on the originating summons. I do not anticipate that there would really be any issue of fact in the magistrates' court, although, of course, I cannot be sure of that, but the question of substance would be one of law whether or not the circumstances were such as to be struck at by section 11 or section 43 of the Pilotage Act, 1913. That, as I say, is precisely the question raised by the proceedings in the Chancery Division. It seems to me, in those circumstances, that this case comes within the principle to which I have referred and is one in which it would be proper to say that the criminal proceedings should not be proceeded with until the question of construction had been decided in the Chancery Division, the Chancery proceedings having been on foot before the criminal proceedings were instituted and, indeed, before the offence in respect of which the criminal proceedings were taken was committed.

Mr. Naisby, who appears for the defendants, has contended that the case does not come within that principle on three grounds. He says, first, that the parties to the two sets of proceedings are not the same. In the Chancery Division the parties are Thames Launches Ltd. and Trinity House. In the criminal proceedings the parties are the person by whom the information is laid, that is to say, the complainant and the master of the

[16] 20 Ch.D. 190, 197.

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vessel. I do not think, with respect to Mr. Naisby, that there is really any substance in that point. It is not disputed that the complainant is promoting the prosecution in the course of his duties as an employee of Trinity House, and in so doing is acting as their agent, and the matter in respect of which the prosecution is brought is something which the master of the vessel did in the course of his employment by the plaintiff company. I think, looking at the reality of the situation, that the parties are the same in both sets of proceedings.

Then Mr. Naisby says that, in any case, Trinity House is not here as a person who is seeking to obtain a remedy in two different courts in respect of the same subject-matter, because in the Chancery proceedings it is not Trinity House which is seeking any relief at all—they are the defendants. In that connection he referred me to *Saull* v. *Browne*,[17] where Lord Cairns said[18]: "I should be unwilling to express any doubt that there "may be cases in which criminal proceedings instituted by a "party to a suit in this court are so identical with the civil pro-"ceedings as to induce this court to order that the same person "shall not at the same time pursue his remedy in this court and "pursue another remedy which ranges itself under the head of "criminal jurisdiction. No doubt there may be such a case, and "the authorities which have been referred to, when properly "understood, entirely come under the description which I have "given." The authorities referred to include *York Corporation* v. *Pilkington*,[19] to which I have made reference. Mr. Naisby says that the principle is that a man should not pursue a remedy in respect of the same matter in more than one court. In my judgment, the principle is rather wider than that. I think it is that no man should be allowed to institute proceedings in any court if the circumstances are such that to do so would really be vexatious. In my judgment, it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject-matter where exactly the same issue is raised by his opponent in proceedings already instituted in another court in which he is not the plaintiff but the defendant. The following will illustrate what I mean. Supposing a question of construction were to arise upon a will in respect of which the High Court and the Palatine Court had concurrent jurisdiction. If one party affected by that question started proceedings in the High Court for its determination making another party defendant, in my opinion it would be grossly vexatious for that defendant subsequently to start proceedings in the Palatine Court raising precisely the same question. I do not think that the way in which the proceedings are constituted from the point of view of who is the plaintiff and who is the defendant can be the test to be applied.

Then Mr. Naisby says that there are questions which would

[17] (1874) 10 Ch.App. 64.
[18] Ibid. 65.
[19] 2 Atk. 302.

arise before the magistrate which would not arise in the Chancery proceedings. As I have already mentioned, there may be questions of fact which may have to be brought before the magistrate which do not arise in the Chancery proceedings, which ask for declarations and do not relate to any particular event. But the substantial point in these proceedings is the same. In these circumstances, I think that the right course for me to take is to grant an injunction restraining the defendants from proceeding on the two summonses in the Thames Metropolitan Magistrates' Court until the final determination of the questions raised on the originating summons or until further order.

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The notice of motion also asks for further relief in a much wider form which I should not be prepared to grant, but I think that in the circumstances it would be right for me to grant the injunction I have mentioned.

Order accordingly. Costs to be costs in the originating summons. Leave to appeal if such leave were necessary.

Solicitors: *J. A. & H. E. Farnfield; Freshfields.*

V. A. M.

[CHANCERY DIVISION.]

LITTLEWOODS MAIL ORDER STORES LTD. *v.* INLAND REVENUE COMMISSIONERS.

1960 *Nov.* 16, 17.

Danckwerts J.

Revenue—Stamp duty—Conveyance or transfer on sale—Exchange or conveyance on sale—Deed entitled "deed of exchange"—No evidence of preceding contract of sale—Whether lease is a "conveyance"—Lease by friendly society to company—Assignment of lease to an associated company—Whether beneficial interest in the property previously "conveyed" by a person not associated with the transferor or transferee—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1—*Finance Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 42—*Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 50.

In 1958, a friendly society owned certain freehold property subject to a lease for 99 years from June, 1947, at an annual rent of £23,444 in favour of company A. On December 8, 1958, the society granted to company A a lease of the property for 22 years, 10 days, at an annual rent of £6, which operated as a surrender of the 99-year lease. On December 9, company A assigned the 22-year, 10-day lease to company B which was a wholly-owned subsidiary of company A. On December 10, company B granted to company A an underlease of the property for 22 years at an annual rent of £42,450. On December 11, the society and company B executed a deed, called a deed of exchange, whereby company B assigned to

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the society the 22-year, 10-day lease, subject to and with the benefit of the 22-year underlease, and the society conveyed to company B the fee simple of the property, subject to and with the benefit of the 22-year, 10-day lease. On December 12, company B executed a deed guaranteeing the payment to the society by company A of the annual rent of £42,450 reserved by the 22-year underlease and charging its freehold reversion with payment thereof. On December 13, company A, by deed, indemnified the society against payment of stamp duty and penalties.

On appeal by company A against assessments to ad valorem stamp duty on (1) the deed of assignment dated December 9, on the ground that it was exempted from stamp duty by section 42 of the Finance Act, 1930,[1] and was not deprived of that exemption by section 50 of the Finance Act, 1938,[2] although it was admitted that the transactions were an arrangement; and (2) the deed of exchange dated December 11 on the ground that it should be assessed under the head of charge "exchange or excambion" and not "conveyance or "transfer on sale":—

Held, (1) that the lease dated December 8, 1958, was a "conveyance" (post, p. 34), so that, at the date of the assignment of December 9, 1958, of that lease by company A to company B, the beneficial interest in the property was previously "conveyed" by a person not associated with either company A or company B, within the meaning of section 50 of the Finance Act, 1938; and that the assignment of December 9, 1958, was not, therefore, exempted from stamp duty by virtue of section 42 of the Finance Act, 1930.

(2) That the deed of exchange on its face was a straightforward exchange, and, there being nothing which amounted to a preceding contract of sale between the society and company B or which suggested it was a sale, it was impossible to say that in reality it was not an exchange but a conveyance on sale (post, p. 35); the deed of exchange, accordingly, was liable to stamp duty of 10s. only.

Escoigne Properties Ltd. v. *Inland Revenue Commissioners* [1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L. distinguished.

CASE STATED by the Commissioners of Inland Revenue.

The appellants, Littlewoods Mail Order Stores Ltd. ("Littlewoods"), appealed from assessment of stamp duty made on

[1] Finance Act, 1930, s. 42: "(1) "Stamp duty under the heading "'Conveyance or Transfer on Sale' "in the First Schedule to the Stamp "Act, 1891, shall not be chargeable "on an instrument to which this "section applies . . . (2) This section "applies to any instrument as "respects which it is shown to the "satisfaction of the Commissioners "of Inland Revenue—(*a*) that the "effect thereof is to convey or transfer "a beneficial interest in property "from one company with limited "liability to another such company; "and (*b*) that either—(i) one of the "companies is beneficial owner of not "less than ninety per cent. of the "issued share capital of the other "company . . ."

[2] Finance Act, 1938, s. 50: "(1) "Section 42 of the Finance Act, 1930 ". . . shall not apply to any such in- "strument, unless it is shown to the "satisfaction of the Commissioners "of Inland Revenue that the instru- "ment was not executed in pursuance "of or in connection with an arrange- "ment whereunder—(*a*) the con- "sideration for the transfer or con- "veyance was to be provided directly "or indirectly by a person other than "a company which at the time of the "execution of the instrument was "associated with either the trans- "feror or the transferee; or (*b*) the "beneficial interest in the property "was previously conveyed or trans- "ferred directly or indirectly by such "a person as aforesaid."

two out of six deeds relating to transactions in respect of the same property presented for adjudication under section 12 of the Stamp Act, 1891.

The following facts were stated by the commissioners: In 1958, before the execution of the first of the six deeds, some trustees of a friendly society, the Independent Order of Odd Fellows (hereinafter called "Oddfellows") were entitled to the fee simple of Jubilee House, Oxford Street, London, which had been let to Littlewoods for the term of 99 years from June 24, 1947, at an annual rent of £23,444. After the execution of these six deeds, Fork Manufacturing Co. Ltd. (hereinafter called "Fork"), a wholly-owned subsidiary of Littlewoods, had acquired the fee simple, the term of 99 years had been extinguished and Oddfellows were entitled to the payment of £42,444 per annum under a lease for 22 years from December 10, 1958, payable by Littlewoods but guaranteed by Fork and charged on its freehold reversion. The six deeds were as follows:

1. Monday, December 8, 1958. A lease by Oddfellows to Littlewoods of Jubilee House for 22 years and 10 days at a rent of £6 per annum, which operated as a surrender of the existing lease.

2. Tuesday, December 9, 1958. An assignment made between Littlewoods and Fork which, after reciting, "Whereas: (1) By "a lease dated the eighth day of December, 1958 and made "between [Oddfellows] of the one part and Littlewoods of "the other part . . . Jubilee House Oxford Street and factory "premises abutting Ramillies Place registered at the Land Regis- "try with absolute title under Title Numbers 276399 and 280914 ". . . were demised by [Oddfellows] to Littlewoods from the said "eighth day of December 1958 for the term of twenty-two years "and ten days subject (so far as then subsisting) to the leases or "tenancies then affecting the demised premises and except and "reserved as therein mentioned and subject also to the payment "of the yearly rent of £6 thereby reserved and to the covenants "agreements and conditions therein contained (2) Littlewoods is "the beneficial owner of the whole of the issued share capital of "Fork (3) Littlewoods has requested Fork to accept the transfer "to Fork of the property hereby assured in manner hereinafter "appearing which Fork has agreed to do," provided "that in "pursuance of the said agreement and in consideration of the "premises Littlewoods as beneficial owner hereby assigns unto "Fork all the premises comprised in or demised by the said "lease dated the eighth day of December 1958 hereinbefore men- "tioned to hold the same unto Fork for all the residue now "unexpired of the said term of twenty-two years and ten days "granted by the said lease subject henceforth to the payment of "the annual rent of six pounds thereby reserved and to the cove- "nants agreements and conditions therein contained and on the "part of the lessee to be observed and performed."

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3. Wednesday, December 10, 1958. An underlease by Fork to Littlewoods of Jubilee House for 22 years at a rent of £42,450 per annum.

4. Thursday, December 11, 1958. A deed described as a deed of exchange and made between Oddfellows and Fork, which recited the lease dated December 8, 1958, and continued: "(2) [Oddfellows] . . . are entitled to the premises comprised in "and demised by the lease for an estate in fee simple in reversion "expectant upon the determination of the term thereby granted "(3) By an assignment made the ninth day of December 1958 "between [Littlewoods] of the one part and [Fork] of the other "part the entirety of the premises comprised in and demised by "the lease were assigned to [Fork] for all the residue then "unexpired of the said term of twenty-two years and ten days "subject to the payment of the said yearly rent reserved by and "the performance and observance of the covenants on the part "of the leases and conditions contained in the lease (4) By "an underlease (hereinafter referred to as 'the underlease') "made the tenth day of December 1958 between [Fork] of the "one part and [Littlewoods] of the other part the entirety of "the premises comprised in and demised by the lease were sub-"demised to [Littlewoods] for all the residue then unexpired of "the said term granted by the lease except the last ten days thereof "subject to the payment of the yearly rent of £42,450 and the "performance and observance of the covenants on the part of the "underlessees and conditions in the underlease reserved and "contained (5) [Fork] is entitled to the premises comprised in "and demised by the lease for all the residue of the term thereby "granted in reversion expectant upon the determination of the "term granted by the underlease (6) The parties hereto have "mutually agreed to exchange their said respective estates and "interests in the said property Now in pursuance of the said "agreement and for the considerations hereinafter mentioned and "divers other good and valuable considerations this deed wit-"nesseth as follows:—1. In consideration of the assignment here-"inafter made by [Fork] to [Oddfellows] [Oddfellows] as trustees "hereby transfer to [Fork] all that the land and property com-"prised in the title above referred to subject to and with the "benefit of the lease but to the intent that any leasehold estate "of [Fork] comprised in Title No. LN 58308 of which [Fork] "is the registered proprietor shall merge and be extinguished in "the freehold estate hereby transferred to [Fork]

"2. In consideration of the transfer hereinbefore made by "[Oddfellows] to [Fork] [Fork] as beneficial owner hereby "assigns unto [Oddfellows] all those leasehold premises com-"prised in and demised by the lease to hold the same unto "[Oddfellows] for all the residue now unexpired of the term "granted by the lease subject henceforth to the payment of the "said yearly rent of £6 and the performance and observance of

"the covenants on the part of the lessees and conditions in the "lease reserved and contained and subject also to but with the "benefit of the underlease." By clause 3 Oddfellows covenanted with Fork to pay the rent and observe the covenants and conditions contained in the lease dated December 8, 1958.

5. Friday, December 12, 1958. A deed of guarantee and legal charge between Fork and Oddfellows, by which deed Fork guaranteed payment to Oddfellows by Littlewoods of the rent reserved by the underlease and charged the freehold reversion with the payment.

6. Saturday, December 13, 1958. A deed of indemnity between Littlewoods and Oddfellows whereby Oddfellows were indemnified against payment of stamp duty and penalties.

The commissioners, through the Controller of Stamps, asked the solicitors for Littlewoods to explain the circumstances attending the execution of the lease of December 8, 1958, and the considerations which prompted the landlords to grant this lease for an annual rent of only £6. The controller also requested to be furnished with a narrative statement of the events and negotiations leading up to the execution of the various documents in the adjudication, supported by the relative correspondence and any agreement entered into by the parties. It was stated by the solicitors to Littlewoods that no form of agreement other than the documents presented for adjudication was entered into by the parties.

With regard to the assignment of December 9, 1958, Littlewoods claimed that this was exempt from duty by reason of the provisions of section 42 of the Finance Act, 1930. There was furnished by their solicitors a copy of a statutory declaration sworn on December 18, 1958, by a partner in that firm. Paragraph 6 of the statutory declaration stated that the assignment of December 9, 1958, was not executed in pursuance of or in connection with such an arrangement as is described in section 50 of the Finance Act, 1938.

The commissioners were of opinion that the assignment by Littlewoods to Fork of December 9, 1958, conferred a substantial benefit on Fork, being made either for no consideration or for an inadequate consideration, and was a conveyance or transfer operating as a voluntary disposition falling within the provisions of section 74 of the Finance (1909–10) Act, 1910, and chargeable with ad valorem duty under that section. Asuming that the effect of the assignment was to convey or transfer a beneficial interest in property from one "associated" company with limited liability (namely Littlewoods) to another such company (namely Fork) within the terms of section 42 (2) (*a*) of the Finance Act, 1930, the commissioners were of opinion that such beneficial interest "was" within the meaning of section 50 of the Finance Act, 1938, "previously conveyed or transferred" by Oddfellows or their trustees who were "associated" neither with Littlewoods

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nor Fork; and, notwithstanding the statutory declaration, the commissioners were not satisfied that the assignment was not executed in pursuance of or in connection with an arrangement under which such beneficial interest was so previously conveyed or transferred. The commissioners were accordingly of opinion that the exemption claimed was not applicable.

So far as regards the instrument called a "deed of exchange" of December 11, 1958, the commissioners, having considered all the instruments submitted for adjudication and the facts disclosed in the correspondence, came to the conclusion, on the facts before them, that there had been a sale by Oddfellows of the freehold property in consideration of an annuity of £42,444 payable for 22 years, and that the conveyance of the freehold property contained in the instrument called a "deed of exchange" was a "conveyance or transfer on sale" within the meaning of and was chargeable under the provisions of section 56 (2) of the Stamp Act, 1891, and other relevant statutory provisions at the rate of £1 for every £50 on a consideration of £42,444 per annum for 20 years, viz., on £848,880, duty £16,978.

The commissioners assessed the duty on the six deeds as follows: (1) Lease dated December 8, 1958, by reference to the head of charge "Lease or Tack . . . (3) For any other definite "term . . . " in the First Schedule to the Stamp Act, 1891, ad valorem duty in respect of the rent of £6 per annum: 2s. (2) Assignment dated December 9, 1958. Ad valorem voluntary disposition duty under the provisions of section 74 of the Finance (1909–10) Act, 1910, on the estimated value £400,000 of the leasehold interest assigned: £8,000. (3) Underlease dated December 10, 1958. By reference to the before-mentioned head of charge "Lease or Tack . . . (3)," ad valorem duty in respect of the rent of £42,450 per annum: £849. (4) Deed of exchange dated December 11, 1958. As a conveyance on sale of the fee simple by reference to the head of charge "Conveyance or "Transfer on sale," and to section 56 (2) of the Stamp Act, 1891, ad valorem duty at the rate of £1 per £50 on £42,444 × 20: £16,978. (5) Guarantee dated December 12, 1958: 10s. (6) Deed of indemnity dated December 13, 1958: 10s.

No objection was taken by Littlewoods to the assessment of duty in respect of the deeds numbered 1, 3, 5, and 6 above, nor to the valuation of the property assigned by the assignment of December 9, 1958, at £400,000; but Littlewoods contended that the assignment of December 9, 1958, was exempt from stamp duty under the provisions of section 42 of the Finance Act, 1930, and that the deed described as a deed of exchange dated December 11, 1958, was liable to the duty of 10s. only, under the head of charge "Exchange or Excambion—Instruments effecting" in the First Schedule to the Stamp Act, 1891.

R. O. Wilberforce Q.C. and *K. B. Suenson Taylor* for Littlewoods.

B. L. Bathurst Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases, not referred to in the judgment, were cited in argument: *In re Sanders' Settlement* [3]; *Kemp* v. *Inland Revenue Commissioners* [4]; *G. H. R. Co. Ltd.* v. *Inland Revenue Commissioners* [5]; *Swayne* v. *Inland Revenue Commissioners* [6]; *Cormack's Trustees* v. *Inland Revenue Commissioners* [7]; *Eastbourne Corporation* v. *Attorney-General* [8]; *Speyer Bros.* v. *Inland Revenue Commissioners* [9]; *Wale* v. *Inland Revenue Commissioners* [10]; *Cohen and Moore* v. *Inland Revenue Commissioners* [11]; *Kirkness* v. *John Hudson & Co. Ltd.* [12]; *Jopling* v. *Inland Revenue Commissioners.* [13]

DANCKWERTS J. This is an appeal on a case stated by the Commissioners of Inland Revenue in pursuance of section 13 of the Stamp Act, 1891, and involves two points in regard to stamp duty which are in themselves quite distinct and dependent on different considerations, although they are both dependent ultimately on the Stamp Act, 1891, and they arise out of the same series of transactions.

In 1958, Jubilee House in Oxford Street was let to Littlewoods for a term of 99 years from June 24, 1947, at an annual rent of £23,444. The landlords were a friendly society, the Independent Order of Oddfellows. It appears that in 1958 the rent of £23,444 per year was less than the rent which might be obtained in respect of the property known as Jubilee House in Oxford Street. Apparently Oddfellows wished to get a higher rent, but were prepared to grant a shorter term in order to obtain the higher rent and that would involve getting rid of the existing lease which had some 80 years to run at that time. That was, I think, the origin of the transactions which followed, and which were carried out by means of six documents dated December 8, 1958, and the following five days.

The object of the particular method which was adopted of carrying out the transaction was to save the payment of greater stamp duty and, as Harman L.J. pointed out in *Holmleigh Holdings Ltd.* v. *Inland Revenue Commissioners,* [1] there is nothing illegal in arranging your affairs and the documents which you

[3] [1896] 1 Ch. 480; 12 T.L.R. 232, C.A.

[4] [1905] 1 K.B. 581; 21 T.L.R. 168.

[5] [1943] K.B. 303; 59 T.L.R. 211; [1943] 1 All E.R. 424.

[6] [1899] 1 Q.B. 335; 15 T.L.R. 133.

[7] [1924] S.C. 819.

[8] [1904] A.C. 155; 20 T.L.R. 252, H.L.

[9] [1908] A.C. 92; 24 T.L.R. 257, H.L.

[10] (1879) L.R. 4 Ex.D. 270.

[11] [1933] 2 K.B. 126.

[12] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345, H.L.

[13] [1940] 2 K.B. 282; 56 T.L.R. 877; [1940] 3 All E.R. 279.

[1] (1958) 37 A.T.C. 406.

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execute to produce the result of reducing the amount of stamp duty which has to be paid.

[His Lordship referred to the six deeds and continued:] The documents were sent for adjudication and there is an appeal only in respect of two of the documents. Those two are the assignment of December 9, 1958, which assigned to Fork the 22 years and 10 days lease, and the deed that was described as a deed of exchange. On those two deeds assessments of stamp duty were made, being £8,000 in respect of the assignment and £16,978 in respect of the deed which was called a deed of exchange. The duty has been paid, subject to the appeal, by Littlewoods.

It should be said that it is clear from the correspondence which passed between the advisers of the various parties that there was no preceding contract at any time before the execution of these documents, although it is claimed that the parties were co-operating, and that their legal advisers were busily engaged in evolving an arrangement which would be found to diminish as far as possible the liability for stamp duty.

As regards the assignment of December 9, 1958, the matter depends not only on the Stamp Act, 1891. Under that Act the assignment would plainly have been a conveyance and would have attracted the appropriate duty, and what I have to consider is whether the claim of Littlewoods, that it is exempted by virtue of section 42 of the Finance Act, 1930, is correct. Section 42 of that Act provides: "(1) Stamp duty under the heading 'Conveyance "'or Transfer on Sale' in the First Schedule to the Stamp Act, "1891, shall not be chargeable on an instrument to which this "section applies." Subsection (2) provides: "This section "applies to any instrument as respects which it is shown to the "satisfaction of the Commissioners of Inland Revenue"—which means, of course, that the onus is on the person concerned—"(*a*) that the effect thereof is to convey or transfer a beneficial "interest in property from one company with limited liability to "another such company; and (*b*) that either—(i) one of the "companies is beneficial owner of not less than ninety per cent. "of the issued share capital of the other company." Sub-paragraph (ii) is not material to the present case.

The position was that Littlewoods owned the whole of the capital of Fork, although they were two companies. They came within the description contained in this section and, under the provision of the section, so far as it applies, would be exempted from the payment of stamp duty on the conveyance.

In 1938, however, another provision was introduced by section 50 of the Finance Act of that year, which provided by sub-section (1) that: "Section 42 of the Finance Act, 1930 (which "relieves from stamp duty any instrument the effect whereof is "to convey or transfer a beneficial interest in property from one "associated company to another, in this section respectively "referred to as the 'transferor' and 'transferee') shall not apply

"to any such instrument, unless it is shown to the satisfaction "of the Commissioners of Inland Revenue"—again the onus is on the person concerned in the instrument—"that the instru- "ment was not executed in pursuance of or in connection with an "arrangement whereunder—(*a*) the consideration for the transfer "or conveyance was to be provided directly or indirectly by a "person other than a company which at the time of the execu- "tion of the instrument was associated with either the transferor "or the transferee." That person is referred to again in paragraph (*b*), which says: "the beneficial interest in the property "was previously conveyed or transferred directly or indirectly by "such a person as aforesaid." That was the person referred to in paragraph (*a*), which was a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee.

Oddfellows, when they granted the lease of 22 years and 10 days at a rent of £6 a year, were persons who were not associated with either the transferor or transferee, Littlewoods or Fork, and the real point which arises is this: can it be said that the lease which was granted by Oddfellows for 22 years and 10 days was the transfer or conveyance of a beneficial interest in the property? The property appears to be the property which was transferred by Littlewoods to Fork by the assignment of December 9, 1958. Therefore, can it be said, for the purposes of this case, that the granting of that lease by Oddfellows was a conveyance? It is obviously not a transfer but it is possible it may be a conveyance.

Mr. Wilberforce, for Littlewoods, pointed out that in the Schedule to the Stamp Act, a conveyance on sale and other sorts of conveyances are referred to in a different set of provisions from those relating to the grant of a lease, which appears under the term "Lease or Tack." He referred me to various other sections which bear on the matter in one way or another, the group beginning with section 54, which is headed "Conveyances "on Sale," and the group beginning with section 75, entitled "Leases." I do not think, however, that that is really conclusive in regard to the matter which I have to decide. I have to decide whether, in the context of these statutes, the term "conveyance" does not include the grant of a lease. The Finance Act, 1930, and the Finance Act, 1938, have probably got to be construed as one with the Stamp Act, 1891, but I do not know that that either is really conclusive on the matter. The real question is: what is the meaning of "conveyance"?

I have been referred to *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[2] That seems to me to be a very different case from the present one, but the point of it, for the purpose of this case, is that the observations of the House of Lords do seem to indicate that a wide construction should be given

[2] [1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L.

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to the meaning of section 50, which is the important section for the purposes of this document.

It is quite clear, from the various cases to which I have been referred, that the word "conveyance" sometimes is capable of including a lease and sometimes is not capable of including a lease, the word "conveyance" being used in the more limited sense of the transfer of real estate to some other person. However, it seems to me that there are cases, and statements in the books, which indicate that it is not improper to describe a lease as a conveyance and, therefore, a person who grants a lease may be said to have conveyed an estate or property.

In Blackstone's Commentaries, 18th ed., vol. 2, p. 317, Sir William Blackstone says: "A lease is properly a conveyance of "any lands or tenements (usually in consideration of rent or "other annual recompense), made for life, for years, or at will, "but always for a less time than the lessor hath in the premises." Then, of course, he says that, if the whole interest is granted, it is an assignment.

A lease was treated as being a conveyance in *Credland* v. *Potter*,[3] a case concerning the registration of a document, where Lord Cairns discussed the matter and, having considered the object of the statute and the cases to which it was intended to refer, came to the conclusion[4] that a lease was to be regarded as a conveyance.

On the whole, I have come to the conclusion that, for the purposes of the present case, a lease is a conveyance and a person who grants a lease is a conveying party. Consequently, the assignment of December 9, 1958, came within the provisions of section 50 of the Finance Act, 1938, and, accordingly, the exemption conferred by the Finance Act, 1930, did not apply to it. In that respect I think that the commissioners were right in their contentions and that the duty is the amount which was assessed, that is, £8,000.

The second point in this appeal is entirely different. It arises in regard to the document described as a deed of exchange dated December 11, 1958. [His Lordship referred to the deed and read paragraphs (1) and (2) of the operative parts and continued:] On the face of it, that was a perfectly straightforward exchange and nothing else. It is quite true it was an exchange of the freehold for a term of only 22 years and 10 days; but that term of 22 years and 10 days was a valuable property in that it carried with it the benefit of the underlease, and the rent payable under the underlease was £42,450 per year. There is no suggestion that the values were not equal. There is no provision for payment of a sum by way of equality of exchange, and there has not throughout been any suggestion that the value of the freehold, valuable as it was, and the value of the leasehold interest were not in the eyes of the parties of equal value.

[3] (1874) L.R. 10 Ch.App. 8. [4] Ibid. 8, 11.

I have been referred to various provisions of the Stamp Act through which it is not necessary for me to go in detail. The principal argument on behalf of the Crown was that this was a conveyance on sale and, as it was a conveyance on sale, the commissioners were entitled to choose whether to assess it as a conveyance on sale or as an exchange; and therefore, if it was both, it did not matter that it was not only a conveyance on sale but also an exchange. It was said also that it was not an exchange having regard to all the circumstances of the case, and was, in fact, a conveyance on sale and nothing else.

I was referred to a number of cases which, however, seem to me to be very different. In *Escoigne's* case,[5] for instance, it was not a case of an exchange. There was a pre-existing contract of sale. In *Lord Portman* v. *Inland Revenue Commissioners* [6] it was perfectly plain that though the document was termed a deed of exchange, in fact it was the implementation of a number of sales and, in that case, I had no difficulty in reaching a conclusion that the document was properly chargeable as a conveyance on sale. In the same way, in *Oughtred* v. *Inland Revenue Commissioners*,[7] it was quite plain that there had been sales and that the ultimate document executed by the trustees of the settlement in that case was a completion. None of the facts in those cases seem to me to be fairly comparable with the present case. In the present case, there was no preceding contract of sale at all. I cannot find in the facts of this case anything amounting to a sale.

I have described what was the original object of the parties, and the series of documents by which the object was carried out, which were designed to produce the result of less stamp duty being payable than would otherwise have been the case. I see no reason for saying that the documents were other than what they purport to be on their face. It is plain that they were very carefully settled, and if one could point to an earlier contract of sale, there might have been a different result. It seems to me that in the present case there was no sale at all and, therefore, it is impossible to say that the deed was not an exchange, and that it really was a conveyance on sale.

That disposes of the matter except for one subsidiary point which was raised. It was said by the commissioners that one cannot have an exchange except of interests which are of the same character. There is the authority of Blackstone's Commentaries, 18th ed., vol. 2, p. 322–3, in favour of that proposition, but I doubt whether that is the law at the present time. In *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners*,[8] Wills J. suggested [9] that possibly that was the law, and that exchanges

[5] [1958] A.C. 549.

[6] (1956) 35 A.T.C. 349.

[7] [1958] Ch. 678; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443, C.A.; [1960] A.C. 206; [1959] 3 W.L.R. 898; [1959] 3 All E.R. 623, H.L.

[8] [1897] 1 Q.B. 778; 13 T.L.R. 548.

[9] [1897] 1 Q.B. 778, 784.

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could only be made of freehold interests in land. That seems to me to be going beyond anything that Blackstone said; but, however it may be, I do not think that that is the law at the present time. In my opinion, the law has progressed beyond that state and there may, at the present time, be exchanges of many different interests. There may possibly be an exchange of one class of property for another class of property; and certainly there may be an exchange of an interest in land for a different interest in the same land, which may be greater or smaller. I do not think, therefore, that the subsidiary point, which, indeed, was not pressed upon me for decision, is one with which I need concern myself.

In the result, the document in question is not subject to ad valorem stamp duty, but is to be stamped with a 10s. stamp as an exchange.

Declaration that the assignment of December 9, 1958, *was liable to duty as assessed, and that the deed of exchange dated December* 11, 1958, *was liable to duty of* 10*s.*

Order that the surplus duty be returned to Littlewoods.

No order as to costs.

Solicitors: *Jaques & Co.; Solicitor of Inland Revenue.*

V. A. M.

[COURT OF APPEAL.]

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Nov. 16, 17.

Lord Evershed M.R., Harman and Donovan L.JJ.

BEESLY *v.* HALLWOOD ESTATES LTD.

[1959 B. No. 402.]

Deed—Escrow—Lease—Lease executed by landlord company—Delivery of counterpart—Whether landlord bound to exchange lease for counterpart.

By a lease dated May 21, 1938, for a term of 21 years from March 25, 1938, it was provided that, on the tenants giving at least six months' notice in writing previous to the determination of the lease, they should have the right to obtain a further lease for 21 years on the same conditions subject to certain amendments. The option was never registered as a land charge under the Land Charges Act, 1925. On January 10, 1948, the residue of the term was assigned to the plaintiff for valuable consideration; and, in August, 1955, the freehold reversion was purchased by the defendant company for money.

On July 1, 1958, the plaintiff gave notice exercising the option. Both the plaintiff and the directors of the defendant company were

then of opinion that the option was binding on the defendant company. On August 27, 1958, the defendant company's solicitors wrote to the plaintiff's solicitor setting out the terms of the new lease and informing them that the grant of the new lease would be subject to an undertaking being given to redecorate the property. There was some further correspondence with regard to the terms of the undertaking but it was never given. On September 11, 1958, the defendant company's solicitors sent a counterpart lease to the plaintiff's solicitors for execution by the plaintiff. At some date between September 13 and 26, 1958, the seal of the defendant company was attached to the new lease; on September 24 or 25, 1958, the plaintiff executed the counterpart lease. At a board meeting of the defendant company held on September 26, 1958, it was reported that a new lease had been executed, when one of the directors suggested that the position as to the registration of the option should be investigated. The defendant company were advised that the option was void for lack of registration, and on October 8, 1958, a letter was written to the plaintiff's solicitors informing them that the defendant company had decided not to grant the new lease.

In an action in which the plaintiff claimed, inter alia, that the defendants were bound by the lease sealed by them, Buckley J. held that the sealing of the lease by the defendant company imported delivery and they were bound by that lease subject to the plaintiff handing over the counterpart which she had executed. On appeal:—

Held, that where a deed is delivered as an escrow it is not recallable, and upon the performance of the condition on which it is delivered, it becomes binding; and that, on the facts, the only condition which attended the delivery of the lease by the defendant company was that the plaintiff should execute and deliver her counterpart; the defendant company would become bound on such delivery.

The observations of Lord Cranworth in *Xenos* v. *Wickham* (1886) L.R. 2 H.L. 296 applied.

Decision of Buckley J. [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314 affirmed.

APPEAL from Buckley J.[1]

By a lease made on May 21, 1938, the lessors, Dr. R. Collum's Representatives Ltd., granted to the tenants, Walter Weeks and Winifred Gertrude Weeks, a lease of property known as No. 132, 132a and 132b, Ewell Road, Surbiton, Surrey for a term of 21 years from March 25, 1938. Clause 5 of the lease provided that "On giving at least six months' notice in writing expiring previous "to the determination of this demise the tenants shall have the "right to obtain a further lease for twenty-one years on the same "conditions subject to the following amendments:—(a) That "there shall be no right of renewal of the said term at the end of "such further lease. (b) That the yearly rentals payable during "the said term shall be as follows:—(i) £200 for the first seven "years. (ii) £225 for the second seven years. (iii) £250 for "the last seven years. (c) The legal costs, stamp duties and "other expenses attendant on the granting of such further lease "shall be borne by the tenants." That option was never registered as a land charge under the Land Charges Act, 1925.

[1] [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314.

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By an assignment dated January 10, 1948, made between the tenants and the plaintiff, Phyllis Eirene Beesly, the tenants, in consideration of a payment of £5,000, assigned the demised property to the plaintiff for the residue of the term subject to the rent, covenants and conditions reserved by and contained in the lease. The assignment also comprised the tenants' stock-in-trade and other chattels and the goodwill of the business carried on by them at the property. In August, 1955, the defendants, Hallwood Estates Ltd., purchased the freehold reversion expectant on the term for money. The defendants had notice of the option when they bought the property, and on August 13, 1955, their solicitors applied for an official search under the Land Charges Act, 1925, for entries affecting No. 132, Ewell Road, and obtained a certificate of no subsisting entries.

On July 1, 1958, the plaintiff's then solicitors wrote a letter to the original lessors, c/o Messrs. Whiddington, estate agents, on the plaintiff's behalf, enclosing a formal notice to exercise the option given to her by clause 5 of the lease. On August 27, 1958, the defendants' solicitors wrote to the plaintiff's solicitors that they had been instructed to act by the defendants. The letter continued: "We are instructed that the term is to be for 21 years "at a rental of £200 per annum for the first seven years, £225 "per annum for the next seven years, and £250 per annum for "the remainder of the term. In other respects the new lease will "be in similar terms to the existing one and this being so, "we shall be glad to know whether in the circumstances you "require to see a draft. Our clients inform us that the repairing "covenants have not been complied with by your client and that "the granting of the new lease will be subject to an undertaking "being given that the whole of the exterior and interior will be "redecorated within the course of the next six months, although "they understand that the work to the interior is already in "hand."

After some further letters, which are not material, the plaintiff's solicitors wrote to the defendants' solicitors on September 10, 1958, that "the rents are to be as set out in your letter and the "terms of the new lease are to be similar to those in the existing "lease. In these circumstances, we will gladly dispense with a "draft, but we should be glad to know by whom the new lease "is to be granted. Under the existing lease, the lessors are "Dr. R. Collum's Representatives Ltd." The letter also asked if the undertaking could be extended to nine months. On September 11, 1958, the defendants' solicitors wrote to the plaintiff's solicitors enclosing a counterpart lease for execution by the plaintiff and informing them that the lease would be granted by the defendants. On September 13, 1958, the defendants' solicitors wrote a further letter: "With reference to your letter to us of the "10th instant, our clients say that they are quite prepared for "the period of the exterior decorations to be extended from six "to nine months, and so far as the interior decorations are

"concerned they understand that these will be completed shortly, "and they will be glad to hear from your client that this has been "done, so that they may make an inspection." At some date between September 13 and 26, 1958, the seal of the defendants was regularly attached to the new lease; and on September 24 or 25, 1958, the plaintiff executed the counterpart lease.

At a board meeting of the defendant company held on September 26, 1958, it was reported to the board as follows: "132, Ewell "Road, Surbiton. A new lease has been executed for the letting "of this property to Mrs. P. E. Weaver [the plaintiff] for a term "of 21 years from the 25th March, 1959, at a rent of £200 per "annum for the first seven years, £225 for the next seven years, "and £250 for the remaining seven years, the tenant to pay all "outgoings." At this time both the plaintiff and the directors of the defendant company believed that the option was valid; but one of the directors suggested that the position as to registration of the option should be investigated. The defendants were advised that the option was void for lack of registration, and on October 8, 1958, their solicitors wrote to the plaintiff's solicitor: "We are "instructed to inform you that our clients have decided not to "grant the new lease to your client." Further correspondence followed in which the plaintiff's solicitors called upon the defendants to execute the new lease.

On February 6, 1959, the plaintiff issued the writ claiming [as re-amended] (1) a declaration that the defendants were bound by the further lease sealed by them; (2) an order that upon her handing over to the defendants the counterpart of the further lease they should hand over the further lease to her; alternatively (3) a declaration that the plaintiff was entitled to a further lease of the demised premises upon the terms contained in clause 5 of the original lease; (4) an order that the defendants should execute a further lease in accordance with the terms contained in the counterpart lease or otherwise in accordance with the terms contained in clause 5; in either event (5) damages. By her re-amended statement of claim she alleged that she had duly exercised the option granted to her by clause 5; alternatively, that by their execution of the new lease and by all or some of the letters dated July 1, August 27, September 10, 11 and 13, 1958, the defendants had agreed to grant and she agreed to take a further lease; and that the defendants were bound by the new lease which they had sealed.

By their re-amended defence and counterclaim the defendants denied that the plaintiff had against them any right under clause 5 of the lease and relied on section 13 of the Land Charges Act, 1925. They also denied that they had executed the further lease and that they had agreed to grant or the plaintiff to take any further lease. Alternatively they alleged that, if an agreement was constituted by the alleged execution or the letters, it was a condition precedent of the granting of the further lease that the undertaking as to repairs should be given; and, in the further

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alternative, that the alleged agreement was entered into under a mistake of fact or as as to private right common to both parties, in that they both believed that the defendants were under a binding obligation to grant the new lease. They also denied that the further lease was binding on them, and alleged that it was delivered as an escrow and was not to take effect until the undertaking had been given and/or until the document should have been exchanged with the counterpart; alternatively, they alleged that the lease had been executed under the mistake previously alleged. The defendants counterclaimed for possession of the part of the property occupied by the plaintiff personally and for mesne profits.

It was agreed that, unless the option was unenforceable by reason of non-registration, it was exercisable by the plaintiff against the defendants, although there had been no express assignment to the plaintiff of the benefits of the option and that, if the option was valid, the notice exercising it had been effectually served on the defendants.

The facts as to the sealing of the new lease and as to what occurred at the board meeting held on September 26, 1958, were unknown to the plaintiff until one of the directors of the defendant company gave evidence at the hearing in March, 1960. On April 8, 1960, after the conclusion of the legal argument on the other points, the plaintiff was given leave to amend her statement of claim.

Buckley J. held that the option was void for non-registration as against the defendant company and that the letters passing between the parties did not constitute a contract to grant a new lease. However, he gave judgment for the plaintiff on the ground that the sealing of the lease imported delivery and that the company intended to deliver it as an escrow conditionally upon the plaintiff executing the counterpart and, accordingly, that subject to the plaintiff handing over the counterpart the defendants were bound by the lease.

The defendant company appealed on the ground (inter alia) that the lease not having been exchanged with any counterpart the defendant company was free to countermand the delivery of the alleged lease to the plaintiff and to refuse to be bound by it. The defendant company did not on appeal dispute that the sealing of the lease imported delivery.

The plaintiff gave notice of cross appeal against the decision that the option was registerable under the Land Charges Act, 1925, and that the letters passing between the parties did not constitute a contract. The cross appeal was not argued.

Nigel Warren Q.C. and *A. E. Holdsworth* for the defendant company.

Sir Lynn Ungoed-Thomas Q.C. and *F. Bower Alcock* for the plaintiff.

The following cases were referred to in argument which are not mentioned in the judgments: *Eccles* v. *Bryant* [2]; *Foundling Hospital (Governors and Guardians)* v. *Crane* [3]; *Windsor Refrigerator Co. Ltd.* v. *Branch Nominees.* [4]

LORD EVERSHED M.R. I will ask Harman L.J. to deliver the first judgment.

HARMAN L.J. This is an appeal from a reserved decision of Buckley J. delivered last April. It concerns the lease of property consisting of a shop and two flats in Ewell Road, Surbiton.

The story begins in 1938 when this property was the subject of a lease by the predecessors in title of the defendants to a predecessor in title of the plaintiff. That lease was for a term of 21 years from Lady Day, 1938, and it contained an unconditional option for the lessee to exercise by notice the right which was thereby given to him or her to have a further lease of 21 years to start from Lady Day, 1959—that is to say, when the old lease ended.

In 1948, the lease was assigned to the plaintiff who paid, I think, £5,000, partly for the assignment and partly for the goodwill of a hairdressers' business carried on in the shop. The reversion was assigned to the defendants in 1955. On July 1, 1958, the plaintiff sent a notice to the defendants or their solicitors exercising the option, and there is no dispute, and never has been, that in point of form that notice was a good exercise of the option.

There was a certain amount of negotiation between the solicitors by correspondence, which does not matter, for on September 11, 1958, an engrossed counterpart of the proposed new lease was sent to the plaintiff's solicitors. Between that date and September 26 the new lease was executed by the defendants, and of that more hereafter. About the same time, on September 24 or 25, the counterpart was executed by the plaintiff. On October 8, the defendants wrote refusing to go on with the matter. There had by then been no exchange of the two documents.

The writ was issued on February 6, 1959, and the statement of claim was delivered on February 26. By that claim the plaintiff—who is now the respondent to this appeal—asked for a declaration that she was entitled to a further lease—that is to say in pursuance of the option—and an order upon the defendants to execute. The defence was that the option was void as it had never been registered as an estate contract under the Land Registration Act, 1925. Confronted with that, the plaintiff amended her statement of claim and pleaded that, if the option was itself bad, the correspondence between the solicitors prior to September 26 amounted to a fresh contract to grant a new lease and that specific performance of that should be granted.

[2] [1948] Ch. 93; [1947] 2 All E.R. 865, C.A.
[3] [1911] 2 K.B. 367, C.A.
[4] [1960] 3 W.L.R. 108; [1960] 2 All E.R. 568.

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In June the defence was amended and it was there pleaded that there was a condition precedent to any agreement that might exist, namely, that certain repairs should be done and that the parties had never reached any consensus on that subject and, therefore, no agreement was made. Alternatively, there was a plea of mistake, and the defendants counterclaimed for possession, the former lease having run out on Lady Day of that year.

The tenant (the plaintiff) was still in occupation. There followed the usual discovery, and it is the lamentable fact that the defendants did not disclose the document of lease executed by them, nor did they disclose the minute book of the company which, as hereinafter appears, contained a most relevant entry, and the action came to trial in March of this year without the plaintiff being aware of those two matters. The minute and the lease came to light during the course of the hearing, and it is not surprising that the judge then granted an adjournment to the plaintiff and that she re-amended her statement of claim on March 31 to plead that the lease had been executed and that upon tender by her of the counterpart—which she had always been ready to do—she was entitled to have the lease handed over to her: the contract on this footing was complete and not a matter for specific performance at all.

There was a re-amendment of the defence in which it was admitted that the seal of the defendants was affixed to the document of lease, but it was apparently denied that there had been any delivery. Alternatively, it was said that if there had been delivery, it was subject to a condition, namely that there should be an agreement about the so-called decorations and that there should be exchange, which had never occurred. The hearing was resumed on April 7 on that footing.

A number of points were taken and on two of them the defendants were successful. The judge held that the option was not binding for want of registration as an estate contract: further, that the letters passing between the solicitors and the document of lease and the counterpart themselves did not constitute any new contract of which the plaintiff could obtain specific performance. One of the pleas in the defence was rejected, namely that about mistake: the judge held that the mistake, if there was one, was a mistake of law and, therefore, no defence. In the end the plaintiff succeeded on the ground added by the re-amendment that the deed had been executed as an escrow and, that being so, it was not a mere offer that could be withdrawn before acceptance but was a deed subject to a condition; and that there had been no breach of any condition to which it was subject and, therefore, it was a binding document. It is on that point alone that the defendants have appealed to this court.

There is a cross-notice whereby the questions of registration and contract are put in issue, but those questions have not been agitated before this court because they do not arise on the

appeal and would only arise in the event of the appeal being successful.

The question, therefore, was, first of all: what was the nature of this document? The judge held that it was a deed delivered as an escrow—in other words, that there had been a good execution and delivery—and that matter was not put in issue before us at all.

The judge dealt with the matter quite shortly. He held that in view of section 74 of the Law of Property Act, 1925, he was bound, prima facie, to hold that there had been due execution, this being a document under seal issuing from a body corporate and appearing on the face of it to be complete. He said [1]: "Mr. "Holdsworth"—that is the defendants' counsel—"concedes that "the seal of the defendants was regularly attached to the lease. "I know nothing further about the actual circumstances of its "being attached. It will be recollected that the correspondence "to which I have made reference discussed an undertaking to "be given by the plaintiff relating to certain decorations . . . "I do, however, know that the seal is countersigned by the "chairman of the board" and then he recites a minute and says: ". . . it is clear from the evidence that everybody present "at the board meeting of September 26 regarded the lease sealed "by the defendant company as binding, albeit they did so with "regret. Whereas this attitude of mind would, in my opinion, "not be inconsistent with the binding quality of the lease being "conditional on the lessee binding herself by execution of a "counterpart to obligations on her part expressed in the lease, "it is inconsistent with any idea that it was also conditional on "some matter wholly extraneous to the lease, as was the proposed "undertaking as to redecoration. I, therefore, reach the con-"clusion of fact that the defendants, by sealing the lease, intended "to deliver, and did deliver, it as their deed intended to bind them "conditionally only upon the plaintiff executing a counterpart, "but subject to no other condition."

It was admitted before us, and not surprisingly, that this was right, for when one looks at the minute of September 26 one finds a record of a meeting on September 26 at which all the three directors of the appellant company were present: It reads: "132, Ewell Road, Surbiton. A new lease has been executed for "the letting of this property to Mrs. P. E. Weaver" [the plaintiff] "for a term of twenty-one years from March 25, 1959, "at a rent of £200 per annum for the first seven years, £225 "for the next seven years and £250 for the remaining seven "years, the tenant paying all outgoings." This, be it observed, is a report by the chairman, who was also the managing director of this company, to the board meeting and it was accepted as a fait accompli.

It was only at that meeting and after that report had been made, a general regret being expressed at the company being

[1] [1960] 1 W.L.R. 549, 561, 562, 563; [1960] 2 All E.R. 314.

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obliged to create this new lease—which was, of course, extremely unprofitable to them having regard to the rent—that one of the board suggested that there might be a loophole, namely, if the earlier document of lease containing the option were not registered. The company's solicitors were consulted and they expressed the view, apparently, that it did not matter whether it was registered or no, but one of the directors, who was a solicitor (and who gave evidence), made further investigations in the matter and, as a result, it was decided to write the letter, which I have mentioned, on October 8 declining to go on with the matter.

The substantial plea is this, that as by October 8 there had been no performance of the condition as to exchange in that the counterpart had not been returned, the defendant company was entitled to withdraw from what was, in effect, an offer made subject to a condition not then accepted and, therefore, retractable at will by the offeror.

If that were the true nature of a document delivered in escrow the result might follow. The question, then, is: what is an escrow? Can a body or an individual having executed a document under seal as an escrow subject to a condition resile before the condition is accepted? That, really, is the point now taken and it is a very narrow one.

Of course, if there had been no delivery, as was pleaded, the matter would be wholly different; but that, by the time the action came to this court, had been decided as a fact by the judge and accepted by the defendants.

An escrow, then, is a type of deed which, perhaps, is best described in Norton upon Deeds, p. 15; I read from the author's edition: "If an instrument be delivered to take effect on the "happening of a specified event or upon condition that it is not "to be operative until some condition is performed, then pending "the happening of the event or the performance of the condi-"tion, the instrument is called an escrow. The maker (of that "deed) may so deliver it as to supend or qualify its binding "effect. He may declare that it shall have no effect until a "certain time has arrived or until some condition has been "performed, but when the time has arrived or the condition has "been performed the delivery becomes absolute and the maker "of the deed is absolutely bound by it whether he has parted "with the possession or not. Until the specified time has arrived "or the condition has been performed the instrument is not a "deed, it is a mere escrow"—that is a quotation from Lord Cranworth's speech in the leading case of *Xenos* v. *Wickham*.[2]

In Norton, p. 17, there is a further relevant statement: "Whether the document was delivered as an escrow or as a deed "is a question of what the parties intended, and that intention "may appear either from their statements or the circumstances"

[2] (1866) L.R. 2 H.L. 296, 323.

—that is to say, the question is one of fact, and it has been so decided in this case.

We also had our attention drawn to Sheppard's Touchstone, and I look at the second page 58 in the 1820 edition of that work and find this: "Delivery of a deed as an escrow is said "to be where one doth make and seal a deed and deliver it "unto a stranger until certain conditions have been performed "then to be delivered to him to whom the deed is made to take "effect as his deed, and so a man may deliver a deed and such "delivery is good," and then two so called "cautions" are mentioned and those cautions relate to matters which are now no longer law. Then I turn to page 59 and find this: "But "when the conditions are performed and the deed delivered over, "then the deed shall take as much effect as if it were or had "been delivered immediately to the party to whom it is made, "and no act of God or man can hinder or prevent its effect then "if the party that doth make it be not at the time of the making "thereof disabled from making it."

Lastly on this subject I quote a dictum of Farwell L.J. in *Foundling Hospital (Governors and Guardians)* v. *Crane.*[3] I need not deal with the facts of that case; it was there held, as the head-note shows, that the proper inference from the facts was that the document was never legally delivered either absolutely as a deed or as an escrow and was therefore inoperative. From Sir George Farwell's decision I read these words: "Was the deed, then, delivered "as an escrow, or was there no delivery at all? I doubt if a man, "by executing a deed, and handing it over to his own solicitors to "be held on his behalf until he gives them further instructions, "makes a delivery of it as an escrow at all. I doubt also if a "deed can be delivered as an escrow at all subject to an over-"riding power in the grantor to recall the deed altogether."

In other words, if you do deliver a document as an escrow it is your act and deed and is not recallable by you. If, of course, the condition be never performed it never becomes binding, and I suppose there must come a time, if there be unreasonable delay in the performance of the condition, when, in these days at any rate where equitable principles govern the actions of the court, the person or firm that has executed the escrow would be released from its obligation. But in this case there was no refusal on the part of the plaintiff to exchange the counterpart. It is quite clear that was the condition, although some attempt was made to argue that no condition was attached. In my opinion, however, where it is the common intention of the parties—as, indeed, is almost universal in these days—to proceed by means of lease and counterpart, it is readily to be inferred that delivery of the counterpart is a condition of the escrow.

But nobody here on the defendant company's part called on the plaintiff to deliver her counterpart. There was no unreasonable withholding of it or delay. It was merely that the company,

[3] [1911] 2 K.B. 367, 379, C.A.

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having second thoughts or, perhaps, shrewder advice, determined to attempt to get out of what was for them in the event binding. In my judgment, that is exactly what they cannot do.

Reliance was placed on a case of *Phillips* v. *Edwards*.[4] Those who rely on reports in 33 Beavan are sometimes said to be in the last ditch, but I do not complain at all here that there is anything wrong about the decision. However, it was a decision in a case about contract and it was said that the execution of the two documents without exchange did not amount to a contract. There is, in my judgment, nothing controversial about that; indeed, I ventured to express some such view in *Hollington Bros. Ltd.* v. *Rhodes*,[5] a case to which the judge referred in his judgment. The statement of Romilly M.R. in *Phillips* v. *Edwards*[6] and my own statement were relied upon by Mr. Warren as showing that is was necessary that there should be an exchange before the parties were bound. If the matter had lain in contract that would be right, if there had been no delivery of the deed of lease that would be right; but on the facts here it is quite clear that there was a delivery, but a delivery in escrow. But an escrow is no less a man's act and deed because there is a condition outstanding than is a perfectly completed deed handed over, and, therefore, the company was at least bound to wait a reasonable time before attempting to resile from their position.

In my judgment the judge, although he did not deal specifically with that aspect of the case, did, in fact, decide it on that ground, and quite rightly, and as far as the appeal goes it seems to me that it fails and ought to be dismissed.

DONOVAN L.J. It is, of course, the case that a deed may be delivered subject to a condition that it shall not take effect until some other event happens or some condition is fulfilled; in other words it may be delivered as an escrow. But if I purport to deliver a deed, and at the same time indicate that I am to be free to undo it at any time before it passes to the grantee, I am not delivering a deed subject to a condition, I am not delivering a deed at all; because delivery in this context indicates an intention to be bound presently by the deed, albeit in some cases subject to a condition. I doubt whether Lord Romilly intended to say anything different in the case of *Phillips* v. *Edwards*[6] to which Harman L.J. has referred.

In the present case the only condition which, in my view, could be spelt out of the facts attending the delivery of the lease by the defendant company is, as the judge held, that the plaintiff should execute and deliver her counterpart, which she did. If there were the further condition that, having done this, she should send that counterpart to the defendants, she has at all times been ready and willing to do so.

I agree, accordingly, that the appeal should be dismissed.

[4] (1864) 33 Beav. 440.

[5] [1951] 2 T.L.R. 691; [1951] 2 All E.R. 578.

[6] 33 Beav. 440.

Lord Evershed M.R. I am also of the same opinion and only add a very few words to what has been said by my brethren out of respect to the arguments of counsel before us in a case which is somewhat unusual in its nature, raising, as it does, a short but strict point of law.

It was conceded by Mr. Warren that the sealing of the lease in question shortly before September 26, 1958, by the defendant company operated as execution and delivery, but it was said that the lease was delivered as an escrow; that is to say, that its effect was suspended or qualified pending the performance of the indicated condition.

The condition suggested was that there must be first an exchange, in accordance with ordinary conveyancing practice, of the lease on the one hand and in counterpart on the other. As Sir Lynn Ungoad-Thomas pointed out, there is substantial ground at any rate upon the evidence, for the view that the sealing of this deed was not at the time intended to be, still less expressed to be, conditional. Buckley J., however, held upon the facts that the lease was delivered as an escrow subject to the condition that the counterpart should be executed and delivered by the plaintiff lessee. I am certainly prepared to accept that conclusion, and since, as is always so in the case of a lease, there are substantial obligations put upon the lessee, such a condition would be the natural, and I venture to think the only natural, condition to the delivery of the lease as an escrow.

As Harman L.J. has pointed out, there is an important distinction in this respect between an instrument in writing which may be executed conditionally and a deed. For in the case of the former, until the condition is performed, there is nothing at all. The position is not the same in the case of an instrument under seal executed and delivered, for in the latter case, as pointed out in the passage which Harman L.J. has cited in *Xenos* v. *Wickham*,[7] when the time has arrived or the condition has been performed the delivery becomes absolute and the maker of the deed is absolutely bound by it whether he has parted with its possession or not.

The real basis of Mr. Warren's argument is that pending the performance of the conditions—that is to say, execution and delivery of the counterpart by the plaintiff—the defendant company were entitled, for any reason they thought good, to resile altogether from the effects of their deed; and that, in my judgment, is inconsistent with the fundamental character of delivery of the lease as an escrow. No doubt if performance of the condition is long enough delayed the party who has delivered the deed might be relieved in equity from any further consequences; but like my brethren I am of opinion that where a lease, such as the lease in this case, has been executed and delivered as an escrow he who has executed and delivered it cannot thereafter, pending

[7] L.R. 2 H.L. 296.

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performance, resile from it altogether and do so on an entirely novel ground. I mean by that last expression that when the execution and delivery was reported to the board of the defendant company there had been a suggestion that the option was unenforceable. At the time the advice given to the board was that such suggestion was unfounded and so the matter was left. At a later date other advice was given which led the defendant company to suppose that—as, indeed, Buckley J. held—the option was unenforceable by reason of want of registration, and what the defendant company here has sought to sustain is that having discovered afterwards that fact, they can on that ground altogether resile from the deed at any time before the actual performance of the condition.

For the reasons which have already been given by Harman L.J.—with which I entirely agree—I cannot accept that submission, and I, like my brethren, therefore think that the appeal fails and must be dismissed.

Appeal dismissed with costs.

Solicitors: *George C. Carter & Co.; Sydney S. Silverman.*

B. A. B.

[HOUSE OF LORDS.]

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Nov. 16, 17; *Dec.* 21.

LORD CITRINE (OWNERS) . . . . APPELLANTS;
AND
HEBRIDEAN COAST (OWNERS) . . . RESPONDENTS.

THE HEBRIDEAN COAST.

Shipping—Collision—Damages for detention—Damaged ship owned by public authority—Not profit-earning—No other ship chartered to replace damaged ship—Measure of damages—Assessment of actual loss—Rate of interest on capital.
Ships' Names—The Hebridean Coast.

In 1951 a collision occurred between the *Lord Citrine*, a collier owned by the appellants, and a ship of the respondents, causing damage to the former. The respondents admitted liability for the collision and consented to a reference to assess damages in respect of loss by detention for 11½ days, quantified by the appellants on the basis of the cost of chartering other shipping to replace the *Lord Citrine*. The registrar found that of the sea-borne coal supplied to the appellants during the year in question about half was carried in their own ships, the rest being carried in chartered ships, and that the appellants' ships could not have carried the whole of the sea-borne coal. During the detention period none of

* *Present*: LORD REID, LORD MORTON OF HENRYTON, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST.

the appellants' ships was idle. The appellants were using a number of chartered ships at the time, but no specific ship could be said to have taken the place of the *Lord Citrine*:—

Held, that the measure of damages should be based on interest on the value of the ship and not on a calculation of the cost of carrying in chartered tonnage the coal which the *Lord Citrine* would have carried.

It was not proved that the loss of the ship resulted in the appellants having to use chartered tonnage. The finding that none of the appellants' ships was idle did not exclude the possibility that they were not being used to their full capacity and so were able to carry the very small proportion of the total coal carried during the remainder of the relevant period, which the *Lord Citrine* would have carried during the detention period.

Steam Sand Pump Dredger No. 7 (*Owners*) v. *Greta Holme* (*Owners*) [1897] A.C. 596; 13 T.L.R. 552, H.L. and *Admiralty Commissioners* v. *Susquehanna* (*Owners*) [1926] A.C. 665; 42 T.L.R. 639, H.L. applied.

Decision of the Court of Appeal [1960] 3 W.L.R. 29; [1960] 2 All E.R. 85 affirmed.

APPEAL from the Court of Appeal (Hodson, Willmer and Devlin L.JJ.).

This was an appeal from an order of the Court of Appeal by which the court unanimously dismissed the appeal of the appellants, the owners of the steamship *Lord Citrine*, and affirmed the decision of Lord Merriman P., whereby he upheld the motion in objection of the respondents, the owners of the motorship or vessel *Hebridean Coast*, to the registrar's decision and varied that decision.

The facts are fully stated in the opinion of Lord Reid.

A. W. Roskill Q.C., *W. W. Porges Q.C.* and *R. F. Stone* for the appellants.

Kenneth Carpmael Q.C., *P. Bucknill* and *J. Rochford* for the respondents.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Mediana* (*Owners*) v. *Comet* (*Owners*)[1] and *Mersey Docks and Harbour Board* v. *Marpessa* (*Owners*).[2]

Their Lordships took time for consideration.

Dec. 21. LORD REID. My Lords, nearly nine years ago, on December 23, 1951, there was a minor collision off Cromer between the *Lord Citrine* and the *Hebridean Coast*. The owners of the *Hebridean Coast* admitted liability on March 21, 1952, and since then the only question at issue between the parties has been the amount of damages due to the appellants. But the appellants' statement of damages, amounting in all to £5,241, was not filed

[1] [1900] A.C. 113; 16 T.L.R. 194, H.L.

[2] [1907] A.C. 241; 23 T.L.R. 572,

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until June 14, 1956, and the case only now comes before your Lordships for final decision.

The *Lord Citrine* was owned by the Central Electricity Authority and was one of a number of vessels used by them to bring coal to London from various ports on the north-east coast. When the collision occurred she was on a voyage in ballast from London to Immingham. After the collision she was able to proceed to Immingham and, after some temporary repairs, to take on her cargo of coal and carry it to London. Thereafter she was out of service for a time undergoing permanent repairs. The largest item in the appellants' claim was "14. Loss by detention: "10 a.m. 31.12.51 to 7 a.m. 14.1.52, 13 days 21 hours, loss of "use of *Lord Citrine* for carriage of coal and charter of equivalent "shipping space £2,451 13s. 0d." All the other items were agreed or decided by the Admiralty Registrar and this item has now been modified, the claim now being for £1,525 for detention for 11½ days.

The point at issue between the parties is largely a question of fact. The Admiralty Registrar made careful and elaborate findings of fact but on some crucial points these lack precision. I do not blame him because it would appear that the issues were not presented to him with precision.

I shall first set out as briefly as I can the facts which are not in dispute. The Central Electricity Authority and the National Coal Board agreed tonnage programmes for each summer and winter period. About a quarter of the tonnage due to be brought to London was brought by sea. During the winter period November–April, 1951–52, the Coal Board only supplied about 87 per cent. of the agreed tonnage. About 1,250,000 tons should have been brought by sea during this period and it would seem that about 87 per cent. of that amount was in fact brought by sea. It is not disputed that all the coal available for shipment was in fact shipped during the period.

The authority's own ships did not and could not carry more than about half of that coal, the rest was carried in chartered vessels. Certain vessels were chartered on ten-year charter. Others were employed on short charter or spot charter as required. The *Lord Citrine's* voyages lasted on the average 8½ days and her average cargo was 4,171 tons. If she had not been under repair she would not have been idle but would have been carrying coal, but we do not know to what port she would have been sent or what particular consignment of coal she would have carried during the repair period.

There is no evidence or finding that the loss of the *Lord Citrine's* services during the repair period in any way dislocated the authority's programme or that any particular steps were taken at the time to make good that loss of her services. The registrar found that all the authority's own ships were "regularly "employed" and that none was "idle during the detention "period." He further found that "no specific vessel can be

"pointed to as having taken the place of the *Lord Citrine* during "the 11½ days' detention of that vessel." By that he clearly means no specific vessel either of the authority's fleet or of the chartered ships. The appellants' argument before him was that "the general circumstances were such as to indicate that the "loss of one of their ships resulted in their having to use char-"tered tonnage more than they would otherwise have done." Their claim was based on the cost to them of the "charter of "equivalent shipping space," and the finding of the registrar is: "I do not think that if the plaintiffs have to show they chartered "other tonnage to replace the *Lord Citrine* they have succeeded "in doing so." But he added: "It seems to me quite likely "that they did in fact do so," though he does not explain why he thought this quite likely.

The argument which I have quoted from the registrar's reasons was repeated before your Lordships. If I substitute the word "prove" for "indicate," the argument might be valid if supported by the facts. The appellants attached great importance to *Strathfillan* (*Owners*) v. *Ikala* (*Owners*).[1] I shall quote two passages. Lord Sumner said[2]: "It has to be proved that, "in doing the shipowner the wrong of laying his ship idle at the "time in question, work, which she would otherwise have done "during the time, went undone to his measurable loss or was "only done by resorting to other expedients at a measurable "outlay." And Lord Warrington of Clyffe said[3]: "Though "there was no sufficient positive evidence of any chartering "effected for the purpose of supplying the tonnage lost by the "detention of the *Strathfillan* the circumstances proved might "have been such that the tribunal would have been justified in "drawing the inference that a proportion of the chartered tonnage "did in fact supply the tonnage lost by the detention."

Proof may be by direct evidence or by inference, and the standard of proof in civil cases is that the fact to be proved must be made to appear more probable than not. The essential steps in the appellants' argument are these. All the coal available during the winter period was in fact brought to London. This must have included the coal which the *Lord Citrine* would have carried if there had been no detention for repairs. That coal must have been carried either in the authority's vessels or in chartered vessels. It could not have been carried in the authority's vessels because they were already being used to their full capacity. Therefore it must have been carried in chartered vessels. It is more expensive to carry coal in chartered vessels, and the claim is for the difference in cost between carrying the coal in chartered vessels and carrying it in the authority's vessels.

If any one of the links in this chain is faulty, the argument breaks down, and I need only consider the statement that all the authority's vessels were already being used to their full capacity.

[1] [1929] A.C. 196, H.L.
[2] Ibid. 205.
[3] Ibid. 211.

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The amount which the *Lord Citrine* would have carried during the detention period is a very small proportion of the total carried during the remainder of the winter period by the authority's vessels—almost certainly less than 1 per cent. Do the findings then show that so small an extra burden could not be or probably was not carried by them? The registrar's findings are that all the authority's own ships and those on ten-year charter were "regularly employed over the years" and that "none of the "authority's vessels except the *Lord Citrine* was idle during the "detention period." I do not regard a finding that vessels were regularly employed over the years as excluding the possibility or even the likelihood that they could have carried 1 per cent. more than they did, and finding that none was idle during the detention period is of little weight. All we know is—if we do know it—that all the available coal was brought during the winter period. There is nothing to show that the coal which the *Lord Citrine* would have carried was brought at any particular time, and that is not surprising, because no one knows what coal she would have carried or from what port. I would also refer to and adopt what Willmer and Devlin L.JJ. said on this matter in the Court of Appeal.

Counsel also referred your Lordships to the evidence. They were quite entitled to do so because the registrar's findings are not binding on this House even when they have been accepted in the courts below. But the evidence appears to me to be even less definite than the registrar's findings and to afford even less basis for the appellants' contentions.

The appellants then argued that, in any event, they are entitled to general damages, that the method of assessing such damages is a jury question, and that, taking the whole matter into consideration as a jury would, a fair method is to take into account what, as a matter of regular practice, the authority was paying for chartered tonnage. I must confess that I do not understand that. I do not proceed on any supposed distinction in principle between a profit-earning ship and a non-profit-earning ship. The task of assessing damages is easier with a profit-earning ship and depends on the probability that she would have earned so much money if her owner could have used her. With a non-profit-earning ship there is no direct financial loss and one must ask what harm was done to the owner by his being deprived of the use of his ship. Then comes what may be a very difficult task, to put a value in money on the harm which the owner has suffered. But you must first prove the harm. If no harm is proved beyond the mere fact that the owner is deprived of the services of his ship during the period of repairs, the opinion of Lord Herschell in *Steam Sand Pump Dredger No. 7* (*Owners*) v. *Greta Holme* (*Owners*)[4] appears to have given rise to the practice of awarding damages based on interest on the value of the ship.

[4] [1897] A.C. 596; 13 T.L.R. 552, H.L.

In this case if the coal in question was carried in the authority's own vessels there is nothing to show that that involved them in any substantial additional expense. The case would be like *Admiralty Commissioners* v. *Susquehanna (Owners)*.[5] It is only if the coal was carried in chartered ships that there would be any reason for taking into account the cost of so carrying it. But that is just what the appellants have failed to prove. I do not see how general damages can be awarded on the basis of compensating an owner for some kind of harm which he cannot prove that he ever sustained.

The award of general damages approved by the Court of Appeal was based on interest on the value of the vessel. The appellants argue that that is a very unsatisfactory basis. So it may be, though it has been in use for a long time. But if the only alternative proposed by the appellants cannot be supported, then I see no other possible course but to use this method with all its disadvantages.

In my judgment, the appeal should be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, throughout the argument on this appeal the words "the appellants" were used to cover both the present owners, the Central Electricity Generating Board and their immediate predecessors, the Central Electricity Authority. I shall follow this practice.

The respondents admitted liability, and all questions of damages have been agreed, except for one item, namely, a claim for damages in respect of the detention of the *Lord Citrine*, for a period which has been agreed at 11½ days, while the collision damage was being repaired.

The learned President awarded, by way of general damages, interest at 7 per cent. on the capital value of the *Lord Citrine*, and the Court of Appeal affirmed his decision. Mr. Ashton Roskill, for the appellants, submitted that the method of awarding interest on capital was a "last resort" in assessing damages and should not have been adopted in the present case. He put his argument as follows: (1) It is to be inferred that the appellants chartered tonnage to replace the *Lord Citrine*. If so, the damage sustained is special damage, and the amount is the net cost to the appellants of chartering equivalent space; alternatively, (2) the appellants lost the use of the *Lord Citrine* for 11½ days, and are entitled to be compensated in general damages therefor. Such damages fall to be ascertained by reference to the sums which the appellants were paying for chartered tonnage, as a matter of regular practice, less expenses saved by not using the *Lord Citrine*.

My Lords, in my opinion, the claim to special damage must fail, as the evidence does not establish that the appellants

[5] [1926] A.C. 655; 42 T.L.R. 639, H.L.

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chartered any tonnage to replace the *Lord Citrine*, and a claim for special damage must be clearly proved.

In support of his second argument Mr. Roskill referred to the following findings by the registrar:

"(i) The authority's own ships could not have carried the "whole of the seaborne coal actually received; there were ten "large chartered vessels on ten-year charter from June, 1949; "all these vessels were regularly employed over the years subject, "of course, to periods of survey, etc.; certain other vessels were "employed on short charter and others on spot charter as "required, e.g. owing to weather conditions:

"(ii) None of the authority's vessels except the *Lord Citrine* "was idle during the detention period and if any had been idle it "would have been known to the authority:

"(iii) If the *Lord Citrine* had not been under repair she would "not have been idle but would have been carrying coal or on the "way in ballast for more coal or loading or unloading; the average "duration of a round voyage was agreed at 8½ days including "loading and unloading:

"(iv) At no time during the 26 winter weeks of 1951–52 was "the authority not chartering vessels additional to the long-term "chartered vessels."

Counsel then referred to the following passage in the registrar's "reasons for decision": "There is, in my view, no difficulty "in finding the proper amount of damages in the present case; "I accept the figure arrived at by the plaintiffs in their amended "claim. The main point which seems doubtful is whether the "plaintiffs are entitled to base that figure, which I feel to be the "right one, on charter rates less savings as they have done or "whether the figure must be reached in another way." Counsel submits that at this stage the registrar went wrong in principle. Thinking that he was precluded from awarding general damages on the former basis, because the appellants were not a profit-earning body, he had resort to the method of awarding damages by way of interest on the capital value of the *Lord Citrine*.

My Lords, I think that the registrar was wrong in drawing any distinction, for this purpose, between a profit-earning body and a non-profit-earning body. I see no reason, in principle, why such a distinction should be drawn, and no one of the authorities cited in argument lends any support to the view taken by the registrar. So far, I would accept Mr. Roskill's argument. In *The Susquehanna*[6] Viscount Dunedin observes: ". . . the "functions of the registrar and merchants are those of a jury," and I think it was open to the registrar to adopt the method of assessing damages which he rejected, if he thought that this method was justified by the evidence.

In my view, however, the appellants have not proved that

[6] [1926] A.C. 655, 662; 42 T.L.R. 639, H.L.

they were put to any extra expense in carrying coal by the detention of the *Lord Citrine*. In agreement with the learned President and the Court of Appeal, I think that the present case is simply one wherein the appellants have been wrongfully deprived for a time of the services which could have been rendered by that vessel. They are, therefore, entitled to general damages on the principle laid down in *The Greta Holme*.[7]

I would dismiss the appeal.

LORD TUCKER. My Lords, this case does not, in my view, raise any question of principle or general importance in shipping circles save in so far as it seeks to disturb a practice which has prevailed ever since the decision in *The Greta Holme*.[7] in 1897.

It is clear that the appellants failed to prove any specific damage which could be assessed in pounds, shillings and pence. This seems to be generally referred to as special damage in contradistinction to general damages which cannot be accurately quantified but fall to be computed on what is often referred to as "a jury basis" or a "judicial guess." The distinction may be convenient but I doubt whether it is strictly accurate when applied to loss alleged to have been suffered as a result of damage to a chattel by negligence. Specific damage of the kind referred to must be strictly proved and must, in the case of collision at sea, be causally connected with the collision. See *per* Lord Sumner in *The Ikala*.[8]

Having failed to prove such damage the appellants sought to invite your Lordships to infer that extra coal must at some time have been carried in chartered vessels instead of the authority's own ships as a result of the detention of the *Lord Citrine* for repairs necessitated by the collision with the *Hebridean Coast*. If such was the case I do not understand why it could not have been proved at the inquiry before the Admiralty Registrar, or, at any rate, that some firmer basis for such an inference could not have been laid than the mere statement by the registrar that "none of the authority's vessels except the *Lord Citrine* was idle "during the detention period." There is no finding that they were all loaded to capacity nor is there any finding that any chartered vessel which otherwise would have been idle was available. Furthermore, the evidence of the witness Stafford showed that he really was not possessed of sufficient material to enable him to answer questions as to the whereabouts of any particular vessel, or its employment at any particular time, so that too much reliance cannot be placed on the denial that any of the authority's vessels were "idle" during the period in question.

Having therefore failed to prove or lay the foundation for an inference that additional coal was carried at charter rates as a result of the collision, and having left the evidence in such a state that it would appear not improbable that the authority in fact

[7] [1897] A.C. 596; 13 T.L.R. 552, H.L.

[8] [1929] A.C. 196, 205, H.L.

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suffered no pecuniary loss at all, it was argued that nonetheless the registrar should not have adopted the practice which derives from *The Greta Holme* case [9] of assessing damages in such cases on the basis of interest on the value of the damaged vessel. I can find no reason in the present case for holding that the registrar was not entitled to take the course which he did subject to the deduction for depreciation allowed in the Court of Appeal. In *Admiralty Commissioners* v. *Chekiang* (*Owners*),[10] Lord Sumner was somewhat critical of the principle of assessing damages on this basis, but, after examining the facts of that case, he stated that he could not say as a matter of law that the registrar was wrong in adopting this method. It appears to me that this observation is equally applicable to the present case, and that there are no special facts or circumstances which render it inappropriate.

I would, accordingly, dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, though the damage caused to the *Lord Citrine* had the result that her owners were deprived of her use for a period of 11½ days, they have not been able to point to any specific charter by which the use of some substituted vessel was obtained. They contend, however, that the facts which have been found justify an inference that they did charter tonnage to replace the *Lord Citrine*. The learned registrar while holding that they had failed to show that they had chartered replacement tonnage, considered that it was quite likely that they had in fact done so. On the evidence I do not consider that any inference that replacement tonnage was chartered could legitimately be drawn: nor do I think that the likelihood that there had been such chartering was shown. The appellants had a number of ships available to them for the carriage during the winter period of the coal that they intended to carry to London by sea: some of these ships were owned by them and some were chartered. In submitting that an inference should be drawn that the loss of the use of the *Lord Citrine* resulted in some chartering of replacement tonnage, the appellants do not fix the period or the dates of the suggested chartering, though their claim is based upon the average on the charter rates ruling in the period between the end of November, 1951, and the first part of February, 1952. It is always possible that in the later part of the winter period there was some chartering that continued for a slightly longer time than would have been the case had the *Lord Citrine* not been damaged, but this is neither established by direct proof nor, in my view, by inference. When it is remembered that the tonnage of coal that would be carried by the *Lord Citrine* on one voyage was a minimal fraction of the total tonnage which would be carried by sea during the winter period and for which purpose a fleet of ships was available, it seems probable that the lost

[9] [1897] A.C. 596.

[10] [1926] A.C. 637; 42 T.L.R. 634, H.L.

carrying capacity was, as Willmer L.J. said,[11] "easily absorbed "by the work of the other vessels which the plaintiffs had at their "disposal." It is sufficient, however, to say that proof is lacking from which it can be deduced that some additional or prolonged chartering was caused. It is possible that as a result of the temporary unavailability of the *Lord Citrine* the accumulated stocks of coal of the appellants at their generating stations were at some time or times slightly less than they would otherwise have been: this, however, is speculative and, in any event, the appellants have not suggested that their output of electric power was at all affected.

On the findings of the learned registrar the respondents have not sought to argue that the damages to be awarded in respect of the loss of the use of the *Lord Citrine* for 11½ days should be only nominal. It is therefore proper that such sum should be awarded as will fairly compensate the appellants. This sum is to be assessed having regard to the particular facts of this case. No help in the process of assessment is to be derived from seeking to describe the *Lord Citrine* by some form of words or by seeking to place her in some category or classification. Everything depends upon the circumstances which are special to this case. The appellants would not have hired out the *Lord Citrine* on a commercial basis and so have earned money from some charterer. Nor was their use of the *Lord Citrine* in any way comparable to the use which the owners of the *Ikala* were able to make of her as a profit-earning ship earning specially high profits in exceptional times. Nevertheless, the wrongdoing of the respondents did have the result that for a period of 11½ days the *Lord Citrine* was under repair whereas, had she not so been, she would have been carrying coal and playing her part in the appellants' comprehensive winter coal-carrying operations. The then capital value of the *Lord Citrine* was for her owners "infructuous" during the 11½ days. In these circumstances, I respectfully agree with the assessment of damages made by the learned President, which, on the evidence in this case (subject to the addition of the agreed sum for depreciation), seems to me to have been fair and reasonable.

Appeal dismissed.

Solicitors: *Sinclair, Roche & Temperley for Botterell, Roche & Temperley, Newcastle-upon-Tyne; Middleton, Lewis & Co. for Middleton & Co., Sunderland.*

F. C.

[11] [1960] 3 W.L.R. 29, 35; [1960] 2 All E.R. 85.

[PROBATE, ETC., DIVISION.]

1960
Oct. 14, 20.

Phillimore J.

JACKSON *v.* JACKSON AND PAVAN.

Husband and Wife—Divorce—Evidence—Adultery—Birth of child—Entry of birth signed in names of wife and co-respondent—Facts in entry prima facie true—Births and Deaths Registration Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 20), *ss.* 10, 34.

Husband and Wife—Practice—Costs—Costs against co-respondent—Entry of birth of child signed in names of wife and co-respondent—No other evidence of adultery against him—No evidence co-respondent knew wife married at time of adultery—Discretion to award costs.

Any entry in a register of births is prima facie evidence of the truth of the entry in so far as the entry is required to be made by statute.

The court has a complete discretion to make an order for costs against a co-respondent in a case where the co-respondent, even if he did not know that the wife was a married woman, ought to have known.

At the hearing of a husband's undefended petition for divorce on the ground of adultery evidence was given that the wife had given birth to a child of whom the husband could not have been the father. The entry in the birth certificate purported to be signed by both porents; but while the signature of the mother on the original entry was identified in evidence as that of the wife, there was no evidence to indentify the signature of the father as that of the co-respondent. The address given for both informants was the same. There was some evidence that the occupation given as that of the father, an hotel waiter, was also that of the co-respondent. While a man had been seen at the address given in the certificate that man had not been identified.

There was no evidence in any case, apart from what might be inferred from the certificate, that the co-respondent, who had entered an appearance by solicitors, but who did not defend the petition nor contest the prayer for costs, knew that the wife was a married woman:—

Held, (1) that the court was entitled on the facts, and after taking into account the provisions of section 10 of the Births and Deaths Registration Act, 1953,[1] to find that the man who signed the register was the man for whom solicitors had entered an appearance.

In re Stollery [1926] Ch. 284; 42 T.L.R. 253, C.A. applied.

(2) That, although there was no evidence, apart from the entry of birth, that the co-respondent knew the wife to be a married woman, that did not necessarily prevent the court from making an order for costs. The court had upon a husband's prayer for costs against a co-respondent a complete discretion in the matter, and in the circumstances it was appropriate that the co-respondent should be ordered to pay them.

[1] Births and Deaths Registration Act, 1953, s. 10: "Notwithstanding "anything in the foregoing provisions "of this Act, in the case of an illegi-"timate child, no person shall as "father of the child be required to "give information concerning the "birth of the child, and the registrar "shall not enter in the register the "name of any person as father of "the child except at the joint request "of the mother and the person ack-"nowledging himself to be the father "of the child, and that person "shall, in that case, sign the register "together with the mother."

Langrick v. *Lankrick and Funnell* [1920] P. 90; 36 T.L.R. 308 applied.

UNDEFENDED PETITION for divorce by husband on the ground of adultery.

The husband by his petition prayed for a divorce on the ground that his wife had committed adultery with one Bruno Pavan. In addition to evidence of admissions of adultery both oral and in writing by the wife a birth certificate was put in which disclosed that the wife had given birth to a female child on October 29, 1957, of whom the husband could not have been the father. Her name was given as "Elsie May Pavan otherwise Jackson, formerly Finch" (her maiden name). The name of the father was given as "Bruno Pavan," and his occupation as that of an hotel waiter. The names of both were given as the informants, and their address was the same. But while evidence was given to identify the signature of the informant mother as that of the wife, there was no evidence to identify the signature of the co-respondent Pavan, nor was there other evidence against him of adultery although a man had been seen at the address in question. The co-respondent entered an appearance by solicitors but did not contest any issues at the hearing at which he neither appeared nor was represented.

Apart from such evidence as might be accepted from the certificate, there was no evidence that the co-respondent knew the wife to be a married woman.

David Calcutt for the husband.

The following cases were cited in argument in addition to those referred to in the judgment: *Rooker* v. *Rooker and Newton* [2]; *Hennell* v. *Lyon* [3]; *Simpson* v. *Dismore* [4]; *Greenshields* v. *Crawford* [5]; *Russell* v. *Smith* [6]; *Sewell* v. *Evans and Rowell v. Hyde* [7]; *Hamber* v. *Roberts* [8]; *Martin* v. *White* [9]; *Burne* v. *Burne and Helvoet.* [10]

PHILLIMORE J. This is an undefended suit in which the husband, Ernest Stanley Jackson, seeks a dissolution of his marriage on the ground that his wife has committed adultery with a man called Bruno Pavan. I heard the facts of the case on October 14, 1960, when I was satisfied that the husband had proved that his wife had committed adultery. The evidence largely consisted of admissions which she made to her husband, either directly or through her solicitors. The difficulty that has arisen in this case is, that her admissions not being evidence against the co-respondent, I was left in some doubt as

[2] (1863) 3 Sw. & Tr. 526.
[3] (1817) 1 Barn. & Ad. 182.
[4] (1842) 9 M. & W. 47.
[5] (1842) 9 M. & W. 314.
[6] (1842) 9 M. & W. 810.
[7] (1843) 4 Q.B. 626.
[8] (1849) 7 C.B. 861.
[9] [1910] 1 K.B. 665.
[10] [1920] P. 17.

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to whether I ought to find adultery proved against him and so make and order for costs against him. Apart from the admissions, both verbal and in writing, made by the wife, a birth certificate was put in disclosing that the wife had had a child on October 29, 1957, the father's name being given as Bruno Pavan, the name of the co-respondent. Counsel had not got the authorities available in court and so I adjourned the case to consider whether the entries in the birth certificate constituted sufficient evidence to entitle the court to find adultery proved against the co-respondent, and to make an order for costs against him.

Mr. Calcutt, who, in a most useful argument, has referred me to the statutes and the authorities, submitted that the entries in the birth certificate were prima facie evidence of the facts entered, in so far as those were facts required to be entered by statute, and I think that that submission is right.

The registration of births was formerly governed by the Births and Deaths Registration Act, 1836. That Act was followed by Acts in 1837 and 1874 [1]; but for practical purposes registration of births is really now covered by the provisions of the Acts of 1836 and 1953. Section 39 of the 1953 Act gives the registrar power to make regulations as to what matters must be registered, and those regulations are the Registration (Births, Still-births, Deaths and Marriages) Consolidated Regulations, 1954 (S.I. 1954, No. 1596). They require the completion of a form to show when and where the child was born; its name, if any; its sex; the name and surname of the father; the name, surname and maiden surname of the mother; the occupation of the father; the signature, description and residence of the informant; when the birth was registered; and the signature of the registrar. [His Lordship read section 10 of the Act of 1953 [2] and continued:]

In the form before me it is stated that the child, a girl named Beryl, was born on October 29, 1957, at the Hackney Hospital at Hackney. The name and surname of the father is given as Bruno Pavan (the name of the co-respondent). The name and surname and maiden name of the mother is given as Elsie May Pavan, otherwise Jackson, formerly Finch, of 53, Wilton Way, Hackney. The occupation of the father is given as hotel waiter. The signature and description and residence of the informants are Bruno Pavan, father, E. M. Jackson, mother, and the address, 53, Wilton Way, E.5.

It is clear, therefore, from these entries that this was the birth of an illegitimate child. A witness who had inspected the original register identified the signature of the mother as that of the wife. It was not possible to identify the signature of the co-respondent. The document I have before me is a certificate signed by the registrar which is put before the court pursuant to

[1] The Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86); Births and Deaths Registration Act, 1837 (7 Will. 4, c. 22); Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88).

[2] Formerly s. 7 of the Act of 1874.

the provisions of section 38 of the Act of 1836, and section 34 of the Act of 1953, and which, under those provisions, I am to regard as "evidence of the birth."

To what extent are the entries in that document evidence of the birth, and of the circumstances of the birth, and of the parents responsible for the birth?

That question is really concluded by the decision of the Court of Appeal in *In re Stollery*.[3] The court was there considering the claim of two plaintiffs to be next-of-kin on an intestacy. The matter turned, inter alia, upon the contents of three birth certificates; and in considering the effect of those certificates and their entries the court referred[4] to a decision of the House of Lords, *Irish Society* v. *Bishop of Derry*[5] in which the judges had been asked to advise the House on the effect of entries in public documents. In that case Parke B. had given the following advice[6]: "In public documents, made "for the information of the Crown, or all the King's subjects "who may require the information they contain, the entry by a "public officer is presumed to be true when it is made, and is "for that reason receivable in all cases, whether the officer or his "successor may be concerned in such cases or not. A marriage "or burial register would certainly be admissible to prove a "marriage or death, in suits to which the clergyman who made "it might happen afterwards to be a party, though he had a "pecuniary interest in the particular marriage or death at the "time." Pollock M.R. in his judgment continued[7]: "That "appears to be a wide statement that the entries by the public "officer are presumed to be true, and if so it might be said that "the statement of the father and of the mother appearing "in the copy of the certificate must show that those persons were "the father and mother of the child"; and after reviewing *Wilton & Co.* v. *Phillips*,[8] *In the Estate of Goodrich*[9] and *Brierley* v. *Brierley and Williams*,[10] he sums up his opinion as follows[11]: "It appears to me upon those cases that the true "effect of section 38 of the Act of 1836 is that the certificate is "evidence of the date of the birth, although not absolute and "conclusive, but still it is to be taken as—I think one may here "use the words—prima facie evidence of the date of the birth."

That conclusion is based on the fact that this certificate really replaces, for the purposes of the evidence, the actual entry made by a public officer, and that the details entered are entered by him pursuant to statutory requirements. The judgment of Sargant L.J. in that same case, in which he emphasises[12] the distinction between entries pursuant to the requirement of the statute, and what I may call superfluous entries, is also in point.

[3] [1926] Ch. 284; 42 T.L.R. 253, C.A.
[4] ([1926] Ch. 284, 310.
[5] (1846) 12 Cl. & F. 641, H.L.
[6] Ibid. 668, 669.
[7] [1926] Ch. 284, 310.
[8] (1903) 19 T.L.R. 390.
[9] [1904] P. 138; 20 T.L.R. 203.
[10] [1918] P. 257; 34 T.L.R. 458.
[11] [1926] Ch. 284, 313.
[12] Ibid. 324.

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I am quite satisfied that the law is that any entry in a register of births is prima facie evidence of the truth of the entry in so far as the entry is one required to be made by statute.

Since the certificate which is put before me in effect takes the place of the register, I have a certificate showing that this child was acknowledged by a man, and by a woman who we know to be the wife (because the signature has been identified) to have been the child of Bruno Pavan; and a woman, who, as I say, was the wife, but who was passing under the name of Elsie May Pavan, of 53, Wilton Way, Hackney. The man is described as an hotel waiter and he signed his name in column 7; and the mother, or the wife, has signed hers immediately below. In the light of the provisions of section 10 of the Act of 1953 both these persons, in so signing that register, made a clear admission that this child was illegitimate, and that she was the child of them both.

The question remains, am I satisfied that this man, "Bruno "Pavan," was the co-respondent in this case? The husband cannot identify his signature; he has never seen it. His solicitors have been careful to enter an appearance for him. That avoids the risk which would have arisen, if the co-respondent had signed the acknowledgment of service, of the signature being compared with that on the register. He has not chosen to come here and contest the suit. It is a very unusual name; but there is evidence, apart from the certificate, that this man was an hotel waiter. There is the address—an address to which he subscribes; that is an address at which it is known that there was a man at one time with the wife, for the husband caught a glimpse of him.

I am entitled to be satisfied on these facts that the man who signed the register is the man for whom solicitors have entered an appearance. It seems reasonable to assume that if there had been some error in identity a defence would have been put forward.

I turn finally to the question of costs. It is clear that apart from this certificate there is no evidence that this man knew the lady to be a married woman. I do not think that that necessarily prevents the court from making an order for costs. I have referred to the decision of Sir Henry Duke P. in *Langrick* v. *Langrick and Funnell.*[13] Sir Henry Duke P. made it perfectly clear that the court had a complete discretion, and, for himself, that he would make an order for costs in a case where the co-respondent, even if he did not know that a woman was a married woman, ought to have known. Here this man signed the register with this woman, the wife. Of course, that follows long after the original adultery; but I see no reason to suppose that if he had wanted to discover whether she was married or not before he committed adultery with her, that he would not have been able

[13] [1920] P. 90; 36 T.L.R. 308.

to do so. He has not appeared to dispute the matter; and in those circumstances I think that it is proper to assume that he knew that she was a married woman, or would have known if he had taken any trouble to inquire, and to make an order for costs.

Accordingly, I am satisfied that this wife committed adultery with this co-respondent, and he with her, and to make an order for costs against him.

Decree nisi of divorce.
Costs against correspondent.

Solicitors: *Abbott, Baldwin & Co.*

J. B. G.

Reporter's Note: A recent authority in which the authorities upon the question whether a correspondent should pay costs in the absence of definite evidence that he knew the wife to be a married woman was *Lycett-Green* v. *Lycett-Green and Du Puy.*[14] Section 7 of the Act of 1874 was also considered in *Mayo* v. *Mayo*[15] where the omission of the name of the child's father in the birth certificate was held to be tantamount to an admission of adultery by the mother.

[14] [1956] 1 W.L.R. 990; [1956] 3 All E.R. 97.

[15] [1948] P. 172; [1948] 2 All E.R. 869.

[CHANCERY DIVISION.]

QUALTER, HALL & CO. LTD. *v.* BOARD OF TRADE AND ANOTHER.

1960
Nov. 23;
Dec. 7.

Cross J.

[1960 Q. No. 1275.]

Company—Exempt private company—"Providing capital"—Reorganisation—Purchase of shares from members by finance and banking companies—Whether provision of capital for company—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 127, 129 (4); *Sch.* 7, *paras.* 1, 2 (1) (2), 7 (1), 9.

Statute—Construction—Ambiguity—Title of section—Companies Act, 1948, *Sch.* 7, *para.* 7.

An exempt private company, in order to reduce the disparity between its nominal and its issued capital, and to provide the principal shareholders with funds to pay the estate duty prospectively payable on their deaths without jeopardising the future of the company as a family business, on July 22, 1955, passed a series of resolutions increasing the capital from £115,000 to £165,000 by the creation of 25,000 6½ per cent. £1 cumulative preference shares and 25,000 "A" ordinary £1 shares, converting the existing 85,000 non-cumulative redeemable preference shares, of which 60,000 had been issued, into 85,000 6½ per cent. cumulative preference shares and

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amalgamating them with the 25,000 6½ per cent. cumulative preference shares, converting 3,000 £10 ordinary shares into 30,000 "B" £1 ordinary shares and capitalising a sum of £75,000 in the general reserve account, the directors were authorised to appropriate that sum to the members who should be registered immediately after the passing of the resolution as holders of the 30,000 "B" ordinary £1 shares in proportion to the amount paid up on those shares and to apply the sum in paying up in full at par the 50,000 unissued 6½ per cent. £1 cumulative preference shares and the 25,000 unissued "A" ordinary £1 shares and to allot those shares to those members. At the same time the company adopted a new set of articles, article 72 of which provided that the "A" ordinary shareholders and the preference shareholders were entitled to receive notice of general meetings but were not entitled to attend and vote at them unless, in the case of the preference shareholders, at the date of the notice the dividend on their shares was six months in arrear, and in the case of both classes of shares, the business of the meeting included certain specified resolutions. At a directors' meeting held on the same day the directors resolved that the £75,000 should be capitalised, applied and allotted as resolved, and the chairman stated that as a result of arrangements made with a finance company, that company had agreed with the holders of those shares to purchase one-third of each of the 50,000 preference shares and 25,000 of the "A" ordinary shares, and to place the other two-thirds of each class with four other companies which were banking or finance companies within the meaning of paragraph 9 of Schedule 7 to the Companies Act, 1948, so that the status of an exempt private company would be preserved, while the members renounced their interest in the shares. Letters of authority and request for this allotment were then signed by the members and received by the company, and it was resolved that the 50,000 unissued 6½ per cent. £1 cumulative preference shares and the 25,000 unissued "A" £1 ordinary shares be allotted to the banking and finance companies.

On a summons by the company to determine whether, on the true construction of section 129 and Schedule 7 to the Companies Act, 1948,[1] the company had, in the events which had happened, ceased

[1] Companies Act, 1948, s. 129: "(1) A private company shall be "excepted from the requirements "imposed by section 127 of this Act "if, but only if,—(a) the conditions "mentioned in the next following "subsection are satisfied at the date "of the return and have been satisfied "at all times since the commence-"ment of this Act . . . (2) The "said conditions are—(a) that the "conditions contained in the Seventh "Schedule to this Act are satisfied "as to the persons interested in the "company's shares and debentures ". . . (4) Any reference in this Act "to an exempt private company shall "be construed as referring to a com-"pany with respect to which the "conditions mentioned in subsection "(2) of this section are satisfied and "have been satisfied at all times "since the commencement of this Act "or since the giving by the Board of "Trade of a direction under the pro-"viso to subsection (1) of this "section."

Sch. 7: "1. The basic conditions "as to the shares or debentures of "the company whose exemption is in "question are—(a) that no body "corporate is the holder of any of "the shares or debentures; and (b) "that no person other than the "holder has any interest in any of "the shares or debentures; but these "conditions are subject to the ex-"ceptions provided for by the follow-"ing paragraphs of this Schedule. "2.—(1) The rules contained in the "following sub-paragraphs of this "paragraph shall apply for the pur-"poses both of the basic conditions "and of the exceptions from those "conditions. (2) Where any share "or debenture or any interest in any "share or debenture is subject to a "charge in favour of a banking or "finance company by way of security "for the purposes of a transaction

to be an exempt private company within the meaning of section 129 (4):—

Held, (1) that the definition in paragraph 9 of Schedule 7 to the Act of 1948 of a banking or finance company must be read into paragraph 7, and that, on their true construction, the words "providing capital" in the heading to paragraph 7 meant providing capital for the company, and were inapt to describe payment of the purchase price of shares by a purchaser to his vendor, but related solely to the provision of capital for the company, and that, therefore, the company did not fall within the exception in paragraph 7, and ceased to be an exempt private company as from July 22, 1955.

(2) *Held*, further, that the banking and finance companies had not the right to exercise one-fifth or more of the total voting power at any general meeting of the company within the meaning of the proviso to paragraph 1 (1), so that, if the case had fallen within the exception in paragraph 7, it would not have been taken out of it by the proviso.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment of Cross J.

Before the reorganisation of its capital, which took place in July, 1955, the capital of the plaintiff company, Qualter, Hall Company Ltd., a private company, consisted of £115,000 divided into 85,000 6 per cent. non-cumulative redeemable preference shares of £1 each, of which 60,000 had been issued and were fully paid, and 3,000 ordinary shares of £10 each, all of which had been issued and were fully paid. All the issued shares were held by thirteen members of the Hall family. In this circumstance, it was accepted by the Registrar of Companies that the conditions contained in the Seventh Schedule to the Companies Act, 1948, were satisfied, and that the company was an exempt private company.

"entered into in the ordinary course "of its business as such—(*a*) any "interest under the charge, whether "of the banking or finance company "or a nominee for it, shall be dis-"regarded; and (*b*) if the banking "or finance company or its nominee "is the holder of the share or deben-"ture, the person entitled to the "equity of redemption shall be "treated as the holder, whether he "has a present right to redeem or "not . . . *Exception for Bank-"ing or Finance Company providing "Capital.* 7. (1) The first of the basic "conditions shall be subject to an "exception for any shares or deben-"tures held by or by a nominee for a "banking or finance company, where "the banking or finance company "acquired the shares or debentures or "its interest therein in the ordinary "course of its business as such and "by arrangement with the relevant "company or its promoters: Provided "that this exception shall not apply "if the banking or finance company "has the right (or, where there is "more than one such company hold-"ing shares or debentures to which "this exception has to be applied in "determining the relevant company's "right to be treated as an exempt "private company, they have between "them the right) to exercise or con-"trol the exercise of one fifth or more "of the total voting power at any "general meeting of the relevant com-"pany. . . . 9. In this Schedule the "expression 'banking or finance com-"'pany' means any body corporate "or partnership whose ordinary busi-"ness includes the business of bank-"ing and any other body corporate "whose ordinary business includes "the business of lending money or "of subscribing for shares or deben-"tures. . ."

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As the balance-sheet of the company as at October 31, 1954, showed substantial reserves and unappropriated profits, the directors considered whether the capital structure should not be reorganised so as to reduce the disparity between the nominal amount of the paid-up share capital and the real value of the capital employed in the business, and at the same time to provide the principal shareholders with funds with which the estate duty prospectively payable on their deaths in respect of their holdings could be met without jeopardising the future of the company as a family business. After discussion with the directors, the auditors of the company prepared a memorandum outlining a possible scheme for the capitalisation of the reserves, under which further preference and ordinary shares would be issued by the company credited as fully paid-up and sold to financial institutions by the shareholders entitled thereto. A copy of that memorandum was sent to Estate Duty Investment Trust Ltd., which investigated the company's affairs in detail in order to ascertain whether the scheme was one in which they would be prepared to take part and recommend other financial institutions to join. The directors of the company provided Estate Duty Investment Trust Ltd. with all the information which it required for that purpose since they were of the opinion that the proposed reorganisation would not only be to their personal advantage as shareholders but would also ensure the continuity of the company's business under family control. In the result, Estate Duty Investment Trust Ltd. and four other financial institutions decided to become shareholders in the company and its capital structure was reorganised pursuant to a series of resolutions passed by the company on July 22, 1955.

The effect of these resolutions was, stated briefly, as follows: (1) The capital of the company was increased from £115,000 to to £165,000 by the creation of 25,000 6½ per cent. cumulative preference shares of £1 each and 25,000 "A" ordinary shares of £1 each. (2) The existing 85,000 non-cumulative redeemable preference shares were converted into 85,000 6½ per cent cumulative preference shares and amalgamated with the 25,000 newly created 6½ per cent. cumulative preference shares. (3) The existing 3,000 £10 ordinary shares were converted into 30,000 "B" ordinary shares of £1 each. (4) A sum of £75,000, forming part of the undivided profits of the company standing to the credit of the general reserve account, was capitalised and the directors were authorised to appropriate such sum to the members who should be registered immediately after the passing of the resolution as holders of the 30,000 "B" ordinary shares of £1 each resulting from the subdivision and conversion into such shares of the former 3,000 shares of £10 each in the capital of the company in proportion to the amount paid up on the said "B" ordinary shares held by them respectively, and to apply the said capitalised sum in paying up in full at par the 50,000 unissued 6½ per cent. cumulative preference shares of

£1 each and the 25,000 unissued "A" ordinary shares of £1 each in the capital of the company, such shares to be allotted and distributed, credited as fully paid up, amongst the said members in the proportion aforesaid. At the same time the company adopted a new set of articles, by article 72 of which the "A" ordinary shareholders and the preference shareholders were entitled to receive notice of general meetings of the company but were not entitled to attend and vote at such meeting unless either (a) as regards the preference shareholders at the date of the notice convening the meeting the dividend on their shares was six months in arrear, or (b) as regards both the "A" ordinary shareholders and the preference shareholders the business of the meeting included the consideration of a resolution for reducing the capital of the company or winding up the company or sanctioning a sale of its undertaking or varying or abrogating any of the special rights attached to the "A" ordinary shares or to the preference shares or altering the voting rights attached to any class of shares or altering the provisions of the memorandum of association of the company with respect to the objects of the company.

At a directors' meeting held on July 22, 1955, after the passing of these resolutions by the company, the directors resolved that the £75,000 should be capitalised and applied in the payment up in full of the preference and "A" ordinary shares referred to in the resolution, and allotted and distributed amongst the "B" ordinary shareholders in the manner contemplated by the resolution. The chairman explained that as a result of arrangements made with Estate Duty Investment Trust Ltd., the latter had agreed with the members entitled to the shares in question to purchase from them one-third of each of the 50,000 preference shares and 25,000 "A" ordinary shares, and to place the other two-thirds with four other companies who were also banking or finance companies as defined in paragraph 9 of the Seventh Schedule to the Companies Act, 1948. The exempt private company status of the company, the chairman continued, would thus be preserved, but the members concerned would have to renounce their respective interests in the shares in favour of Estate Duty Investment Trust Ltd., and the companies with whom they had placed the remainder of the shares. Letters of authority and request in respect of the allotment of the preference shares and "A" ordinary shares to which the members in question were respectively entitled duly signed by them were then received by the meeting, and it was resolved that pursuant to the foregoing resolutions and to such letters the 50,000 unissued 6½ per cent. cumulative preference shares of £1 each and the 25,000 unissued "A" ordinary shares of £1 each be allotted to the five banking or finance companies concerned in the proportions set out in the Schedule to the directors' resolution.

In the result, therefore, on payment to each of the shareholders concerned of the appropriate purchase price, five

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companies, who were admittedly banking or finance companies within the meaning of the Seventh Schedule, became together entitled to 50,000 preference shares and 25,000 "A" ordinary shares in the company.

A summons was issued on the application of the company, to which the Board of Trade and the Registrar of Companies were defendants, to determine whether, upon the true construction of section 129 and the Seventh Schedule to the Companies Act, 1948, in the events which had happened the company had ceased to be an exempt private company within the meaning of section 129 (4).

Sir Milner Holland Q.C. and *R. B. S. Instone* for the plaintiff company.

E. Blanshard Stamp for the Board of Trade and the Registrar of Companies.

No cases were cited in argument.

Cur adv. vult.

December 7. CROSS J. read the following judgment: The question raised by this summons is whether the plaintiff company, Qualter, Hall & Co. Ltd., is an exempt private company within the meaning of section 129 of the Companies Act, 1948, which exempts certain private companies from the requirements laid down by section 127. One of the conditions of exemption is that the conditions contained in the Seventh Schedule to the Act are satisfied as to the persons interested in the company's shares and debentures. The parts of the Seventh Schedule which are relevant to this case are paragraphs 1, 2, 7 and 9. [His Lordship read those paragraphs, stated the facts and continued:]

The advisers of the company clearly did not expect that its status as an exempt private company would be affected by this transaction.

The Board of Trade, however, has taken the view that as from July 22, 1955, the company ceased to be an exempt private company (a) because paragraph 7 only applies to cases in which the banking or finance companies provide capital for the company and not to cases such as this where the shares are bought from shareholders who are entitled to have them allotted to themselves, or, alternatively, (b) that in any event the proviso to paragraph 7 applies in this case since the banking and finance companies in question have the right to exercise more than one-fifth of the total voting powers at general meetings of the company called to consider such resolutions as are expressly referred to in article 72.

On the first point, counsel for the company contended that the words in paragraph 7 "acquired the shares or debentures or "its interest therein . . . by arrangement with the . . . company "or its promoters" naturally included a purchase of the shares

or debentures or of some interest in them from the holders by arrangement with the company as well as an issue of shares or debentures by the company in consideration of money paid to it; that had it been the intention of Parliament to confine the exception to the latter case it would not have used such vague words as "acquired by arrangement with the company" but would have spoken of subscribing for shares or debentures; that the reference to an acquisition of an interest in the shares or debentures was inappropriate to the limited construction contended for by the Board of Trade; and, finally, that though there might possibly be cases of purchases of shares from shareholders which would not fall within the exception because the shares had not been acquired by arrangement with the company, the purchases in this case had been by arrangement with the company which had in effect initiated the whole scheme.

Counsel for the Board of Trade did not dispute that, if the company were otherwise right in its contention on this point, the acquisition of the shares in question in this case had been by arrangement with the company. He contended, however, first, that the words "provided capital" in the title to the paragraph meant provided capital for the company, and that the title defined the scope of the paragraph. He also contended that the words "in the ordinary course of its business as such" in paragraph 7, read in conjunction with the definition of a banking or finance company, showed that the shares or debentures must be acquired by the banking or finance company in the course of its business of lending money or subscribing for shares. He submitted that the reference to "an interest" in the shares or debentures was as consistent with the construction for which he was arguing as that for which counsel for the company was arguing, and that the word "acquired" was used rather than "subscribed" because a word was needed which would cover debentures as well as shares, and the acquisition of a partial interest as well as the whole beneficial interest in the shares or debentures in question.

I accept the submission of counsel for the Board of Trade as to the meaning of the words "providing capital" in the heading to paragraph 7. The words themselves are quite inapt to describe the payment of the purchase price of shares by a purchaser to his vendor, and appearing as they do in a Companies Act, they seem to me to relate simply and solely to the provision of capital for the company.

Counsel for the company suggested that if "providing "capital" means providing capital for the company, the company in this case obtained additional capital through the capitalisation of its reserves; that even if that operation could properly be described as a provision of capital, which I doubt, the provision was made by the company for itself, and not for it by the banking and finance companies, so that, even so, what was done here would not come within the scope of the title. But though

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a title to a section in an Act can give a clue to the meaning of an ambiguous passage in the section, it cannot control the meaning of the words used in the section if they are clear and unambiguous. (See *In re Penrhyn.*[1]) Then is this paragraph, read apart from the title, clear and unambiguous? I do not think so. If one reads into it, as one must, the definition of a banking or finance company, it is to my mind a question of doubt whether a purchase of shares by a finance company whose ordinary business includes purchasing shares as well as subscribing for them is or is not within it. Do the words "as such" in paragraph 7 refer, in the case of a finance company, to the words "the business of lending money or of subscribing for shares" in paragraph 9 or do they refer to the business of such a company as a whole provided only that that includes the business of lending money or subscribing for shares? I think that one can fairly look at the title of the paragraph for assistance in resolving this doubt.

Two further considerations incline me to accept the contentions of the Board of Trade in preference to those of the company on this point. The first is that section 129 creates an exception to a general rule, and should therefore in cases of doubt be construed against the party who relies on it. Secondly, I think that the construction contended for by the company might in some cases make the paragraph very hard to work. A purchase of shares in a private company can hardly in practice be carried through without the consent of the company; but what degree of approval or co-operation on the part of the company will justify one in saying that the shares have been acquired by arrangement with the company? In cases of doubt the court can, I think, fairly incline to put on this paragraph a meaning which makes it easily workable by the Registrar of Companies in preference to one which might give rise to many difficult borderline cases.

In view of the conclusion which I have reached on the first point, it is not strictly necessary for me to deal with the proviso to paragraph 7, but as this case will probably go further, I think that I ought to express a view on it. The question turns, of course, on the meaning to be given to the words "any general meeting." Do they mean any and every general meeting or any one general meeting out of many possible general meetings? Section 132 (1) of the Companies Act, 1948, contains the words "the total voting rights of all the members having . . . a right to "vote at general meetings of the company." Both sides agree that this means at all general meetings of the company. Here on the other hand (as in section 195 (10) (*b*) of the Act) the reference is to the right to exercise some fraction of the voting power "at any general meeting."

Counsel for the Board of Trade argues that Parliament would not have used different words to say the same thing, but I do not think that one can attribute much weight to this sort of

[1] [1923] 1 Ch. 143, 147; 39 T.L.R. 116.

argument when dealing with a document as long and complicated as the Companies Act, 1948. I prefer to ask myself what answer the directors of these finance companies would give to the question "Have you between you the right to exercise one-fifth or "more of the voting power at any general meeting of this com-"pany?" I think that they would answer "No, not as things "are. If the preference dividend falls into arrear, then we shall "have that right, but at present we can only control one-fifth "or more of the voting power at a general meeting called exclu-"sively for the purpose of considering resolutions of the types "mentioned in article 72 (b)." I do not think that they would treat the question as meaning: "May there be a general meeting "of this company at which you will have the right to exercise "one-fifth or more of the voting power?" I appreciate that to construe "any" as meaning "any and every" makes it very easy for a company which wishes to do so to evade the proviso by giving a finance company voting control on all issues which are likely to arise while withholding it on some matters of no moment. But putting the matter at its highest against the company, this word "any" is ambiguous, and, since it occurs in a proviso to the exception, the benefit of any doubt as to its meaning should, I think, be given to the company rather than to the Board of Trade. If, therefore, I had thought that this case fell within the exception, I should not have held that it was taken out of it by the proviso. As it is, however, I shall declare that the company ceased to be an exempt private company as from July 22, 1955.

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Order accordingly.
No order as to costs.

Solicitors: *Biddle, Thorne, Welsford & Barnes* for *Wake, Smith & Co., Sheffield; Solicitor, Board of Trade.*

M. G. T.

[COURT OF APPEAL.]

ROSS SMITH (ORSE. RADFORD) *v.* ROSS SMITH.

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1960 *Nov.* 18, 21, 22; *Dec.* 20.

Ormerod, Willmer and Upjohn L.JJ.

Husband and Wife—Nullity—Jurisdiction—Marriage celebrated in jurisdiction—Husband resident and domiciled in Scotland—Jurisdiction of English court to annul void or voidable marriages where husband neither domiciled nor resident in jurisdiction.

Judicial Precedent—Court of Appeal decision—Conflicting Court of Appeal decision—Jurisdiction to follow later of the two conflicting decisions.

A wife petitioned for a decree of nullity on the ground of the husband's incapacity or, alternatively, his wilful refusal to consummate the marriage. The marriage had been celebrated in England. At the time of the institution of the suit, the wife was

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resident in England, but the husband was not, and was at all material times domiciled in Scotland. On an issue as to whether the court had jurisdiction to hear the suit, Karminski J. held that the court did not have jurisdiction. On the wife's appeal:—

Held, that jurisdiction existed to entertain a suit for nullity of any class whenever it was shown that the marriage was celebrated in England; accordingly, as the present marriage had been celebrated in England the court had jurisdiction to pronounce on its validity, and to inquire into both the grounds on which its validity was impugned.

Ramsay-Fairfax (*orse. Scott-Gibson*) v. *Ramsay-Fairfax* [1956] P. 115; [1955] 3 W.L.R. 849; [1955] 3 All E.R. 695, C.A. and *Addison* (*orse. MacAllister*) v. *Addison* [1955] N.I. 1 applied.

Casey v. *Casey* [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110, C.A. not followed.

Hill (*orse. Petchey*) v. *Hill* [1960] P. 130; [1959] 3 W.L.R. 828; [1959] 3 All E.R. 754 overruled.

Decision of Karminski J. [1960] 3 W.L.R. 753; [1960] 3 All E.R. 70 reversed.

APPEAL from Karminski J.[1]

The parties were married on July 8, 1955, at Newcastle-upon-Tyne. On October 19, 1959, the wife presented a petition for nullity of marriage on the ground of wilful refusal by the husband to consummate the marriage, and in the alternative, on the ground of the husband's incapacity. The petition alleged that the wife was resident in England, that the husband was domiciled in Kuwait and that the parties were domiciled in England. By his answer, dated April 7, 1960, the husband alleged that he was then resident in Scotland and that he was, at all material times, domiciled in that country. On those pleadings an issue was directed to be tried as to whether the court had jurisdiction in the suit, by reason either of the domicile of the parties or the place where the marriage was celebrated. Karminski J. found that the husband was domiciled in Scotland, that he was not resident in England, and held that the court did not have jurisdiction to hear the suit.

The wife appealed.

J. B. Latey Q.C. and *S. K. D. De Ferrars* for the appellant wife.

F. Laskey for the respondent husband.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Niboyet* v. *Niboyet*[2]; *Srini Vasan* (*orse. Clayton*) v. *Srini Vasan*[3] and *Baindail* (*orse. Lawson*) v. *Baindail*[4]; *Morelle Ltd.* v. *Wakeling*[5]; *Quinn* v.

[1] [1960] 3 W.L.R. 753; [1960] 3 All E.R. 70.

[2] (1878) 4 P.D. 1, C.A.

[3] [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.

[4] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.

[5] [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672, C.A.

Leatham[6]; *Jacobs* v. *London County Council*[7]; *Fairman* v. *Perpetual Investment Building Society*.[8]

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Dec. 20. WILLMER L.J. First of all, I should like to say how sorry we are that Ormerod L.J. is unable to be with us today, but the judgment I am about to read is the judgment of the court.

The appellant (who for convenience is referred to hereafter as the wife) who seeks a decree of nullity against the respondent husband on the ground of his incapacity, or, alternatively, his wilful refusal to consummate the marriage. The question which has arisen is whether the High Court has jurisdiction to entertain the suit, having regard to the fact that the husband is domiciled in Scotland and has not at any material time been resident in England. For the reasons given in *De Reneville* (*orse. Sheridan*) v. *De Reneville*,[1] the domicile of the wife must be regarded as the same as that of the husband unless and until the marriage is annulled.

In 1927 it was decided by the House of Lords in *Salvesen or Von Lorang* v. *Austrian Property Administrator*[2] that the court of the domicile has in all cases jurisdiction to pronounce a decree of nullity. But in that case Viscount Haldane observed[3]: "Whether there cannot be jurisdiction which is not that of the "domicile in restricted instances to entertain a suit for nullity is "a question we have not before us for determination." Commenting on this observation in *De Reneville* v. *De Reneville*,[4] Lord Greene M.R. said: "This doubtful question remains to be "answered by the House of Lords, and there is no need for us to "attempt to answer it for the purposes of this appeal."

Since then it has been decided by this court in *Ramsay-Fairfax* (*orse. Scott-Gibbon*) v. *Ramsay-Fairfax*,[5] that jurisdiction to pronounce a decree of nullity exists where the parties are resident, although not domiciled, in England, and that for this purpose no distinction is to be drawn between marriages which are void ab initio and those which are merely voidable. The further question which is now raised by the present appeal is whether jurisdiction exists, in a case where the parties are not domiciled, and the respondent is not resident, in England, on the ground that the marriage was celebrated in England, the marriage in this case having taken place at Newcastle-upon-Tyne on July 8, 1955.

The appeal is from the decision of Karminski J., who held that he had no jurisdiction to entertain the suit. He reached this conclusion because he held himself bound by the decision of

[6] [1901] A.C. 495.
[7] [1950] A.C. 361; 66 T.L.R. 659; [1950] 1 All E.R. 737, H.L.
[8] [1923] A.C. 74; 39 T.L.R. 54, H.L.
[1] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56, C.A.
[2] [1927] A.C. 641; 43 T.L.R. 609, H.L.
[3] Ibid. 654.
[4] [1948] P. 100, 108.
[5] [1956] P. 115; [1955] 3 W.L.R. 188 & 849; [1955] 3 All E.R. 695, C.A.

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this court in *Casey* v. *Casey*,[6] although it is to be remarked that in that case the petition was on the ground of wilful refusal only, and no question of incapacity arose. The judge considered, but declined to follow, the decision in *Hill* (*orse. Petchey*) v. *Hill*,[7] where Collingwood J., distinguishing *Casey* v. *Casey*,[8] held that he had jurisdiction to entertain a suit for nullity on the ground of incapacity where the marriage had been celebrated in England, notwithstanding that the parties were domiciled, and the respondent husband was resident, in Scotland. Karminski J. also considered, but held that he was not free to follow, the decision in *Addison* (*orse. McAllister*) v. *Addison*,[9] where Lord MacDermott C.J. in a case indistinguishable on its facts from the present case, after a full review of all the English authorities, including *Casey* v. *Casey*,[10] decided that the court of Northern Ireland did have jurisdiction to entertain the suit.

The decision in *Casey* v. *Casey*[10] has not by any means been received with universal favour and approval by textbook writers and commentators. But, being a decision of this court, it is clearly binding upon us, unless it can be shown that its ratio decidendi is so inconsistent with other authority by which we are bound that we are free to consider the matter afresh and decide which of the conflicting decisions we ought to follow. In considering *Casey* v. *Casey*,[10] however, we are met by the difficulty that the members of this court who heard that case did not speak with one voice. In that case, which arose out of a wife's petition for nullity on the ground of wilful refusal, the respondent husband was domiciled and ordinarily resident in one of the provinces of Canada, and the question was whether the fact of the marriage having been celebrated in England was sufficient to confer jurisdiction. All the members of the court agreed that it was not, but their reasons for this conclusion differed. Bucknill L.J., with whose judgment Cohen L.J. expressed his complete agreement, based his decision partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a valid marriage; and he thought it reasonable that a similar rule should be applied to a marriage which is merely voidable on the ground of wilful refusal to consummate it. The view of Somervell L.J. was that jurisdiction based on the place where the marriage was celebrated should be confined to cases where the validity of the ceremony itself was attacked. He said[11]: "The mere fact that the "ceremony of marriage took place in a country does not seem to "me a ground for founding jurisdiction in cases where the "matters alleged in the petition do not in any way dispute the "validity of the ceremony as effecting a marriage."

[6] [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110, C.A.

[7] [1960] P. 130; [1959] 3 W.L.R. 828; [1959] 3 All E.R. 754.

[8] [1949] P. 420.

[9] [1955] N.I. 1.

[10] [1949] P. 420.

[11] [1949] P. 420, 433.

In expressing the view of the majority, Bucknill L.J. was following and adopting the same reasoning as was followed by Bateson J. in *Inverclyde (orse. Tripp)* v. *Inverclyde*,[12] namely, that so far as jurisdiction is concerned there is no distinction in principle between a petition to dissolve a valid marriage and a petition to annul a marriage which is merely voidable whether for incapacity or wilful refusal. The argument for the wife in the present case is that this line of reasoning has now been expressly disapproved in *Ramsay-Fairfax* v. *Ramsay-Fairfax*,[13] where this court not only overruled *Inverclyde* v. *Inverclyde*,[14] but held, approving the decision of Pilcher J. in *Hutter* v. *Hutter (orse. Perry)*,[15] that for the purposes of founding jurisdiction in nullity proceedings no distinction is to be drawn between marriages which are void ab initio and those which are merely voidable. It follows, so it is contended, that the main ground on which the majority in *Casey* v. *Casey*[16] based their decision is in conflict with the express decision of this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[17] As to the minority view expressed by Somervell L.J.—which is the view that Karminski J. was himself disposed to adopt in the present case—it is contended that this, being a minority view, is not binding upon us. It is, moreover, attacked as being unsupported by authority, unsound in principle, and impossible of application in practice. Counsel for the wife further relied, in support of his argument, on a dictum of Denning L.J. in *Ramsay-Fairfax* v. *Ramsay-Fairfax*, where he said[18]: "It may be in these nullity cases that the courts of the domicile "also have jurisdiction: so may the courts of the place where "the marriage was celebrated."

The question which has arisen for decision in the present case is one with a long history behind it. The jurisdiction of the High Court in relation to nullity proceedings is derived from that exercised by the ecclesiastical courts before the passing of the Matrimonial Causes Act, 1857. In this respect it differs from the jurisdiction to dissolve marriages, which is wholly statutory. Section 22 of the Act of 1857 provided: "In all suits and pro-"ceedings, other than proceedings to dissolve any marriage, the "said court"—that is to say, the new court for divorce and matrimonial causes—"shall proceed and act and give relief on "principles and rules which in the opinion of the said court shall "be as nearly as may be conformable to the principles and rules "on which the ecclesiastical courts have heretofore acted and given "relief." This section was repealed by the Judicature (Consolidation) Act, 1925, but its substance was re-enacted by section 32 of that Act, which provides: ". . . where no special provision is "contained in this Act or in rules of court with reference thereto,

[12] [1931] P. 29; 47 T.L.R. 140.
[13] [1956] P. 115.
[14] [1931] P. 29.
[15] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.
[16] [1949] P. 420.
[17] [1956] P. 115.
[18] Ibid. 134.

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"any such jurisdiction shall be exercised as nearly as may be in "the same manner as that in which it might have been exercised "by the court to which it formerly appertained." It is true that additional grounds, unknown to the ecclesiastical courts, are now available by statute for seeking a decree of nullity. But we do not think that this circumstance makes any difference from the point of view of jurisdiction: for, as was said by Morris L.J. in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [19]: "those are merely "additional grounds for the granting of a decree of nullity by the "court if the court is endowed with a jurisdiction to grant a decree "of nullity."

The ecclesiastical courts in practice assumed jurisdiction, in theory at least, only in cases where the party proceeded against was resident within the particular diocese, their powers in this respect being restricted by the Ecclesiastical Jurisdiction Act, 1531. No case has been cited to us in which any ecclesiastical court assumed jurisdiction on the mere ground that the marriage was celebrated within the jurisdiction of the diocese. On the other hand, there is authority for the proposition that they recognised that the court of the place of celebration provided a natural forum for adjudicating on the validity of a marriage. Thus in 1752, in *Scrimshire* v. *Scrimshire* [20]—a restitution suit between parties who had contracted a marriage in France which was illegal by French law—Sir Edward Simpson said [21]: "I take it to "be clear, that both parties in the cause had obtained a forum in "France, where the marriage contract was entered into; and by "marrying there, had subjected themselves to be punished by the "laws of the country for a clandestine marriage; and had also "subjected the validity of the contract to be tried by the laws of "that country." Again in 1811, in *Dalrymple* v. *Dalrymple* [22]—another restitution suit, in which the husband was of Scottish origin and the marriage took place in Scotland—Sir William Scott said [23]: "I am not aware that the case so brought here is "exposed to any serious disadvantage, beyond that which it must "unavoidably sustain in the inferior qualifications of the person, "who has to decide upon it, to the talents of the eminent men, "to whose judgment it would have been submitted, in its more "natural forum." We think it may be inferred that, had they not been restricted by the provisions of the Ecclesiastical Jurisdiction Act, and had facilities existed, such as are now available, for service out of the jurisdiction, the ecclesiastical courts would not have been slow to assume jurisdiction to pronounce on the validity of any marriage celebrated within the diocese.

What is of vital significance in relation to the question now under consideration is that the ecclesiastical courts drew no distinction, from the point of view of jurisdiction, between marriages void ab initio and those which were merely voidable.

[19] [1956] P. 115, 135.
[20] (1752) 2 Hag.Con. 395.
[21] Ibid. 411.
[22] (1811) 2 Hag.Con. 54.
[23] Ibid. 59.

Jurisdiction was readily assumed in the case of voidable marriages, for instance, in cases of physical incapacity. Whatever the ground on which relief was claimed the decree was always in the same form, and pronounced the marriage esse et fuisse nullum. The decree of nullity as pronounced by the High Court today is substantially similar, and the same form is used whatever the ground for pronouncing the decree.

Since the passing of the Matrimonial Causes Act, 1857, the court has assumed jurisdiction in nullity cases of various kinds, where no ground for asserting jurisdiction existed apart from the fact of the marriage having been celebrated in England. In *Simonin* v. *Mallac* [24] the marriage was celebrated in England; the parties were minors, domiciled and resident in France, who came to this country to be married for the purpose of evading the requirements of French law with regard to parental consent. The question of the jurisdiction of the English court was fully argued, and it was held by the full court that jurisdiction existed on the ground that the marriage had been celebrated in England. The marriage was regular in form and perfectly good by English law, but the court went on to consider whether it could be avoided having regard to the law of the domicile. As a matter of history the decision was that English law was applicable, and not the law of the domicile, so that the marriage was pronounced valid and the petition for nullity was dismissed. No doubt the question, if it arose today, would be decided the other way, and to that extent the decision is of no weight. But in so far as it was decided that the English court had jurisdiction, the decision has stood for 100 years, and though frequently cited has never been overruled, or even questioned. It is not without significance that it was referred to without disapproval by the House of Lords in *Salvesen's case*.[25]

Sottomayor v. *De Barros* [26] was a case of a marriage in England between parties domiciled in Portugal. The parties were first cousins, and the marriage, though good by English law, was incestuous by the law of Portugal. Jurisdiction to hear the case was assumed without argument, and a decree of nullity was granted on the ground of the personal incapacity of the parties, which it was held must be determined according to the law of the domicile. The fact that jurisdiction was assumed without argument becomes, we think, a matter of some significance when it is recorded that the case was tried at first instance by Sir Robert Phillimore,[27] and subsequently went to the Court of Appeal, consisting of James, Baggallay and Cotton L.JJ.[28]

In *Cooper* v. *Crane* [29] the marriage was celebrated in England between an English woman and a man domiciled and resident in the United States of America. The marriage was regular in form,

[24] (1860) 2 Sw. & Tr. 67.
[25] [1927] A.C. 641.
[26] (1877) 3 P.D. 1, C.A.
[27] (1877) 2 P.D. 81.
[28] 3 P.D. 1.
[29] [1891] P. 369.

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but the wife petitioned for a decree of nullity on the ground that her consent was obtained by duress. Jurisdiction was again assumed without argument, and in the event the petition was dismissed on the facts. The case is of significance in that jurisdiction was assumed without argument though the marriage was merely voidable.

In *Linke* (*orse. Van Aerde*) v. *Van Aerde*,[30] where a marriage was celebrated in this country between parties domiciled in Belgium, the question of jurisdiction was argued, and *Simonin* v. *Mallac*[31] and *Sottomayor* v. *De Barros*[32] were cited. It transpired that the marriage was bigamous. It was held by Gorell Barnes J.[33] that "The jurisdiction of this court to deal with the "question of the validity of the marriage of the parties to the "present suit was therefore clear," and he pronounced a decree of nullity accordingly.

Hussein (*orse. Blitz*) v. *Hussein*[34] was another case in which a decree of nullity was sought by a wife on the ground that the marriage was induced by duress. In this case the husband's domicile was in Egypt, but the marriage was celebrated in England. Henn Collins J. expressed himself as satisfied that he had jurisdiction to entertain the suit.

Lastly, in *Galene* v. *Galene* (*orse. Galice*),[35] the parties were domiciled in France, but the marriage was celebrated in England. A decree of nullity had been obtained in France, on the ground that the marriage was defective in form, being clandestine and without parental consent as required by French law. When a petition was presented in this country no question was raised, or doubt expressed, as to the jurisdiction of the court, and Henn Collins J. pronounced a decree of nullity.

In none of these cases were the parties domiciled in this country, nor was the party proceeded against resident here. We have ventured to cite them as showing that over the last 100 years the courts of this country, including the Court of Appeal, have from time to time assumed jurisdiction in nullity cases on the sole ground of the marriage having been celebrated here, and have done so in cases both of void and voidable marriages.

In the meantime, in 1927, in *Salvesen's* case,[36] the House of Lords made it clear that the court of the domicile always has jurisdiction to pronounce on the validity of a marriage wherever celebrated. Lord Phillimore went further and expressed the view[37] that the court of the domicile was the only competent court. This expression of view was not necessary for the decision of the case before the House, and, as we have already indicated, Viscount Haldane, who gave the leading speech, was careful to

[30] (1894) 10 T.L.R. 426.
[31] 2 Sw. & Tr. 67.
[32] 3 P.D. 1.
[33] 10 T.L.R. 426.
[34] [1938] P. 159; 54 T.L.R. 632; [1938] 2 All E.R. 344.
[35] [1939] P. 237; 55 T.L.R. 505. [1939] 2 All E.R. 148.
[36] [1927] A.C. 641.
[37] Ibid. 671.

leave this question open. What is significant with regard to *Salvesen's* case [38] is that none of their Lordships sought to draw any distinction, from the point of view of jurisdiction in nullity, between marriages void ab initio and those which are merely voidable.

This distinction was first drawn by Bateson J. in 1931 in *Inverclyde* v. *Inverclyde*.[39] In that case the petition was by a wife against a husband domiciled in Scotland, and was on the ground of incapacity. Bateson J. held that in the case of a voidable, as opposed to a void, marriage only the court of the domicile had jurisdiction to annul the marriage, and he refused relief notwithstanding that the marriage had been celebrated in England. The distinction which Bateson J. sought to draw between void and voidable marriages marked a wholly new departure. His decision was not followed by Hodson J. in *Easterbrook* v. *Easterbrook* (*orse. Jervis*),[40] nor by Pilcher J. in *Hutter* v. *Hutter*.[41] In each of these cases the petition was by an English wife against a husband domiciled abroad, though temporarily resident here, praying for a decree of nullity on the ground of wilful refusal to consummate the marriage. In both cases the marriage had been celebrated in England. Both were undefended suits, but in *Hutter* v. *Hutter* [41] Pilcher J. had the advantage of hearing the question of jurisdiction fully argued with the assistance of counsel for the King's Proctor. We think it is clear that in the latter case the judge, rejecting the distinction drawn by Bateson J. between void and voidable marriages, rested his decision in favour of granting relief partly on the ground of the residence of the respondent, and partly on the ground of the marriage having been celebrated in England. As we have already indicated, the decision of Bateson J. in *Inverclyde* v. *Inverclyde* [42] was finally overruled by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[43] At the same time, *Easterbrook* v. *Easterbrook* [44] and *Hutter* v. *Hutter* [45] were expressly approved. It may be remarked that there is no inconsistency between the decision in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [46] and that in the earlier case of *De Reneville* v. *De Reneville*,[47] where the distinction drawn between a void and a voidable marriage was relevant, but relevant only, for the purpose of determining the domicile of the petitioning wife.

We have ventured to set out these decisions in their historical sequence with a view to examining the decision in *Casey* v. *Casey* [48] in its historical context. To this we will return presently. For the moment we content ourselves with the remark that, whether or not we hold ourselves bound by it, the decision is in striking conflict with the current of authority which—apart from

[38] [1927] A.C. 641.
[39] [1931] P. 29.
[40] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.
[41] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.
[42] [1931] P. 29.
[43] [1956] P. 115.
[44] [1944] P. 10.
[45] [1944] P. 95.
[46] [1956] P. 115.
[47] [1948] P. 100.
[48] [1949] P. 420.

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Inverclyde v. *Inverclyde*,[49] since held to have been wrongly decided—had been flowing steadily in the opposite direction for a period of many years.

The decision of Lord MacDermott in *Addison* v. *Addison*,[50] though not binding upon this court, is clearly one that is worthy of our respectful consideration. The facts in that case were, mutatis mutandis, indistinguishable from those of the present case. The petition was by a wife resident in Northern Ireland praying for a decree of nullity against her husband on the ground of incapacity, or, alternatively, wilful refusal to consummate the marriage. The husband was domiciled and resident in England, but the marriage had been celebrated in Northern Ireland, and it was on that ground that the jurisdiction of the Northern Irish court was invoked. Lord MacDermott, in a very full judgment, reviewed all the authorities and, anticipating the conclusion reached later in the same year by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*,[51] held that, for the purposes of establishing jurisdiction in nullity proceedings, no distinction is to be drawn between void and voidable marriages. He came to the conclusion that, in the light of the authorities, it must be accepted that the court of the ceremony has, as such, a jurisdiction to annul, and decided that this jurisdiction must extend alike to the case of voidable marriages as it does to those which are void ab initio. He concluded by observing[52]: "There is much to be said for "committing any plea that strikes at the creation of a valid "marriage bond—be it one of bodily or mental or juristic in-"capacity or of a failure to observe the requisite formalities—to "the court of the place where the bond is forged. It seems the "natural forum to decide such issues and in practice it will often "be that best versed in the law to be applied." He accordingly assumed jurisdiction and pronounced a decree.

It remains to refer once more to *Hill* v. *Hill*,[53] where the petition was on the ground of incapacity only, and Collingwood J. felt able to distinguish *Casey* v. *Casey*.[54] As we understand his judgment, he reached this conclusion on two grounds, namely: (1) there is a fundamental difference between incapacity and wilful refusal, in that the former is something which must exist at the time of the marriage, whereas the latter can arise only after the marriage, the existence of a valid marriage being a condition precedent to the cause of complaint; (2) incapacity was a matter regularly dealt with by the ecclesiastical courts, who, however, knew nothing of wilful refusal as affording a ground for relief. We find ourselves quite unable to accept the distinctions which Collingwood J. drew. It is well known that incapacity and wilful refusal are frequently alleged as alternatives. This is because it is often impossible in practice to form any view, in a case where the marriage has not been consummated, as to whether this has

[49] [1931] P. 29.
[50] [1955] N.I. 1.
[51] [1956] P. 115.
[52] [1955] N.I. 1, 32.
[53] [1960] P. 130.
[54] [1949] P. 420.

been due to incapacity or to wilful refusal until all the evidence has been given. It would, we think, be the height of absurdity if the court had to hear the whole of a case before it could decide whether or not it had jurisdiction to entertain it. In the present case, for instance, it would be quite anomalous to decide that there is jurisdiction to entertain the plea of incapacity but not that of wilful refusal, seeing that the same evidence must be adduced in order to establish either the one or the other.

It seems to us that there are three possible views: (1) that in no case does the court have jurisdiction to entertain proceedings for nullity where the sole ground for asserting jurisdiction is the fact of the marriage having been celebrated in England; (2) that the fact of the marriage having been celebrated in England is enough of itself to confer jurisdiction in some cases but not in others; (3) that in every case where the marriage has been celebrated in England that fact is of itself sufficient to confer jurisdiction, whatever the ground of complaint.

The first of these alternatives has not been argued before us by counsel for the husband, who conceded that in the light of the authorities jurisdiction must be held to exist at least in cases where the formal validity of the ceremony or the juristic capacity of the parties is called in question. In any case it appears to us that, having regard to the cases we have referred to, beginning with *Simonin* v. *Mallac*[55] and extending over the last century, it is now much too late to assert that in no case will the court assume jurisdiction on the sole ground of the marriage having been celebrated in England.

It is to the second alternative that the argument has been mainly directed. But if it is to be held that the fact of celebration in England is enough of itself to confer jurisdiction in some classes of case but not in others, the difficulty immediately arises of determining at what point the dividing line is to be drawn. We have already referred to the difficulty of distinguishing, for the purposes of jurisdiction, between a plea of incapacity and a plea of wilful refusal. Apart from *Hill* v. *Hill*,[56] there appears to be no authority for drawing the line at this point. The main ground on which the majority in *Casey* v. *Casey*[57] rested their decision, namely, the distinction between marriages void ab initio and those which are merely voidable, has been cut away since this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*[58] overruled the decision of Bateson J. in *Inverclyde* v. *Inverclyde*.[59] The alternative ground, namely, that of balance of hardship to the parties, does not appear to be supported by authority, and does not in our view furnish a suitable, or, indeed, a practicable, test for determining a question of jurisdiction. The view expressed by Somervell L.J. and adopted by Karminski J. in the present case, is

[55] 2 Sw. & Tr. 67.
[56] [1960] P. 130.
[57] [1949] P. 420.
[58] [1956] P. 115.
[59] [1931] P. 29.

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equally unsupported by authority. On this view, jurisdiction would be excluded in cases of bigamy, or, indeed, in any case where the juristic capacity of the parties is called in question. If, on the other hand, it is to be held that jurisdiction exists where juristic capacity is in question, on what principle, it may be asked, is it to be excluded where the issue relates to physical capacity? Furthermore, on this view, jurisdiction would be excluded in cases where it is alleged that the consent of the petitioner was vitiated by fraud or duress. If the dividing line is to be drawn where Somervell L.J. suggested, it would seem that *Sottomayor* v. *De Barros*,[60] *Cooper* v. *Crane*,[61] *Linke* v. *Van Aerde*[62] and *Hussein* v. *Hussein*[63] would all have to be held to have been wrongly decided, and one of the grounds for the decision in *Hutter* v. *Hutter*[64] (notwithstanding the approval of that decision by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*[65]) would have to be held to have been misconceived.

The only remaining alternative is to say that jurisdiction exists to entertain a suit for nullity of any class whenever it is shown that the marriage was celebrated in England. We can only take this course if we are free to hold that *Casey* v. *Casey*[66] was wrongly decided; and this we can do only if satisfied that the present case is covered by one of the three exceptions to the rule binding this court to follow its own previous decisions which were mentioned by Lord Greene M.R. in *Young* v. *Bristol Aeroplane Co.*[67] Of these three exceptions only the first could possibly apply here. We do not think we are bound to follow the minority view expressed by Somervell L.J. in *Casey* v. *Casey*.[68] The question to be determined is whether the view of the majority, which must be regarded as the ratio decidendi of the case, is in conflict with any other decision of this court, so that we are free to choose which of the conflicting decisions we ought to follow. We have felt considerable difficulty in reaching a conclusion on this point, but, after careful consideration, we have come to the conclusion that the decision of the majority in *Casey* v. *Casey*[68] cannot stand with the unanimous decision of this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[69] In the latter case, as we understand it, it was decided once and for all that no distinction is to be drawn, for jurisdictional purposes, between marriages which are void ab initio and those which are merely voidable. If that is correct, the decision in that case was clearly in conflict with the ratio of the judgment of the majority in *Casey* v. *Casey*.[70] This court must therefore decide which of these two conflicting decisions it will follow, and we entertain no doubt that the decision in

[60] 3 P.D. 1.
[61] [1891] P. 369.
[62] 10 T.L.R. 426.
[63] [1938] P. 159.
[64] [1944] P. 95.
[65] [1956] P. 115.
[66] [1949] P. 420.
[67] [1944] K.B. 718, 729; 60 T.L.R. 536; [1944] 2 All E.R. 293, C.A.
[68] [1944] P. 420.
[69] [1956] P. 115.
[70] [1949] P. 420.

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Ramsay-Fairfax v. *Ramsay-Fairfax* [71] is to be preferred and should be followed.

In reaching this conclusion we are encouraged to find that it is supported by the weighty authority of Lord MacDermott in *Addison* v. *Addison*.[72] We would venture to adopt the reasoning which led him to his conclusion in that case.

In our judgment, the marriage in the present case having been celebrated in England, the High Court has jurisdiction to pronounce on its validity and, for the purpose of doing so, to inquire into both the grounds on which its validity is impugned.

The appeal must, therefore, be allowed.

Appeal allowed with costs. Order below as to costs varied to allow whole of defendant's costs below. Leave to appeal to House of Lords.

Solicitors: *Gibson & Weldon for Frederick Gowen & Stevens, Croydon; Kenneth Brown, Baker, Baker.*

C. J. E.

[71] [1956] P. 115. [72] [1955] N.I. 1.

[COURT OF APPEAL.]

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Dec. 1, 2, 20.
Lord Evershed M.R., Harman and Donovan L.JJ.

Revenue—Income tax—Deduction at source—Failure of payer to deduct tax—Whether recipient of payment chargeable—Rent—Schedule D—Long lease—Statutory duty of tenant to deduct tax—Payment of rents without deduction—Whether landlord properly assessed to tax—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 6, 36, 148, 170 (1) (2); 177 (1) (2).

The tenant of premises under a "long lease" within section 177 of the Income Tax Act, 1952,[1] made to the landlords, without deduction of tax, payments of rent chargeable to tax in accordance with section 177 under Case VI of Schedule D to the Act and subject to

[1] Income Tax Act, 1952, s. 6: "(1) All matters relating to the income tax under Schedules A, B and D, so far as they are not directed by this Act to be executed by any other Commissioners, and, subject to any regulations under section 157 of this Act for the time being in force, all matters relating to the income tax under Schedule E so far as they are not executed by any other Commissioners, shall be executed, as heretofore, by the Commissioners for the general purposes of the income tax (in this Act referred to as 'General Commissioners'), who shall continue to act for the same separate areas as heretofore (in this Act referred to as 'divisions'):"

S. 36: "(1) Statements of profits or gains under Schedule D shall, unless an assessment thereon is required to be made by the Special Commissioners, be laid before the Additional Commissioners, and the

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deduction of tax under section 170. The special commissioners affirmed an assessment on the landlords in respect of the payments of rent, although an assessment should have been made on the tenants and not on the landlords under section 170 of the Act of 1952:—

Held, (1) (Lord Evershed M.R. and Donovan L.J.; Harman L.J. dissenting) that where the lessee under a long lease pays rent not payable out of profits or gains brought into charge and fails to deduct from such rent a sum representing the amount of the tax thereon at the standard rate in force in accordance with the provisions of section 170 (1) of the Income Tax Act, 1952, the Additional Commissioners for Income Tax may, under section 36, assess the lessor in respect of the rent so paid as being "profits or gains" liable to tax under Schedule D, the authority vested in the additional commissioners before section 26 of the Finance Act, 1927 (now section 170 of the Act of 1952) was passed to make assessment upon annual profits or gains not brought into charge to tax still remains, and section 170 has not cut down their powers and duties under section 36 (1) to make such assessments.

(2) The powers of assessment conferred by section 170 (3) on the special commissioners are discretionary and not obligatory; accordingly, the commissioners are not required to make an assessment on the lessee within section 36 (1), and the jurisdiction of the additional commissioners to make an assessment on the lessee are not affected.

The decision in *Glamorgan Quarter Sessions* v. *Wilson* [1918] 1 K.B. 725; 26 T.L.R. 351, and the dicta of Upjohn J. in *Stokes*

"Additional Commissioners shall "appoint meetings for the considera- "tion of all such statements as are "from time to time delivered to "them."

S. 148: "Tax under Schedule D "shall be charged on and paid by the "persons receiving or entitled to the "income in respect of which tax under "that Schedule is in this Act directed "to be charged."

S. 169: "(1) Where any yearly "interest of money, annuity or other "annual payment is payable wholly "out of profits or gains brought into "charge to tax—(*a*) no assessment "shall be made on the person entitled "to the interest, annuity or annual "payment . . . (3) Where—(*a*) any "royalty or other sum paid in respect "of the user of a patent; or (*b*) any "rent, royalty or other payment "which, under any of the provisions "of this Act, is declared to be subject "to deduction of tax under this Chap- "ter as if it were a royalty or other "sum paid in respect of the user of a "patent, is paid wholly out of profits "or gains brought into charge to tax, "the person making the payment shall "be entitled on making the payment "to deduct and retain out of it a sum "representing the amount of the tax "thereon at the standard rate for the "year in which the amount payable "becomes due."

S. 170: "(1) Where—(*a*) any "interest of money, annuity or other "annual payment charged with tax "under Schedule D; or (*b*) any "royalty or other sum paid in respect "of the user of a patent; or (*c*) any "rent, royalty or other payment "which, under any of the provisions "of this Act, is declared to be subject "to deduction of tax under this Chap- "ter as if it were a royalty or other "sum paid in respect of the user of "a patent, is not payable or not "wholly payable out of profits or "gains brought into charge, the per- "son by or through whom any pay- "ment thereof is made shall, on "making the payment, deduct out of "it a sum representing the amount "of the tax thereon at the standard "rate in force at the time of the "payment. (2) Where any such pay- "ment as aforesaid is made by or "through any person, that person "shall forthwith deliver to the Com- "missioners of Inland Revenue, for "the use of the Special Commis- "sioners, an account of the payment, "or of so much thereof as is not "made out of profits or gains brought "into charge, and of the tax deducted "out of the payment or out of that "part thereof, and the Special Com- "missioners shall assess and charge "the payment for which an account "is so delivered on that person."

v. *Bennett* (*Inspector of Taxes*) [1953] Ch. 566, 573; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313 approved.

Per Donovan L.J. The power and the duty of the general commissioners to make assessments upon annual payments made out of profits and gains not brought into charge to tax still remains. This does not involve liability to double taxation, once by deduction at source and again by assessment upon the same income. It is true that there is nothing in the Act expressly prohibiting such an injunction but the prohibition is implied in its provisions: see *per* Lord Davey in *London County Council* v. *Attorney-General* [1901] A.C. 26, 43; 17 T.L.R. 131; 4 T.C. 265, H.L. (post, p. 102).

Decision of Danckwerts J. [1960] Ch. 423; [1960] 2 W.L.R. 531; [1960] 2 All E.R. 643 affirmed.

APPEAL from Danckwerts J.[2]

A company, Grosvenor Place Estates Ltd., appealed to the special commissioners against assessments for the years 1955–56 and 1956–57 under Schedule D of the Income Tax Act, 1952, in respect of payments of rent received under an underlease granted by the company of premises known as Hobart House.

The following facts were proved or admitted before the commissioners:

The National Coal Board were tenants of Hobart House under an underlease for 81 years less four days granted from March 25, 1955, by the company at an annual rent of £96,177. That underlease was a "long lease" within section 177 of the Income Tax Act, 1952. The board made the following payments of rent without deduction of tax to the company: quarter ended June 25, 1955, £24,044 5s.; quarter ended September 29, 1955, £24,044 5s.; quarter ended December 25, 1955, £24,044 5s.; quarter ended March 29, 1956, £24,044 5s.; total £96,177. Quarter ended June 24, 1956, £24,044 5s.; quarter ended September 29, 1956, £24,044 5s.; total £48,088 10s. Those payments of rent were chargeable to tax in accordance with section 177 under Case VI of Schedule D to the Income Tax Act, 1952, and were subject to deduction of tax under either section 169 or section 170 of that Act.

That rent was not paid out of profits and gains of the National Coal Board brought into charge to tax and, accordingly, section 169 of the Act of 1952 did not apply to them. The payments of rent did fall under the provisions of section 170, under which the board should have deducted tax on payment and delivered an account of the payments to the Inland Revenue Commissioners for the use of the special commissioners, who, in the words of the section, "shall assess and charge the payment for which an "account is so delivered on that person," i.e., the person making the payment. The board, as stated above, omitted to deduct tax on payment.

It was admitted by the Crown that the Inland Revenue Commissioners were informed of the payments made, but in what form that information was given was not proved or admitted. There

[2] [1960] Ch. 423; [1960] 2 W.L.R. 531; [1960] 2 All E.R. 643.

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was no evidence that an assessment had been made on the board as the person paying the rents in accordance with the provisions of section 170 and much evidence to the contrary, and the special commissioners drew the inference that none had been made. The special commissioners were informed by counsel for the Crown, in reply to an inquiry by them, that it was not considered obligatory on the assessing special commissioners to make an assessment on the person making the payment, where that payment had been received by the payees in full without deduction of tax: it was considered open to the Revenue, in the existing state of the law, to make an assessment on the recipient in such circumstances, which had been done, and to make an assessment also on the board would create a double assessment of the same sum.

It was contended on behalf of the company that it was obligatory on the assessing special commissioners under the provisions of section 170 to assess the persons making the payment, that it must be assumed that such an assessment either had been or would be made by the commissioners in pursuance of their statutory duty and that, accordingly, an assessment could not be made on the company as payee.

It was contended on behalf of the Crown that the company, having received the rents in full without deduction of tax, was directly assessable.

The special commissioners held that they were bound by the decision in *Glamorgan Quarter Sessions* v. *Wilson* [3] and they, accordingly, dismissed the appeal and confirmed the assessments. They did not feel it incumbent on them, in the view that they took of the matter, to express any opinion on the apparent failure of the assessing special commissioners to assess the board, although they were glad to have had an explanation of the attitude adopted by them in such cases.

The company appealed, the question of law for the decision of the court being whether, on the facts admitted or proved, the commissioners' decision was correct in law.

Danckwerts J. affirmed the decision of the special commissioners and held that assessments had been properly made on the landlords.

The landlords appealed.

Heyworth Talbot Q.C. and *C. N. Beattie* for the appellants, the landlords.

F. N. Bucher Q.C. and *Alan Orr* for the Crown, the respondent.

The following cases were referred to in argument, which are not mentioned in the judgments: *Morant Settlement* (*Trustees*) v.

[3] [1910] 1 K.B. 725; 26 T.L.R. 351.

Inland Revenue Commissioners[4]; *Fry* v. *Salisbury House*[5]; *Allchin* v. *Coulthard*[6]; *Whitworth Park Coal Co. Ltd. (in liquidation)* v. *Inland Revenue Commissioners*[7]; *Canadian Eagle Oil Co.* v. *The King*[8]; *Hughes* v. *Bank of New Zealand Ltd.*[9]; *Hatch* v. *Hatch*.[10]

Cur. adv. vult.

December 20. The following judgments were read:

LORD EVERSHED M.R. In this case I have had the advantage of reading in advance the judgment to be delivered by Donovan L.J. I agree with my brother's conclusions and with his reasons for them. Out of respect, however, for the opposite conclusion which Harman L.J. has reached, and for the argument of the counsel for the appellants, I state shortly my own reasons for thinking that this appeal should be dismissed.

The case is, indeed, a remarkable one. The appellants granted to the National Coal Board a long lease (as that phrase is defined by section 172 of the Income Tax Act, 1952) of premises known as Hobart House, the lease being for a term of 81 years from March 25, 1955, at an annual rent of £96,177. The National Coal Board proceeded to pay to the appellants in respect of each of the first six quarters under their lease the rent in full, i.e., sums on each occasion of £24,044 5s., without any deduction in respect of income tax. Why the Coal Board omitted to make the deductions which it was their duty under section 170 of the Act to make, is not explained and is irrelevant for present purposes. The appellants appear to have accepted these quarterly payments—perhaps naturally enough—without demur. The Additional Commissioners for Income Tax have now proceeded to assess the appellants in respect of these quarterly sums of rent, as being profits or gains liable to tax under Schedule D of the income tax legislation. That they are such profits and gains was not disputed by Mr. Heyworth Talbot but it is contended by him that, the inevitable effect of the statutory language in the relevant sections of the Act is such that the appellants cannot now be assessed for income tax in respect of them. Mr. Heyworth Talbot also submitted, in opening his case, that the Coal Board remained liable to assessment in respect of their various payments, that it was indeed the duty of the special commissioners so to assess the board, but that the board could not now claim to deduct from any future payment of rent any tax which they would be made liable to pay upon such assessments. I am glad to say that, for the

[4] [1948] 1 All E.R. 732; 30 T.C. 147, C.A.

[5] [1930] A.C. 432; 15 T.C. 266; 46 T.L.R. 336, H.L.

[6] [1943] A.C. 607; 59 T.L.R. 396; [1943] 2 All E.R. 352, H.L.; sub nom. *Allchin* v. *South Shields Corporation*, 25 T.C. 445, H.L.

[7] [1959] 3 W.L.R. 842; [1959] 3 All E.R. 703, H.L.

[8] [1946] A.C. 119; 61 T.L.R. 577; 27 T.C. 205; [1945] 2 All E.R. 499, H.L.

[9] [1938] A.C. 366; 54 T.L.R. 542; 21 T.C. 472; [1938] 1 All E.R. 778, H.L.

[10] [1951] W.N. 235; [1951] 1 T.L.R. 825, D.C.

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purposes of this appeal, it is unnecessary for the court to express any view upon any part of this submission.

That the sums of rent in question are profits and gains in the hands of the appellants is not in doubt: and Mr. Heyworth Talbot also conceded that, if the appellants were surtax payers, they would have to pay such tax in respect of the total sums so received by them. It was, however, the main burden of Mr. Heyworth Talbot's argument that the effect of the amendment made in 1927 to what is now section 170 of the Income Tax Act, 1952 (formerly rule 21 of the All Schedules Rules) has been inevitably to liberate persons in the position of the appellants from any liability to assessment for income tax in such circumstances as have occurred in the present case. In the end of all the question turns, as I think, upon the short and single question: are the words of subsection (1) of section 36 of the present Act—"Statements of profits or gains under Schedule D shall, unless an assessment thereon is required to be made by the Special Commissioners, be laid before the Additional Commissioners"—such as to produce the effect, when read in conjunction with section 170 of the Act, that the only assessment which may now lawfully be made in respect of rent payable under a long lease is an assessment to be made by the special commissioners upon the lessee, and so to disable the additional commissioners from themselves making any assessment in any circumstances upon the recipient? A similar point arises from the effect of section 170 upon section 6 of the Act; but the main argument has revolved round section 36, and I do not desire to add anything to what Donovan L.J. says in his judgment in regard to section 6.

If such is the effect of section 170, it was not suggested by Mr. Heyworth Talbot that the result was other than an oblique effect of an amendment to the law intended only to relate to the mechanics of income tax collection. Donovan L.J. has, in his judgment, traced the history of the relevant sections. Prior to the year 1888 liability for assessment to income tax in respect of annual payments made otherwise than out of the profits or gains of the payer rested exclusively upon the recipient as being part of his profits or gains subject to the general charge for income tax. In the year 1888 what later became rule 21 of the All Schedules Rules was introduced in terms which corresponded to the first part of the first subsection of the present section 170. In the year 1927 it emerged as a result of *In re Lang Propeller Co. Ltd.*,[1] that the debt to the Crown thereby created, not being an assessed tax, gave to the Crown no priority in a winding up of the debtor. As a result rule 21 was, by the Finance Act, 1927, amended, and has since been in the form now represented by section 170. It will be observed that Parliament, in making this amendment, though it had before them the language of rule 19 of the All Schedules Rules (now section 169 of the Act of 1952)

[1] [1927] 1 Ch. 120; 42 T.L.R. 702; 11 T.C. 46, C.A.

did not think fit to introduce into the amended rule 21 the language of the subsection 1 (*a*) of section 169: "No assessment "shall be made on the person entitled to the interest, annuity or "annual payment." It has been consistently held by the courts that the amendments introduced by the Acts of 1888 and 1927 were intended as changes only in the machinery of collection—see, for example, the judgment of Finlay J. in the case of *Rye and Eyre* v. *Inland Revenue Commissioners*,[2] and the observations of Upjohn J. in *Stokes* v. *Bennett (Inspector of Taxes)*.[3] It is also not in doubt as a result of the case of *Glamorgan Quarter Sessions* v. *Wilson*,[4] that under the law as it then stood (in 1910) failure on the part of a lessee to make the deduction in respect of tax required by the terms of rule 21 (now found in section 170 (1)) did not have the effect that the lessor was not himself liable to be assessed in respect of the gross sum of rent which he had received. It is, however, now contended—and I return to the fundamental question in the case to which I have already adverted—that the references to assessment by the special commissioners introduced into what are now the later subsections of section 170 have, when read in conjunction with the terms of section 36 of the present Act, not only altered the machinery of tax collection by getting rid of the difficulty encountered in the *Lang Propeller* case,[5] but have materially altered the policy and substance of the law itself by making no longer possible, in circumstances such as the present, assessment of the lessor in respect of rents received by him without deduction by the lessee.

If the purpose of the amendments to the statute was to alter only the machinery for collection, then I apprehend that the court should not give to such amendment the much wider effect now contended for, unless such conclusion is inevitable according to the strict construction of the material language of the statute. As Lord Dunedin observed in *Whitney* v. *Inland Revenue Commissioners*[6]: "A statute is designed to be workable, and the "interpretation thereof . . . should be to secure that object, unless "crucial omission or clear direction makes that end unattainable."

The general scheme or policy of income tax may be discerned, so far as relevant to this appeal, from sections 1, 122 and 148 of the Act of 1952. By the first of those sections tax is charged in respect of "all property profits or gains" described in section 122 (that is, Schedule D), including (by paragraph 1 (*a*) (i)) "the "annual profits or gains arising or accruing—(i) to any person resid-"ing in the United Kingdom from any kind of property what-"ever. . . ." By section 148 the tax under Schedule D "shall "be charged on and paid by the persons receiving or entitled to "the income in respect of which tax under" the schedule is directed to be charged. Rents under long leases are brought

[2] [1935] A.C. 274; 51 T.L.R. 318; 19 T.C. 164, H.L.

[3] [1953] Ch. 566; 34 T.C. 337; [1953] 2 All E.R. 313.

[4] [1910] 1 K.B. 725; 5 T.C. 537.

[5] [1927] 1 Ch. 120, C.A.

[6] [1926] A.C. 37, 52; 45 T.L.R. 58; 10 T.C. 88, H.L.

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within the scope of Schedule D by section 177 of the Act. To such rents, if paid by a lessee wholly out of profits or gains brought by him into tax, section 169 of the Act (formerly rule 19 of the All Schedules Rules) is applicable. Where, however, and to the extent that such rents are not payable out of profits or gains brought into charge, subsection (1) of section 170 requires the lessee, on making the payment, to deduct out of it a sum representing the amount of the tax thereon at the standard rate in force at the time of the payment. Subsections (2) and (3) of the section, so far as relevant, provide: "Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment and of the tax deducted out of the payment, and the Special Commissioners shall assess and charge the payment for which an account is so delivered on that person. (3) The Special Commissioners may, where any person has made default in delivering an account required by this section, . . . make an assessment according to the best of their judgment . . ."

Section 36 of the Act—the vital section for the purposes of this appeal—occurs in Chapter II of Part II of the Act, a chapter concerned, according to its heading with "Returns and Assessments." I, therefore, agree with Donovan L.J., that, according to the scheme and policy of the Act, a person in receipt of profits or gains of the nature of the rent here in question would, prima facie, be taxable in respect thereof and bound, accordingly, to make a return relating thereto. But the machinery of Part VII of the Act (and of sections 170 and 177 in particular) provides that in the case of a rent paid otherwise than out of the profits or gains of the lessee, the duty of the lessee is to deduct the appropriate tax out of his "payment" of the rent and to render an account accordingly for the use of the special commissioners, who will assess him in respect of such "payment" of rent. Thus the ordinary liability of the recipient of the rent (as his profits or gains) is discharged on his behalf by the lessee so that the lessor is regarded for income tax (though not for surtax) purposes as having accounted for tax in respect of the rent.

We are only in this appeal concerned with the case where the lessee has paid the contractual rent in full without making any deduction or rendering any account as he should have done according to the terms of subsection (1) of section 170. What the position might be (or, indeed, might have been prior to 1927) where a lessee, having made the deduction, then failed to account therefor to the Commissioners of Inland Revenue (whether or not after assessment by the special commissioners under the existing Act) it is unnecessary for us to decide. I observe only that, since the rent in the cases supposed are profits or gains of the lessor and of no other person, any attempt to assess both the lessor and the lessee in respect thereof would appear at least to be open

to the objection that an attempt was being made to tax the same person twice in respect of the same taxable income.

These problems do not, however, arise in the present case. The question on the facts of the present case remains; the lessor having received "profits or gains from . . . property" is he, according to the general scheme and policy of the Act, liable to make a return in respect thereof? Or is he exempted from so doing by the language of subsection (1) of section 36? I agree with Donovan L.J. that, upon the facts of the present case, the exemption of that subsection is inapplicable. According to its strict language and in the context of Chapter II of Part II of the Act, the subsection is related to profits or gains under Schedule D, and the exemption is similarly limited to cases where assessment of such profits or gains is "required" to be made by the special commissioners—for example, upon the request, as provided by section 38, of the person chargeable. As a matter of strict language, section 170 is concerned with the assessment of the "payment" of rent by the lessee. True, the "payment" is, by the section, identified with what would in the lessor's hands be profits or gains. Still, in the hands of the lessee, the subject-matter charged in the rent payment which in his hands is not profits or gains, nor is it paid out of profits or gains for which he is chargeable. I refer again to the divergence in language in this respect between sections 169 and 170, the former of which (but not the latter) states expressly that no assessment shall be made upon the recipient of the payment.

But if this be too narrow a view, it is still, as I conceive, necessary to construe the word "required" in subsection (1) of section 36. True it is that, where the lessee has made the deduction when paying his rent and has accounted accordingly to the commissioners, then by the terms of subsection (2) of section 170 the special commissioners "shall" assess him. In such case, I will now assume that the assessment upon the lessee is "required" to be made by the special commissioners within the terms of section 36 (1) of the Act. But in the present case no deduction was made and no account delivered by the National Coal Board. It is therefore conceded by Mr. Heyworth Talbot that subsection (3) and not subsection (2) of section 170 is applicable, and the relevant words of subsection (3) are "The Special "Commissioners may . . . make an assessment." Though Mr. Heyworth Talbot was at first disposed to contend that "may" meant "shall," he later conceded that the powers of assessment conferred by subsection (3) are discretionary and not obligatory. If this is right, then can it fairly be said that, in the circumstances of the present case, the special commissioners are "required" to make an assessment within the terms of subsection (1) of section 36 of the Act? In my judgment it cannot In my judgment, if it is contended that the amendment of the machinery provisions of what is now section 170 have the oblique

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but wide effect upon the general scheme of the Act so as, in a case such as the present, to absolve the lessor from his previously-existing tax liability, such result must be justified by a strict construction of the Act, that is of section 36 (1); and, in my judgment, the word "required" is not satisfied by a mere discretion.

It was said by Mr. Heyworth Talbot that this view had been dismissed as "preposterous" by Lord Dunedin, when Lord President of the Court of Session in the Scottish case of *Lord Advocate* v. *Edinburgh Corporation* [7] in the year 1905. That case was, however, decided long before the amendment introduced by the Act of 1927, and the argument characterised as "preposterous" was different from that which has appealed to me. The Corporation of Edinburgh, having failed to deduct tax from certain interest payments on money borrowed by the corporation (as it should have done under the Act of 1888), was nonetheless assessed to tax upon the interest payments. It was contended by the corporation that since it had, in breach of its statutory duty, failed to deduct the tax, therefore no debt was due to the Crown; that, accordingly, the only remedy of the Crown was for damage at common law; and that the Crown had failed to prove such damage, since (as was then admittedly the law) it could assess and recover the tax from the recipient of the interest. It was this contention which Lord Dunedin described as "preposterous." In my judgment, the case provides no authority for the view that the epithet is applicable to the construction which I would give to the word "required" in what is now section 36 (1) of the Income Tax Act, 1952.

For these reasons, as for the reasons stated by Donovan L.J., I think this appeal fails and should be dismissed.

HARMAN L.J. Under rule 21 of the All Schedules Rules of the Income Tax Act, 1918, and, indeed, as far back as 1888, it was provided that on payment of such a sum as the rent here in question, if not paid out of profits or gains already brought into charge to tax, the payer must deduct a sum equal to the tax in force at the time of payment. By rule 21 (2) ibid., the payer must account for this sum to the Commissioners of Inland Revenue, and the sum became a debt due from him to the Crown and recoverable accordingly.

This continued to be the law until the year 1926, when the point emerged that in a case where bankruptcy principles applied (*Lang's* case [8]) the Crown had no priority for what was merely a debt having regard to rule 21 (2), and not an assessed tax, priority being confined to the latter.

Accordingly, by section 26 of the Finance Act, 1927, the law was altered and rule 21 (2) was replaced by the provision which is now section 170 (2) of the statute of 1952. The new subsection

[7] 1905, 7 S.C. 972. [8] [1927] 1 Ch. 120.

obliges the payer to deliver his account to the Commissioners of Inland Revenue "for the use of the Special Commissioners," who are directed to assess and charge "the payment of which an "account is so delivered." Subsection (3) authorises, but does not require, the special commissioners to make an assessment on the payer who has made default in delivering an account under the rule, and he is liable to forfeit £100.

Now it is conceded that under the law as it stood till the alteration of 1927, the Crown could, having regard to Miscellaneous Rule 1 of Schedule D to the Act of 1918, charge the payee of the rent who had received it without deduction. The ordinary process would apply, that is to say, the additional commissioners would make the assessment under section 121 of the Act of 1918, now section 36 of the Act of 1952. This was so held in *Glamorgan Quarter Sessions* v. *Wilson*,[9] with which I see no cause to quarrel; but the Act of 1927, which turned the retained sum from a debt due to the Crown into an assessed tax, also directed the assessment of it to be made by the special commissioners, and it is said here that the result is that these alone have the power to make an assessment under section 170 (2) as the law now stands, and therefore there is no power in the additional commissioners which enables them to assess the payee.

The grounds for this argument are section 6 and section 36 of the Act of 1952 which, so far as relevant, are in these terms: "6—(1) All matters relating to the income tax under Schedules "... D, so far as they are not directed by this Act to be executed "by any other Commissioners, ... shall be executed, as hereto-"fore, by the Commissioners for the general purposes of the "income tax (in this Act referred to as 'General Commis-"'sioners')." Section 36 (1): "Statements of profits or gains "under Schedule D shall, unless an assessment thereon is required "to be made by the Special Commissioners, be laid before the "Additional Commissioners ... shall direct an assessment to "be made in accordance with the statement."

Now by reason of the alteration of the law in 1927 it is said that the latter section does not apply by reason of the exception, and if these payments can properly be said to be "profits or "gains" I can see no answer to this argument that the assessing power of the general commissioners is now excluded. It is objected that the exception only applies to "profits or gains," and that these deductions from rents are not the lessee's profits or gains, but are payments, and it is pointed out that in section 170 they are so called, and that it is payments and not profits or gains which the special commissioners are there directed to assess and charge. This portion of the rents, however, if not deducted (as here), but paid over to the lessor, is undoubtedly a profit or gain in his hands and must be included under those words in order to be taxable subject-matter under Schedule D: for it is under that

[9] 5 T.C. 544.

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schedule alone that it can be taxed. It seems to me, therefore, that the exception in section 36 does extend to these payments even though they are there looked at from the payee's end and, therefore, so styled.

If this be right, the position is confused by the fact that section 148 of the Act of 1952 provides that tax under Schedule D shall be charged on and paid by the recipient. These moneys are, as I have said, part of his profits or gains. Section 177, however, which is the charging section for rents under long leases, provides by subsection (2) that any payment under that section shall be subject to deduction of tax under Chapter I of this Part, a reference back to section 170, which enjoins the payer and not the recipient to account for the tax, thus being an exception to the generality of section 148.

If I am right so far, it would look as though the Crown, like the dog in the fable, in reaching for the reflected bone in the water—that is for a tax assessed on the lessee and having priority in bankruptcy—has dropped the bone in its mouth represented by the power to assess the lessor. No doubt this is a casus omissus which can be remedied in due course.

It is, in my judgment, an additional argument against the Crown's view that it may result in two assessments, one on lessee and the other on lessor, which are both equally valid in law and both in respect of the same sum of money, first in the hands of the payer and second in those of the payee. This is contrary to the general principle that tax on one sum is not to be charged twice.

I am conscious that there are very formidable arguments on the other side. As I have said, it seems unlikely that Parliament by granting to the Crown in 1927 the additional advantage which the decision of 1926 showed it to require, intended by the same section to deprive it of a right which went back to the origins of the income tax law, and which had been until 1888 the only means of collecting the tax on rents not paid out of profits or gains already charged, but this is, in my judgment, to impute too exalted a standard of consistency to the legislative patchwork embodied in the 532 sections, not to mention fourteen schedules, of the Act of 1952. Any judge with experience of income tax cases, either in this court or below, cannot fail to be conscious of the fact that there are many holes in the net, to which the work of patching is still yearly applied. The whole subject cries out for a drastic overhaul which is often promised but never so far achieved. Until the advent of that hoped for day, I think the court should only follow the language which it finds set down. Pedentium, as Lucretius would say, progrediertes. It seems to me dangerous to talk of "the policy of the Act" or the "equity of the statute". I speak here under the great aegis of Rowlatt J., and see the observation of Lord Halsbury L.C. in *Tennant* v. *Smith*.[10] The court should construe the sections as it finds them,

[10] [1892] A.C. 150; 8 T.L.R. 434, H.L.

and if unexpected results emerge, the cure of them is for Parliament and not for us.

Another objection is that by section 170 (3) of the Act the special commissioners in cases where, as here, default has been made, are not required but merely empowered to assess. My answer to that is that nonetheless tax under section 177 is one required (by section 170 (2)) to be assessed by the special commisioners, and so answers to the exception found in section 36.

The strongest argument for the Crown, as it seems to me, is that in section 169, which deals with deductions where the lessee has paid his rent out of taxed income, there is an express prohibition against assessing the lessor. No such provision is to be found in section 170, and it is, therefore, argued that the formerly existing power to tax him is not taken away. The answer seems to me to be that neither rules 19 and 21 of 1918 nor their predecessors were concerned with assessment of these sums. In one case the lessee was only recouping himself tax already paid: in the other he was till 1927 left with a debt to the Crown. When the latter was converted into an assessed tax it was not perceived that the result might be that section 36 would be involved.

Danckwerts J. was obviously impressed by the taxpayer's argument and would apparently have accepted it but for the dicta of Finlay J. and Upjohn J. which he mentions. For myself I do not feel bound to accede to them, neither being necessary to the decision the judge was pronouncing.

DONOVAN L.J. This appeal raises afresh the question whether an assessment to income tax may validly be made upon the recipient of income in a case where the payer of the income should have deducted tax at source and accounted for it to the Revenue, but has failed to make any such deduction. The problem can be stated in that general way, because it affects all annual payments charged to tax under Schedule D, although the particular payment here involved is rent.

The National Coal Board is tenant of Hobart House in Westminster at a rent of some £96,000 per annum. Between June, 1955, and September, 1956, it made six quarterly payments of rent—about £24,000 each time—to the appellants, who are the landlords. This rent is rent under a long lease as defined in section 172 of the Income Tax Act, 1952. The facts are such that the National Coal Board should have deducted tax at source from these payments and handed the tax in due course over to the Revenue. For some reason the Coal Board failed to make any such deductions, and so assessments have been made upon the appellants direct as recipients of the income. The rent in question is charged to tax under Schedule D by section 177 of the Income Tax Act, 1952, and normally under Case VI of that Schedule. Section 177 (2) also enacts that such rent shall be subject to deduction of tax as if it were a royalty or a sum paid

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for the user of a patent. This means that the machinery of collection of tax at source, which is provided by sections 169 and 170 of the Act, becomes applicable. Under section 169, if the taxpayer has a fund of taxed profits out of which he pays the rent, he must pay tax himself on the whole fund without any deduction for the rent, though the rent is not really his income. When he comes to pay the rent, he may recoup himself by deducting tax at the current standard rate and retain it, and the landlord must allow the deduction. In this class of case, an assessment on the recipient in respect of the rent is expressly forbidden by the section. On the other hand, where, as in the present case, the rent is not paid out of a taxed fund, the Revenue clearly cannot get its tax on the rent in the manner just prescribed. Section 170, therefore, provides that in such a case the payer of the income *must* deduct tax at source at the standard rate and send an account of the payment and of the tax deducted to the Commissioners of Inland Revenue for the use of the special commissioners. The special commissioners are then to make an assessment in respect of the payment upon the payer: and upon such assessment he will be liable to pay over to the Revenue the tax so deducted. If the payer makes default in rendering such an account, or the special commissioners are not satisfied with the account he has delivered, then they may make an assessment upon him to the best of their judgment. They can also inflict a penalty if he neglects or refuses to deliver the account, which, up to 1960, was the sum of £100. In this class of case there is no express prohibition of an assessment direct upon the recipient of the income.

The history of section 169 goes back to 1803, when it appeared in the Income Tax Act of that year as section 208. In the Act of 1842 it was section 102. In the Consolidation Act of 1918 it became rule 19 of the General Rules applicable to All Schedules. Its wording has remained unchanged, in any radical sense, down to the present day. The history of section 170 begins, however, in 1888. Up to that time, the only way provided for getting tax on annual payments made out of untaxed funds was an assessment direct upon the recipient. But section 24 (3) of the Customs and Inland Revenue Act of 1888 introduced the system of collecting the tax at source in this case also. The payer was to deduct tax and to render an account to the Commissioners of Inland Revenue of the amount deducted. That sum was then to be a debt due from him to the Crown and recoverable as such. There was no provision for any *assessment* upon him.

In the Consolidating Act of 1918 section 24 (3) became rule 21 of the General Rules applicable to All Schedules. Its wording remained substantially unchanged until 1927. In that year this court decided the case of *In re Lang Propeller Co. Ltd.*[11] That company was being wound up, but before the winding up began it

[11] [1927] 1 Ch. 120.

had deducted tax under general rule 21 from mortgage interest but failed to hand it over to the Crown. The Crown proved in the liquidation as a creditor. Under the Companies Consolidation Act, 1908, then in force (section 209), the Crown was entitled to preferential payment in respect of assessed taxes. It claimed that this description applied to the tax which the company had deducted under general rule 21. This court, affirming Eve J. held that it did not, and that such tax could not be described as "an assessed tax." So the Crown got no preference for the debt. It then proceeded—if I may borrow the euphemism customary on these occasions—to "put the matter right." In the Finance Act, of the same year, section 26 was enacted requiring the payer of the income to render an account of the payment made out of untaxed funds, and of the tax deducted, and requiring the special commissioners to make an assessment upon him accordingly. In short, the system was introduced which exists today, and which has been reproduced without material alteration as section 170 in the Consolidating Act of 1952. In that way the tax deducted in such circumstances became an "assessed tax," and so the Revenue acquired that preference in respect of it in a winding up which it had unsuccessfully sought in the *Lang Propeller Co. Ltd.* case.[12]

It is, I think, important to bear in mind the reason for the amendment of general rule 21, inasmuch as the taxpayer is contending in the present case that it has had another and more far-reaching result. It is said on his behalf that the amendment also deprived the general commissioners of the power, which they admittedly had from 1803, to assess the recipient of the income directly in such cases. It had been decided long before 1927 that an assessment could validly be made upon the recipient of an annual payment made out of untaxed funds where no tax had been deducted at source. See *Glamorgan Quarter Sessions* v. *Wilson*,[13] which was decided in 1919. It has also been held that where the payer of the income omits to deduct the tax at source, he is still liable to account to the Crown for it. See *Lord Advocate* v. *Edinburgh Corporation*,[14] decided in 1905; *Rye & Eyre* v. *Inland Revenue Commissioners*,[15] decided by the House of Lords in 1935. And in these cases it was for one reason or another pointed out that general rules 19 and 21 were simply machinery for collecting tax. Finlay J. (as he then was) also said in the *Rye & Eyre* case,[15] that the change in rule 21 in 1927 was a change in the machinery of collection and no more. In 1953 Upjohn J. (as he then was) expressed the view in *Stokes* v. *Bennett*[16] that an assessment of tax could validly be made upon the recipient of untaxed income in a case where general rule 21 should have been operated but was not. But this expression of opinion was obiter.

[12] [1927] 1 Ch. 120.
[13] 5 T.C. 544.
[14] 1905, 7 S.C. 972.
[15] (1935) 19 T.C. 164, H.L.
[16] [1953] Ch. 566; 34 T.C. 337.

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In the present case both the special commissioners and Danckwerts J. have rejected the appellants' argument that since 1927 no assessment to tax in what I may call a general rule 21 case can be made upon the recipient of the income. After considering the authorities, the judge thought he should follow the decision in *Glamorgan Quarter Sessions* v. *Wilson* [17] and adopt the dictum of Upjohn J. in *Stokes* v. *Bennett*.[18]

The alteration in the law made in 1927 converting tax deducted under rule 21 into tax assessable by the special commissioners upon the payer could hardly, of itself, deprive the general commissioners of a different jurisdiction which they admittedly had before that date to make an assessment upon the payee. But it is argued that this result is brought about by the language of section 26 of the Act of 1927—now reproduced without material change in section 170 of the Act of 1952—when construed together with sections 6 and 36 of the Act of 1952, and also in the light of the general scheme of that Act. It is also contended that a number of anomalies, which would otherwise arise, are avoided by the appellants' construction. As to section 170 itself, the mandatory nature of the direction to the special commissioners is emphasised: "The Special Commissioners shall assess "and charge the payment." Then in section 6 of that Act appear these words: "All matters relating to the income tax "under Schedules A, B and D, so far as they are not directed by "this Act to be executed by any other Commissioners . . . shall "be executed, as heretofore, by the Commissioners for the general "purposes of the income tax. . . ." The assessment of the rent in the present case is a matter under Schedule D: and it is said that the effect of section 6 is to confine the jurisdiction to assess in cases like the present to the special commissioners. The words relied upon in section 36 are these: "Statements of profits or "gains under Schedule D shall, unless an assessment thereon is "required to be made by the Special Commissioners, be laid "before the Additional Commissioners." This again indicates, it is argued, that the special commissioners have exclusive jurisdiction to assess to tax the payments here in question: and that this conclusion is reinforced by what is said to be the general scheme of the Act to allot the duty of assessment of different kinds of income to different bodies of commissioners with no overlapping.

The payments which are assessed to tax under section 170 do, of course, become income in the hands of the recipient—which is why they are taxed. But in the context of the present problem it is I think both relevant and important to remember that what the special commissioners are in terms told to do in section 170 is to "assess and charge the payment," and to do so on the payer. With this in mind, and turning back to section 6, it is strictly true to say that an assessment upon the recipient in

[17] 5 T.C. 544. [18] [1953] Ch. 566.

respect of his receipt would not offend against the section, for such an assessment is not directed to be executed by commissioners other than the general commissioners.

In view of the stress laid upon section 36 I must deal with it in some greater detail. It is not a section which can properly be construed in isolation. It is one of a number of sections in Chapter II of the Act headed "Returns and Assessment," and in this chapter are found the provisions imposing an obligation on the taxpayer, who is in receipt of profits or gains, to make an income tax return, and a duty upon the general commissioners to make an assessment of those profits and gains to income tax. Thus, any person chargeable to income tax for any year of assessment is to give notice to that effect to the surveyor (section 28). If required to do so by notice, an individual must make a return of his total income for the preceding year (section 19): and also a return of the profits and gains arising to him for the current year estimated according to the provisions of the Act (section 20). The form of the return is to be such as the Commissioners of Inland Revenue shall prescribe, and in prescribing such forms those commissioners are to have regard to the desirability of limiting such returns to one per annum. In addition each such return is to contain a declaration by the person making it that it is truthful and comprehensive of all his profits and gains (section 25). A penalty is imposed for neglect or refusal to make such a return, which penalty, up to 1960, was £20 and treble tax (section 25). The returns of profits under Schedule D are to be laid before the additional commissioners, they are to consider them, and if satisfied with them, are to direct an assessment to be made in accordance with the statement. This is subject to the exception so much relied on by the appellants here "unless an "assessment thereon is required to be made by the Special "Commissioners" (section 36). Finally, a person chargeable under Schedule D may require that all the proceedings in order to have an assessment upon him under that schedule shall be taken before the special commissioners instead of before the additional commissioners (section 38).

It is, I think, quite clear that these sections, including section 36, are dealing with the annual statement of profits and gains according to a taxpayer and with the assessment to be made upon him in respect thereof. They are not dealing with the "accounts" of payments required from the payer of money under section 170, which "accounts" have to be made on each occasion of such a payment; for which "account" no form is prescribed and for default in rendering which a different penalty can be imposed. Nor are the sections in Chapter II dealing with assessments upon such a payer, but with assessments upon the person who has made a return of his profits and gains. It is, therefore, in my respectful opinion, fallacious to construe the words in section 36 "unless an assessment thereon is required to

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"be made by the Special Commissioners" as including a reference to the payments assessed to tax upon the payer under section 170. Those words refer to the various cases where the Act directs an assessment on profits or gains by the Special Commissioners, e.g., where a taxpayer makes an election to this effect under section 38, and (under section 430) to the income of foreign assurance companies with a head office in the United Kingdom in respect of the income of their life insurance funds, and so on.

With regard to anomalies, the example was given of mortgage interest from which tax had been deducted for some years and accounted for under section 170 until in one year no such tax was deducted. If the general commissioners then made an assessment direct upon the recipient, they would under Case III of Schedule D have to base the assessment on the income of the preceding year, and if that were less than the income of the current year, a different figure of income and a different amount of tax would be the result of such an assessment compared with the result of operating section 170. This indeed would be true, but such anomalies are not uncommon where, for one reason or another, the preceding year basis of computation is substituted for the actual year basis, or vice versa. I do not find the anomaly or the others which were suggested to be so startling as to compel the conclusion that the appellants' contentions here must be right.

I should briefly mention section 180 of the Act of 1952 which was said to support the argument. The section deals with the taxation of rents in respect of land not separately assessed and charged under Schedule A and in respect of easements: it enacts that these shall in certain cases be taxed under Schedule D and be subject to deduction of tax at source. Subsection (2) deals specifically with rents in respect of easements enjoyed in connection with electric wires and cables: and proviso (b) to the subsection enacts that any payment of such rent shall, unless tax is assessed thereon under section 170, be chargeable to tax under Case III of Schedule D. It is said that this direction would be otiose if the rent were always so chargeable under the general provisions of the Act. In my opinion this is incorrect. The rents to which proviso (b) is referring are not the kind of annual payment normally falling within the charging provisions of Case III of Schedule D. But the proviso specially makes these provisions applicable, and so specifies the head of charge under which such rents are, if need be, to be assessed. I do not think much can be spelled out of this circumstance either way: but it is interesting to observe that the very anomaly the court is asked to avoid by adopting the appellants' argument is here introduced by the legislature itself. For to charge these rents under Case III will impart the preceding year basis of liability as opposed to the actual year basis which is always a feature of taxation at source under section 170.

The Crown's argument begins with the first section of the Act

of 1952 which provides that whenever any Act enacts that income tax is to be charged for any year, it is to be so charged at the prescribed rates, and in accordance with the Schedules A, B, C, D and E. Section 6 of the same Act, part of which I have already read, then enacts that the general commissioners are to execute all matters relating to income tax under Schedules A, B and D in so far as they are not directed by the Act to be executed by other commissioners. Section 122 of the Act provides that under Schedule D tax shall be charged, inter alia, in respect of profits and gains arising in the United Kingdom to any person from any kind of property here. And section 148 provides that tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income coming within that schedule. The rent in question in this case is charged to tax under Schedule D by virtue of section 177 (2) of the Act and the appellants are the persons receiving it. They must, therefore, if required, make a return of such income and the additional commissioners must then assess it to income tax under the provisions of the 1952 Act which I have already cited.

There would thus seem to be complete authority for the additional commissioners to make the assessments they have made upon the appellants. It is admitted that such authority existed before the Finance Act, 1927, back at least to 1842, in fact it goes back to 1803. The contention that this jurisdiction was taken away by the amendments to general rule 21 made in 1927 rests upon the arguments which I have already outlined. I can find nothing in them to justify the conclusion that the granting of a new jurisdiction to the special commissioners to collect tax at source in a particular way destroyed the jurisdiction of the general commissioners to collect it in some other way if need be. Had such a result been intended, then I think that an express prohibition against an assessment on the recipient would have been introduced into general rule 21 of the same kind as has always been contained in general rule 19 and its predecessors. There is sound reason for not doing this and for preserving the jurisdiction of the general commissioners. For there may be cases where for one reason or another an assessment on the payer cannot be made or made effectively. He may be elusive, or he may be a person not amenable to section 170, e.g., the Crown itself or a foreign ambassador or a resident High Commissioner.

The appellants agree that in such a case the payee would be directly assessable, as indeed Lord Simonds appears to indicate in *Whitworth Park Colliery Co. Ltd.* (*in Liquidation*) v. *Inland Revenue Commissioners.*[19] In other words, it is conceded that where section 170 cannot be operated because the payer is not amenable to its provisions, the power of the general commissioners to assess the payee still endures. This seems to me to increase the difficulties of the argument, for one would certainly expect a

[19] [1959] 3 W.L.R. 854; [1959] 3 All E.R. 703.

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partial withdrawal of the general commissioners' jurisdiction to be by express enactment.

In my opinion, section 26 of the Finance Act, 1927, did not have the effect which the appellants here claim. The power and duty of the general commissioners to make assessments upon annual payments charged with tax under Schedule D where such payments are made out of profits and gains not brought into charge to tax, still remains. This does not involve liability to double taxation, once by deduction at source and again by assessment upon the same income. It is true that there is nothing in the Act expressly prohibiting such an injustice but the prohibition is implicit in its provisions, as the courts have frequently said. See, for example, Lord Davey in *London County Council* v. *Attorney-General.*[20]

I think the special commissioners and the judge came to the right conclusion in this case and that this appeal fails.

Appeal dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Stanley Attenborough & Co.; Solicitor of Inland Revenue.*

[20] [1901] A.C. 26, 43; 17 T.L.R. 131; 4 T.C. 265, H.L.

[COURT OF APPEAL.]

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Revenue—Income tax—Employment—Perquisite—Valuation—Cost or value in hands of recipient—Gift from employer of new suit of clothes—Whether employee taxable on second-hand value only of suit —Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *r.* 1.

In 1955 the directors of a company decided to offer as a gift to each of their employees a suit, overcoat or raincoat made to the company's order by a named tailor as a Christmas present. They requested the tailor to give each employee who accepted the offer a fitting and invited each such employee to call at a branch of the tailor and be fitted with a suit, overcoat or raincoat as he chose up to the value of £15. The bills were to be sent to the company. The taxpayer, one of the employees, called at a branch of the tailor, was accordingly fitted with a suit, and in due course received it. His suit cost £14 15s., which sum the company paid. A sum of £14 15s. in respect of the suit was included in an assessment made on the employee under Schedule E of the Income Tax Act, 1952,[1] for the

[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall "be annually charged on every per- "son having or exercising an office "or employment of profit mentioned "in Schedule E, or to whom any "annuity, pension or stipend charge- "able under that Schedule is payable, "in respect of all salaries, fees, "wages, perquisites or profits what- "soever therefrom for the year of "assessment. . . ."

year 1955 to 1956, as part of the "perquisites or profits" arising from his employment. The taxpayer appealed to the special commissioners, who held that the amount to be included was not £14 15s., but the value of the suit in his hands, on the footing that he could immediately have sold it only as second-hand, which value was agreed at £5:—

Held, that the taxpayer never acquired any rights either against his employers or against the tailor supplying the suit, and that this was not a case where the taxpayer was entitled to call on his employers to pay a sum of money on his behalf. Until the taxpayer received his suit, he got nothing, and when he received it, the thing he received expressed in money's worth was the value of the suit—viz., what he could get for it if he sold it as soon as he received it (post, pp. 109, 111)—and it was on that value (£5) that he was taxable under Schedule E.

Nicholl v. *Austin* (1935) 19 T.C. 531 and *Hartland* v. *Diggines* [1926] A.C. 289; 42 T.L.R. 262, H.L. distinguished.

Decision of Danckwerts J. [1960] Ch. 437; [1960] 2 W.L.R. 515; [1960] 1 All E.R. 650 affirmed.

APPEAL from Danckwerts J.[2]

The taxpayer, S. A. Rogerson, appealed to the special commissioners against an assessment made on him under Schedule E of the Income Tax Act, 1952, for the year 1955–56 in the sum of £1,035 on the ground that a sum of £14 15s., paid by his employers for a suit bought by them as a present to him and supplied to him by Montague Burton Ltd., was wrongly included in computing the amount of his salary, fees, wages, perquisites or profits within the meaning of rule 1 of Schedule 9 to the Act.

The following were among the facts found by the special commissioners: The taxpayer was for the whole of the material year an employee of a company, the Anglo-Oriental and General Investment Trust Ltd. His duties were almost exclusively secretarial and were performed solely at the head office of the company at 55–61, Moorgate, E.C.2, and he was remunerated for his employment by a salary and, at the discretion of the directors, bonuses based on salary. The bonuses were usually paid to him in June and before Christmas in each year. In the material year, 1955–56, he received his usual bonuses and there was no issue before the special commissioners as to his liability to be assessed under rule 1 of Schedule 9 to the Act in respect of that salary and those bonuses.

In 1955 the board of directors of Anglo-Oriental decided to give to all its male staff, other than executives, a Christmas present up to the value of £15 of clothes, suitable for wear at the office, drawn from a choice from or a combination of a suit, overcoat or raincoat; the clothes to be purchased by Anglo-Oriental from Montague Burton Ltd. (hereinafter called "the tailors"). A letter to this effect was sent by Anglo-Oriental to the tailors on November 7, 1955, and the taxpayer's name was on a list of 22 employees whose names were supplied to the tailors. The letter constituted a formal order to the tailors to supply the goods on

[2] [1960] Ch. 437; [1960] 2 W.L.R. 515; [1960] 1 All E.R. 650.

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behalf of the individuals named in the list and contained the following instructions: "Please supply these with suits, overcoats "or raincoats as above and send us your account in due course. "We stress that the bill will be paid by this company and no cash "payment either way can be made between £15 and the actual "cost of the clothes. We have advised the staff to call on you "on or after Thursday, November 10, 1955, to choose a cloth and "to be measured etc., and trust that this will be convenient to "you." On the same date, namely, November 7, 1955, a letter was sent to the taxpayer in similar terms to the letter sent to the tailors. The last paragraph was as follows: "Messrs. Montague "Burton will provide a fitting if this is required and asked for. "They will also make alterations if required. Both fittings and "alterations will take additional time." The tailors' account for goods supplied to 21 employees of Anglo-Oriental (one name having been removed after November 7, 1955), was rendered to Anglo-Oriental on February 29, 1956, and included goods supplied to the taxpayer to an amount of £14 15s. The account was paid by Anglo-Oriental on the same date. On receipt of the letter from Anglo-Oriental the taxpayer called at the tailors' Cheapside premises and was in due course supplied with a suit. This was his own choice and he could have selected an overcoat or raincoat instead of a suit. Thereafter, he continued as previously to buy suits for himself from another tailor and paid more than £14 15s. for them. On average, he wore the suit made by the tailors once or twice a week at the office on ordinary working days. It was his usual custom when he returned home to change his suit, whether supplied by the tailors or otherwise, and to wear less formal clothing. He anticipated, however, that the suit supplied to him by the tailors would be discarded sooner than his other suits because, owing to its lower quality and cut, it would become shabby more quickly. There was no condition in writing or orally as to a refund to Anglo-Oriental if he left their employment before the suit was worn out. There was no evidence that Anglo-Oriental had forbidden the taxpayer to sell the suit, but he entertained no doubt that they would have been displeased if he had done so: in any event he had made no such attempt. Shortly after the suits were supplied by the tailors to the taxpayer and his other colleagues, one of the directors or other officials of Anglo-Oriental made a point of inspecting them.

It was contended for the Crown that the taxpayer received in the year 1955–56, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was money's worth, namely a suit of clothes; that, on the evidence, that advantage of money's worth fell to be measured by the price paid by Anglo-Oriental to the tailors for the suit, that was, the sum of £14 15s.; that that sum was correctly included in computing the amount of the salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning

of rule 1, Schedule 9 to the Income Tax Act, 1952; and that the assessment for the year 1955–56 ought to be confirmed.

It was contended for the taxpayer that, on the evidence, the value of the suit was not salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning of rule 1 of Schedule 9 to the Income Tax Act, 1952; that the suit was not an advantage received by him by virtue of his employment which was capable of being turned into money, because his employers would have been displeased if he had sold it; alternatively that, if the value of the suit was an advantage received by him by virtue of his employment which was capable of being turned into money, the value was not the price paid by Anglo-Oriental to the tailors, namely, £14 15s., but the sum which he could have raised by the sale of the suit in November, 1955, and that that sum was very small; and that no sum, or, in the alternative, a very small sum, should be included in respect of the sum in computing the amount of his emoluments from his employment for the year 1955–56.

The special commissioners considered that in the year 1955–56 the taxpayer received, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was capable of being turned into money, but were, however, unable to accept the Crown's contention that that advantage was the price paid to Montague Burton for the suit, and they held that the money's worth of the suit must be valued by reference to the market value when it became the appellant's property, such value being the second-hand value in November, 1955. No evidence was before the commissioners as to the second-hand value of the suit and the case was set down for a further hearing.

Subsequently, it was reported to the special commissioners that it had been agreed between the Crown and the taxpayer that the taxpayer could have sold the suit unworn in November, 1955, for the sum of £5, and, accordingly, the special commissioners reduced the assessment to £1,027.

Danckwerts J. affirmed the decision of the special commissioners holding that the benefit which the taxpayer received was the value of the suit in his hands and that value, £5, was the amount which should be included in his taxable income for the purposes of Schedule E.

The Crown appealed.

Hilary Magnus Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown.

F. Heyworth Talbot Q.C. and *C. N. Beattie* for the taxpayer.

The following cases were referred to in argument in addition to those referred to in the judgments: *Abbott* v. *Philbin*[3]; *Weight* v. *Salmon*[4]; *Lindus and Hortin* v. *Inland Revenue Commissioners*[5]; *Ede* v. *Wilson and Cornwall*[6]; *Condy* v. *Gordon*.[7]

[3] [1960] Ch. 27; [1959] 3 W.L.R. 739; [1959] 3 All E.R. 590, C.A.
[4] (1934) 19 T.C. 174.
[5] (1933) 17 T.C. 442.
[6] (1945) 26 T.C. 381; [1945] 1 All E.R. 367.
[7] (1925) 9 T.C. 304.

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LORD EVERSHED M.R. The point involved in this appeal falls indeed within the narrowest compass; but it is, or appears to be, novel in the sense that no strictly comparable case seems to have come before the court before.

Mr. Rogerson, the respondent, at the relevant date in 1955–56 was in the service of a company known as the Anglo-Oriental & General Investment Trust Limited. As the season of goodwill approached in the year 1955 the company of which he was the servant wrote to him, and to some twenty or twenty-one fellow servants, a letter which, so far as material, was as follows: "The Board have decided to make a Christmas present to all "male members of the staff of clothes suitable for wear at the "office up to the value of £15. Arrangements have been made "with Messrs. Montague Burton Ltd., 112, Cheapside, E.C.2, "for you to be able to acquire from them a choice from or "combination of the following: Suit, overcoat, raincoat. The "bill will be sent to the Trust, and it is stressed that no cash "payment either way can be made between £15 and the actual "cost of the goods.

"Please take this letter with you when you visit Messrs. "Montague Burton, which can be done on or after Thursday, "November 10, 1955. Messrs. Montague Burton will provide a "fitting if this is required and asked for. They will also make "alterations if required. Both fittings and alterations will take "additional time."

On the same date the company wrote to Montague Burton Ltd. of 112, Cheapside, and the letter is as follows: "We write "with reference to the visit of Mr. W. Peter Spens on November "4, 1955. This company, a subsidiary of London Tin Corporation "Ltd., has decided to give its male staff a Christmas present "(purchased from Messrs. Montague Burton Ltd.) up to the "value of £15 of clothes suitable for wear at the office drawn "from a choice from or combination of a suit, overcoat or rain-"coat. We enclose a copy of a letter which we will write to "each male member of the staff whose names are given below," and then there follows the list of names. "Please supply them "with suits, overcoats or raincoats as above, and send us your "account in due course. We stress that the bill will be paid by "this company, and no cash payment either way can be made "between £15 and the actual cost of the clothes. We have "advised the staff to call on you on or after Thursday, November "10, 1955," etc.

The only other document to which I need refer is a receipt in favour of the company in February of the following year for a total sum of £311 12s. 6d. which was the cost of the suits, overcoats or raincoats which had been supplied to the various members of the company's staff.

It has been necessary to read in full those documents because in the end much turns upon the exact nature of what was done. Mr. Rogerson availed himself of the generosity of his employers,

and acquired clothing from Montague Burton for which the bill was delivered to the company, the price in his case being not quite £15, but £14 15s.

The claim of the Crown has been that that figure, £14 15s., is to be treated as part of the taxable income of the taxpayer for the tax year in question. It is said that it falls within the terms of paragraph 1 of the Ninth Schedule to the Income Tax Act, 1952: "Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E or to whom any annuity, pension or "stipend chargeable under that Schedule is payable, in respect "of all salaries, fees, wages, perquisites or profits whatsoever "therefrom for the year of assessment. . . ." It is the Crown's case that the £14 15s. must be treated as a perquisite or profit from the employment for the year of assessment 1955–56.

On behalf of the taxpayer it was said that any perquisite or profit was limited in this case to the value expressed in money of the thing which he got, namely, the clothing. For the purposes of this case, the value of the clothing, treated, of course, as second-hand the moment it had been delivered, has been agreed at £5. Let me say at once that this involves no reflection upon Messrs. Montague Burton Ltd., who are not before the court; and it should not, of course, be assumed that goods which they supply are worth only one-third of the price which they charge. But it is, of course, notorious that, apart from purchase tax, the value of clothing is very much reduced the moment it can be called second-hand. In any case, the value is one which has been mutually accepted and agreed, and nothing turns upon it. It may have been agreed at a low figure to discourage any cross-appeal by the taxpayer. If so, it has achieved its purpose, for it is now accepted on his behalf that he is rightly taxed, as the judge in the court below held, upon the money value of what he got.

I can now state again the point: What must be regarded for the purpose of the paragraph in the Ninth Schedule of the Act as the perquisite or profit from the taxpayer's employment? The case for the Crown, which Mr. Magnus presented with clarity and attraction, can I think be summarised in the way in which he put it at the end of his argument: "I say" (and I read from my note of the argument) "that where the employee accepts an offer "from his employer to spend money on his behalf, then he is "chargeable on the money spent, and not on the value of the "thing bought for him."

If that is a correct statement of the true nature of this transaction, it may be that the conclusion follows. Mr. Magnus referred to a few cases—gratefully, may I say, we were not given a great many to read—one of which is the case of *Nicholl* v. *Austin* [1] before Finlay J. In that case a director of a company

[1] (1935) 19 T.C. 531.

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was told that, in order to do justice to his standing in the company, he should continue to live at a place called Debden Hall, but his employer, as part of the bargain of service, promised to pay the charges incurred for its use, such as rates and telephone charges, and also the cost of maintaining the gardens. In that case it was held that what Mr. Austin had got from the arrangement in money's worth was the sums which were paid for rates and telephone charges, and also the sums paid for the gardener's wages and the like as regards the gardens.

In the case of *Hartland* v. *Diggines*,[2] an employing company had agreed to pay the income tax on its employee's salary; and there the House of Lords likewise held that the tax so paid must be treated as within the scope of the paragraph of the Schedule. Mr. Magnus's argument was that when this case is viewed according to his argument (as I have stated it) the same reasoning would compel a similiar answer to that given in *Nicholl* v. *Austin*[3] and *Hartland* v. *Diggines*.[4]

I have said that the point is a very short one, and I think it does not lend itself to elaboration. I reject the premise involved in Mr. Magnus's formulation. It is no doubt true in a sense to say that the letter of November 7 was an offer, and one which the person to whom it was addressed was not bound to accept. Indeed, anyone who proposes to give a present to somebody else may find that the somebody else says: "I will not have it." But in the submission which Mr. Magnus has formulated, the word "offer," I think, is used in a sense in which it would be used in a legal context. The suggestion is that here was an offer which, on acceptance, created some right; and it is at that point that I venture to part company with Mr. Magnus.

It seems to me that the taxpayer never acquired any rights against anybody. He received this letter; armed with it he went to Messrs. Montague Burton's establishment, and Montague Burton expressed themselves as willing to supply him with the clothes he ordered. When the clothes were delivered, then (and then only) Mr. Rogerson got something which was his own. He acquired at that point of time a suit, albeit he had no right against anyone to get the suit. Nor had he, as I conceive, any right against the company, though as a matter of ordinary decency as between master and servant he could no doubt rely upon the company doing what they said they would do. But this was not a case in which he was entitled to call upon the company to pay some sum of money on his behalf as that phrase is ordinarily understood.

If I have incurred a debt—for example, my debt due for income tax comparable to *Hartland* v. *Diggines*[4]—and my employer chooses to discharge that debt for me, then it is no doubt true that what I have received in money or money's worth is the

[2] [1926] A.C. 289; 42 T.L.R. 262, H.L.

[3] 19 T.C. 531.

[4] [1926] A.C. 289.

equivalent of the debt; and the sum of money is, therefore, properly brought within the scope of the charge. But as I think in this case, and in accordance with Mr. Heyworth Talbot's argument, what the taxpayer got—what the company intended to give him, what the letter to him and Montague Burton said would be done, and was done—was a present of a suit. Until he got it, he got nothing; and when he got it, the thing which came in (which was his income expressed in money's worth) was the value of the suit.

As I have said, I do not propose to elaborate it because I think it would be of no service either in this, or in other cases. I agree, therefore, with Danckwerts J. when he said that on grounds which I have also tried to express, the case is distinguishable from *Nicholl* v. *Austin*.[5] So far as the rates and telephone charges in that case were concerned, the result was on all fours with the decision in *Hartland* v. *Diggines*,[6] where the employer discharged a liability or an obligation of the servant. Strictly, that might not be true as regards the gardens. The facts in regard to that case are not known. We do not know who in fact employed the gardener. But, as the judge pointed out, there is no doubt that Mr. Austin got the benefit; and there may well be no other way of assessing the value than by reference to what was in truth paid for the upkeep of the garden. This case, as I think, is different. We are here concerned with the present of a suit; that is the subject-matter; and the value of the suit in money seems to me to be the amount for which the taxpayer is properly taxable.

I would, therefore, dismiss the appeal.

HARMAN L.J. I agree. The taxpayer here does not dispute his liability. He agrees that he has received from his employer a perquisite, or something of that nature, which made him chargeable under Schedule E. The only controversy was whether he was to pay tax on the cost of that perquisite to his employer, or the value of it to him, and it appears to me that this perquisite is a taxable subject-matter because it is money's worth. It is money's worth because it can be turned into money, and when turned into money the taxable subject-matter is the value received. I cannot myself see how it is connected directly with the cost to the employer. It is quite true that in *Hartland* v. *Diggines*,[6] for instance, the employer made certain payments of money for the employee's benefit. Well, the only way in which you can make a valuation of money is by money. It is not like a chattel, which is the case here, and therefore there was no difference in the standard of what was paid by the employer, and the advantage received by the employee.

Here there is a difference. It is admitted that as a conventional matter the difference can be taken as that between

[5] 19 T.C. 531. [6] [1926] A.C. 289.

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£14 15s. and £5. Income tax is a tax levied on income. The taxpayer has to pay on what he gets. Here he has got a suit. He can realise it only for £5. The advantage to him is, therefore, £5. The detriment to his employer has been considerably more, but that seems to me to be irrelevant, and I do not see that it makes any difference that no property in this suit ever passed to the employer.

I think, in Lord Watson's words in *Tennant* v. *Smith*,[7] that it is a benefit consisting in "something acquired which the acquirer "becomes possesed of and can dispose of to his advantage—in "other words, money, or that which can be turned to pecuniary "account." This can be realised in cash, and it is that realisable quality which is the measure of the taxpayer's liability.

I would therefore dismiss the appeal.

DONOVAN L.J. I agree, and I add a few words only because of the novelty of the point.

The case wears an aspect of triviality which is deceptive. Tax on £15 alone is involved, but the proposition on which the claim is based is of much wider significance, and it will look very different when applied to other cases which can easily be foreseen, and some of which were referred to during the argument.

The proposition was stated thus: Where an employer offers to spend money for an employee as a reward for service; and that offer is accepted, the employee is liable to be taxed on the money so spent, and not on the thing which the money provides for him. A good many qualifications would need to be added to that proposition to make it true. It looks true in cases like *Hartland* v. *Diggines*[8] and *Nicholl* v. *Austin*,[9] where money liabilities of the employed officers were discharged by the employer. But what the officers were really taxed upon was the money's worth of the immunity they were thus given from their own liabilities. No valuation of that money's worth was required, it was obviously of the same value as the liability which had been discharged.

In the present case the employee never became liable to pay the £14 15s. to Messrs. Montague Burton. Between him and them there was no privity of contract at all; and when the employers paid this sum, they discharged their own liability, and nobody else's.

On what principle is this payment nevertheless to be treated as the respondent's income? To that question, I think, no satisfactory answer is or can be given. At first the Crown suggested that it was the principle underlying certain surtax cases where taxed income had been applied under a trust for the benefit of the beneficiaries; but the court in those cases explained that once the trustees so applied the income, that income itself became the beneficiaries'; see, for example, the case of *Sutton* v. *Inland*

[7] [1892] A.C. 150, 159; 8 T.L.R. 434, H.L.

[8] [1926] A.C. 289.

[9] 19 T.C. 931.

Revenue Commissioners.[10] In the end the Crown conceded (I think rightly) that no true analogy could be drawn between that class of case and the present.

That being so, I can discover no test which yields the result that the payment by the employer to Messrs. Montague Burton in the circumstances of this case is the income of the employee.

In that situation one must get back to what has always, so far as I know, been accepted as the basis of liability under Schedule E, namely, that liability extends to the profits or gains arising or accruing to the holder of the office or employment as such, whether those profits take the form of money, or money's worth. No money arose or accrued to the respondent here from this transaction. Money's worth did, in the shape of the suit. The suit (and the suit alone) answers the description of profit accruing to the employee from his employment. On that basis it should be assessed to income tax at its money value in the taxpayer's hands, that is to say, what he could get for it if he sold it as soon as he received it. It is agreed between the parties that this is the sum of £5; and I therefore also think that the special commissioners and Danckwerts J. came to the right conclusion in this case, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Slaughter & May.*

B. A. B.

[10] (1929) 14 T.C. 662; 45 T.L.R. 565, C.A.

[COURT OF APPEAL.]

C. A.
1960
Nov. 29, 30; *Dec.* 6.
Sellers, Pearce and Devlin L.JJ.

ATTORNEY-GENERAL AND ANOTHER *v.* ST. IVES RURAL DISTRICT COUNCIL AND ANOTHER.

[1958 A. No. 122.]

Land Drainage—Maintenance—Liability for repair and maintenance of drains—Whether responsibility of rural district council or county council—Local Government Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 30 (1).

Land farmed by the plaintiff had from time to time been seriously flooded partly as a result of the non-repair of two drains which ran adjacent to and through the land. By an award under the Enclosure Act, 1800, the drains were maintainable by the surveyor of the highways of the parish; subsequently these duties were transferred to the local highway board and by the Local Government Act, 1894, they were transferred to the rural district council. The question was whether the responsibility for maintaining and repairing the drains now lay on the county council

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as highway authority by virtue of section 30 (1) of the Local Government Act, 1929,[1] and not as hitherto on the rural district council:—

Held, that on the true construction of section 30 (1), the rural district council retained functions inherited from the surveyor of highways unless they were "functions with respect to highways," and the question whether a function was a function "with respect to "highways" had to be answered as a matter of fact by contemporary consideration of the land itself and not by consideration of the award under the Enclosure Act, 1800.

Judgment of Salmon J. [1960] 1 Q.B. 312; [1959] 3 W.L.R. 373; [1959] 3 All E.R. 371 affirmed.

APPEAL from Salmon J.

The plaintiff, Thomas Brownlee Paisley, was a farmer who farmed land in the parish of Holywell-cum-Needingworth in the county of Huntingdon. Two drains known as Parsons Drove and Heath Drain ran adjacent to and passed through the plaintiff's land. These drains were originally natural watercourses. They were small tributaries of the Great Ouse and the natural drains for the land on each side of them.

No work had been one on these drains since 1947. At the date of the issue of the writ the drains had for years been seriously choked, overgrown and silted and were generally in a very bad condition. The plaintiff's land had from time to time been seriously flooded partly as a result of the non-repair of the drains. This flooding had interfered with his farming activities and caused him damage.

The plaintiff brought this action claiming (1) a declaration that the first defendants, St. Ives Rural District Council, alternatively the second defendants, Huntingdon County Council, were bound in law to maintain the drains and keep them in repair; and (2) damages against one or other of the defendants. There was joined to this claim a claim by Her Majesty's Attorney-General, on the relation of the plaintiff, for a declaration in the same terms as that claimed by the plaintiff personally. It was common ground that the duty to keep the drains in proper repair lay on one or other of the defendants.

Salmon J. held, inter alia, that the drains were part of the land drainage scheme, and the function of maintaining and repairing them was not a function with respect to highways within the meaning of the proviso to section 30 (1) of the Act of 1929; accordingly, by that section the duty to maintain and repair the drains was not transferred to the county council but was reserved to the rural district council.

The first defendants appealed.

C. E. Scholefield Q.C. and *G. J. Ponsonby* for the first defendants.

J. P. Widgery Q.C. and *A. P. Fletcher* for the second defendants.

Arthur L. Figgis for the plaintiff.

The case cited in argument is referred to in the judgment.

Cur. adv. vult.

Dec. 6. PEARCE L.J. read the judgment of the court. The St. Ives Rural District Council appeal against a declaration that they are now the authority bound in law to maintain and keep in repair two drains, Parsons Drove and Heath Drain, in the parish of Holywell in Huntingdon. They contend that the liability lies not on them but on their co-defendants, the Huntingdon County Council, by virtue of the Local Government Act, 1929, s. 30 (1).[1]

An award of the commissioners under the Enclosure Act, 1800, ordered that these drains "shall be for ever hereafter main-"tained and kept in repair . . . by and at the expense of the "Surveyor of the Highways for the time being out of a rate to "be from time to time laid by him on all occupiers of lands and "grounds within the parish of Holywell-with-Needingworth "according to the annual value set by us on such lands and "grounds."

By the Highway Act, 1862, s. 11, the duties of surveyors of highways were transferred to highway boards. By the Local Government Act, 1894, s. 25, highway boards were abolished and their duties were transferred to rural district councils, who became the successors of the rural sanitary authority and highway authority.

It is agreed that thus the St. Ives Rural District Council inherited the duty to repair and maintain these drains. The point in dispute is whether that duty still lies on them or was transferred from them to the Huntingdon County Council by the Local Government Act, 1929, s. 30 (1). [His Lordship read section 30 (1) of the Local Government Act, 1929, and continued:]

The judge held that the subsection apart from the proviso would clearly transfer the liability in respect of these drains to the Huntingdon County Council. For the maintenance of these drains was one of such functions under the Highway Acts, 1835 to 1885, as were exercisable by the rural district council who by virtue of the Act of 1894 became the successor of the highway board.

[1] Local Government Act, 1929, s. 30 (1): "As from the appointed "day, every county council shall be "the highway authority as respects "such part of the county as is for "the time being comprised in any "rural district and as respects the "highways therein, and as such shall "have all such functions under the "Highway Acts, 1835 to 1885, as "were exercisable by rural district "councils who by virtue of the Local "Government Act, 1894, became "successors of highway boards, and "rural district councils shall cease "to be highway authorities: Pro-"vided that nothing in this section "shall affect the functions of rural "district councils under the Local "Government Act, 1894, as respects "rights of way and encroachments "on roadside wastes, or any func-"tions not being functions with "respect to highways exercisable at "the appointed day by rural district "councils as successors to surveyors "of highways or highway boards."

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It is agreed that the judge was right in so holding. The judge then went on to hold that the proviso prevented the transfer to the county council of the duty to maintain these particular drains, since it retained to the rural district council "any functions not "being functions with respect to highways" and on the particular facts these drains were not functions with respect to highways.

In our judgment, on the true construction of section 30 (1) with its proviso the rural district council retains functions inherited from the surveyor of highways unless they are "functions with "respect to highways." The difficulty lies in deciding whether the maintenance of these or any other particular drains are "functions with respect to highways," and that point has, we are told, given rise to doubts and problems in many cases.

Mr. Scholefield traced the history of roads from early days and his careful argument may be summarised thus. From the days of Philip and Mary (2 & 3, c. 8), when statutory labour was introduced and local elected surveyors of highways were made responsible, there was constant difficulty in maintaining highways. Later a rate became leviable to help the surveyor to achieve maintenance for which statutory labour was inadequate. And always, especially when the condition of the roads was elementary, water was an enemy to maintenance. It was the privilege as well as the duty of the surveyor to deal with drainage so as to enable him to prevent flooding and accumulations of water which would disintegrate the roads. (See *per* Byrne J. in *Attorney-General* v. *Tamworth Rural District Council.*[1]) The commissioners under the Enclosure Act, 1800, must have had that in mind, Mr. Scholefield argues, when they laid the rate in respect of these drains, not on the riparian owners, but on all the inhabitants of the parish since all were concerned in the maintenance of the highways. It is to their award, therefore, that the court should look in deciding whether the maintenance of these particular drains is "a function with respect to highways."

We cannot accede to that argument. There is no sufficient evidence that the levying of a universal rate was due to the commissioners' belief that it was by virtue of its effect on a highway that maintenance of a particular drain was a matter of concern to all. Nor do we think that the Local Government Act, 1929, when it allocated functions on the appointed day, had any intention of taking century-old awards (or opinions) as the test. The question whether a function was a function with respecct to "highways" must, in our judgment, have been intended to be answered as a matter of fact by a contemporary consideration of the land itself. It would be a question for the surveyor, not the historian. The judge propounded the test which he applied to the particular facts in this case as follows[2]: "There are, of "course, road drains and gullies whose main, if not whose only, "function is to drain the highway. The repair of such drains

[1] (1901) 85 L.T. 190.

[2] [1960] 1 Q.B. 312, 321.

"and gullies is, in my judgment, clearly a function with respect "to highways. There are other drains and ditches whose func- "tion is solely to drain agricultural land, and which cannot in "any way affect highways. The repair of such drains and "ditches is equally clearly not a function with respect to high- "ways. Then there are drains and ditches that affect both "agricultural land and highways. Whether or not the function "of maintaining and repairing these drains and ditches can "properly be described as a function with respect to highways "depends, in my view, on the degree to which the drains can be "truly regarded as land drainage or road drainage."

It is not disputed that the decision of fact is right, if the test which the judge applied is correct. In our judgment it is correct and clear, and we do not seek to improve on it.

Applying that test it should be possible for surveyors of the bodies concerned to agree without serious difficulty what are the boundaries of their respective spheres of duty.

The appeal will be dismissed.

Appeal dismissed with costs.

Solicitors: *John J. McIntyre for Town Clerk, St. Ives; Sharpe Pritchard & Co. for A. Case Aylward, Huntingdon; Fisher, Dowson & Wasbrough for Francis & Co., Cambridge.*

I. G. R. M.

[CHANCERY DIVISION.]

In re WYKES, DECD.

RIDDINGTON *v.* SPENCER AND OTHERS.
[1959 W. No. 2006.]

1960
Dec. 7, 8, 21.

Buckley J.

Charity—Imperfect trust provision—No exclusively charitable object—"Benevolent or welfare fund"—Bequest of fund as benevolent or welfare fund or for welfare purposes for benefit of employees of company—Whether validated by Charitable Trusts (Validation) Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 58), *ss.* 1 (1), 2 (1).

Statute—Construction—Title of Act—Long title—Irrelevant to construction of unambiguous section—Charitable Trusts (Validation) Act, 1954, *s.* 1 (1) (post, p. 123).

By section 1 (1) of the Charitable Trusts (Validation) Act, 1954, "In this Act, 'imperfect trust provision' means any provision "declaring the objects for which property is to be held or applied, "and so describing those objects that, consistently with the terms "of the provision, the property could be used exclusively for charit- "able purposes, but could nevertheless be used for purposes which "are not charitable."

By his will, a testator, who died in 1947, left his residuary estate to his executors on trust to apply the income thereof for

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his wife's upkeep and benefit during her life, and directed that, upon her decease, his residuary estate, after payment of certain legacies, should be divided into three parts, one of which parts was bequeathed to the directors of a company "to be used at their "discretion as a benevolent or welfare fund or for welfare purposes "for the sole benefit of the past, present and future employees of "the company." The testator's wife died in 1954. It was conceded that, apart from the Charitable Trusts (Validation) Act, 1954, that gift was invalid:—

Held, that since the whole of the share in the testator's residuary estate bequeathed to the directors of the company could, consistently with the terms of the bequest, be applied for a charitable purpose, namely, the relief of poverty among the employees and ex-employees of the company, notwithstanding that it could also be used exclusively for purposes which were not charitable, the bequest constituted an "imperfect trust provision" within the meaning of section 1 (1) of the Act, even though it did not include by express reference some charitable purpose as well as other non-charitable purposes; and that the bequest was, therefore, validated by the Act.

In re Gillingham Bus Disaster Fund [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 2 All E.R. 749; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1859] 2 All E.R. 749, C.A. and *In re Harpur's Will Trusts* [1960] 3 W.L.R. 607; [1960] 3 All E.R. 237 considered.

Adjourned summons.

By his will, dated March 10, 1944, the testator, Edward Wykes, appointed his wife, Sarah Ann Wykes, Cyril Robert Riddington and Harold William Waterson to be executors and trustees thereof and, having given certain legacies, left the residue of his estate on trust to his executors, the income thereof to be applied for his wife's upkeep and benefit as she might desire during her lifetime. Upon the decease of his wife, after giving a number of legacies, he directed, by clause 9, that the residue of his estate should be sold and the proceeds divided into three equal parts to be disposed of as follows: (a) one part to the trustees of the Church of Christ then meeting at Andrewes Street, Leicester, upon certain trusts; (b) one part to the Leicester District Committee of the Churches of Christ upon certain trusts and (c) "The remaining one part to the board of "directors of E. Wykes (Leicester) Ltd. to be used at their "discretion as a benevolent or welfare fund or for welfare pur-"poses for the sole benefit of the past, present and future "employees of the company."

The testator died on March 20, 1947, and his wife died on April 25, 1954, leaving the residue of her estate to be divided between five named charities.

E. Wykes (Leicester) Ltd. was a private company incorporated in 1935 to take over the testator's business of elastic rubber thread coverers. In 1947, the capital of the company was £50,000. In 1946, the company instituted a superannuation scheme for the benefit of employees of the company who had not attained the age of 54½ years in the case of males and 49½ in the case of females when they became employees of the company.

The annual pension payable from the normal retiring date for each completed year of service after entry into the scheme ranged from 8s. for an employee earning less than £130 a year to £10 for an employee earning over £750 a year. Some fourteen persons, who were employees of the company when the scheme came into operation on June 3, 1949, were excluded from the scheme through age, ill-health or for some other innocent reason.

By an originating summons dated August 28, 1959, the court was asked to determine (inter alia) whether the bequest contained in clause 9 (c) of the testator's will (i) was a valid charitable bequest, or (ii) was originally invalid but was validated by the Charitable Trusts (Validation) Act, 1954, or (iii) was void for uncertainty or otherwise.

B. S. Tatham for the plaintiff, Cyril Robert Riddington, one of the trustees of the will.

A. P. McNabb for Francis Leslie Lees Spencer and Trevor Charles Lodge, who were interested in questions concerning the bequests in clause 9 (a) and (b).

J. W. M. Turner for Harold William Waterson, the secretary of the company.

C. M. G. Butterfield for the testator's next-of-kin.

B. J. H. Clauson for the Attorney-General.

The following cases, not referred to in the judgment, were cited in argument: *Vernon* v. *Inland Revenue Commissioners* [1]; *In re Cox, decd.* [2]

The following cases referred to in the judgment were not cited in argument: *In re Macduff* [3]; *Oxford Group* v. *Inland Revenue Commissioners* [4]; *In re Foveaux* [5]; *Inland Revenue Commissioners* v. *National Antivivisection Society.* [6]

Cur. adv. vult.

Dec. 21. BUCKLEY J. I have to decide whether a bequest contained in clause 9 (c) of the testator's will is validated by the Charitable Trusts (Validation) Act, 1954. Having given his widow, who died on April 25, 1954, a life interest in his residuary estate, the testator bequeathed a number of reversionary pecuniary legacies to be paid on her death, and directed that the residue of his estate should be divided into three equal parts, with the bequests of two of which I have already dealt. Clause 9 (c) of the will is in the following terms: "The remaining one "part to the board of directors of E. Wykes (Leicester) Limited "to be used at their discretion as a benevolent or welfare fund

[1] [1956] 1 W.L.R. 1169; [1956] 3 All E.R. 14.

[2] [1955] A.C. 627; [1955] 3 W.L.R. 42; [1955] 2 All E.R. 550, P.C.

[3] [1896] 2 Ch. 451; 12 T.L.R. 452, C.A.

[4] [1949] 2 All E.R. 537, C.A.

[5] [1895] 2 Ch. 501; 11 T.L.R. 540.

[6] [1946] 1 K.B. 185; 62 T.L.R. 156; [1946] 1 All E.R. 205, C.A.; [1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217, H.L.

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"or for welfare purposes for the sole benefit of the past, present and future employees of the company. I declare that my executors are empowered to accept the receipt of the then acting secretary in full discharge of the amount due."

The value of the share of residue disposed of by this clause is of the order of £800. E. Wykes (Leicester) Ltd. (which I will call "the company") carries on the business of elastic rubber thread coverers, and is said to be prosperous. It at present employs 150 persons, and there are some 50 former employees alive. In 1946, the company instituted a superannuation scheme for its employees, but a number of employees were excluded from it when the scheme was set up. Some fourteen of these persons are still alive.

The present directors of the company are the third and fifth defendants. The fifth defendant, as one of the persons entitled to share in any property as to which the testator died intestate, has an adverse personal interest, and, accordingly, the argument in support of the trust has been presented by Mr. Turner appearing for the third defendant.

Mr. Turner very properly concedes that the bequest contained in clause 9 (c) is void unless it is validated by the Act, as he contends that it is. The bequest, being one which, apart from the Act, is invalid but would be valid if the objects for which this fund is directed to be held or applied were exclusively charitable, is a disposition to which, by virtue of section 2 (1), the Act applies, if the bequest constitutes an "imperfect trust provision" as defined by section 1 (1) of the Act. If the bequest is such an "imperfect trust provision," then, since it is contained in an instrument which took effect before December 16, 1952, the Act validates the trust by the operation of section 1 (2).

Section 1 (1) of the Act defines an "imperfect trust provision" as follows: "In this Act, 'imperfect trust provision' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable."

I have, therefore, to consider whether clause 9 (c) of the will so declares the objects for which this share of the testator's residuary estate is to be held or applied that consistently therewith the property could be used exclusively for charitable purposes but could nevertheless be used for purposes which are not charitable. A trust for the benefit of employees of a particular company, unless it be for the relief of poverty, cannot be charitable in the eye of the law because such a trust lacks a sufficient element of public benefit (*Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[1]). On the other hand, a trust to relieve

[1] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L.

the poverty of employees of a particular company has been held to be charitable (*Gibson* v. *South American Stores (Gath & Chaves Ltd)*[2]). The class of persons to be benefited under clause 9 (c) of the will is confined to past, present and future employees of the company. Consequently, the only application of the fund or its income for the benefit of members of this class which would be legally charitable would be of a kind calculated to relieve the poverty of the beneficiaries. The relief of poverty would, I think, certainly be one, if not the sole or primary, object of a benevolent or welfare fund, and clearly comes within the term "welfare purposes"; and it seems to me that, if clause 9 (c) were valid, the directors of the company could, consistently with its terms, apply the whole of this share of residue for relieving poverty amongst employees or former employees of the company. In other words, they could have applied it all for charitable purposes, notwithstanding that they might consistently with the terms of the clause have used it all for purposes which are not charitable.

This would seem to demonstrate that this is an "imperfect "trust provision" within the meaning of the Act. It is said, however, that it has been decided, in authorities binding upon me, that an "imperfect trust provision" must declare the objects of the trust in such a form as to include by express reference some legally charitable purpose as well as other non-charitable purposes. An example of objects so declared would be "charitable or benevolent objects." If this be so, clause 9 (c) cannot be an "imperfect trust provision" within the meaning of the Act, for it is impossible to point to any purpose mentioned in this sub-clause which is of an exclusively charitable character. I must, therefore, consider the relevant cases.

In re Gillingham Bus Disaster Fund[3] related to money contributed by the public after a tragic street accident in response to an appeal for a memorial fund "to be devoted, among "other things, to defraying the funeral expenses, caring for the "boys who may be disabled, and then to such worthy cause or "causes in memory of the boys who lost their lives, as the "Mayors may determine." It was held that the words "among other things" did not confer a general discretion upon the trustees. The appeal contemplated three objects, and the word "then" indicated that it was only after the first two, namely, paying funeral expenses and caring for the disabled, had been satisfied that anything was to be applied to worthy causes. It was conceded that the first two objects lacked a sufficient element of public benefit to be charitable. Accordingly, if the whole trust had to be considered together it could not constitute an "imperfect trust provision" because the fund

[2] [1950] Ch. 177; 66 T.L.R. 83; [1949] 2 All E.R. 985, C.A.

[3] [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 2 All E.R. 749; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1959] 2 All E.R. 749, C.A.

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could not be used exclusively for charitable purposes. The argument presented on behalf of the Attorney-General was based upon section 2 (3) of the Act which, it was contended, required the court to apply the Act to the trust for worthy causes as though there were a separate disposition on trust for such worthy causes as the Mayors should determine of the surplus moneys not required for the first two purposes. Harman J. held that section 2 (3) was not applicable, and that, accordingly, there was no "imperfect trust provision." In the course of his judgment, however, the judge, after stating, in effect, that the argument was that the Act should be applied to the trust for worthy causes as though there were a separate disposition for that purpose, and that this trust satisfied the terms of section 1 (1) because all the money applicable for worthy causes might be applied to charitable purposes, said[4]: "This is a very far-"reaching submission. If it be right, a bequest 'for such objects "'as my trustees think fit' will be validated although nothing "whatever about charity is mentioned in the will. The vaguer "the words are, the better they will do. In my judgment, the "Act was not intended to produce any such result. It was, as "the long title shows, intended to cure dispositions whereby "part of the trust fund is devoted to charitable purposes and "part to purposes not charitable, or not wholly charitable, so long "as the whole of the money could be devoted to charity by exclud-"ing words which were too wide or too vague." That observation was not germane to the judge's decision that section 2 (3) could not be called in aid in that case; nor was it, I think, an alternative ground of decision. It was, in my view, obiter dictum. Nevertheless, I should naturally wish to pay great attention to it. Before discussing it, however, I should mention the course the case took in the Court of Appeal.[5] The Master of the Rolls, having reached the conclusion that section 2 (3) was not applicable, declined to express a view upon the construction of section 1 (1). He said[6]: "It is accordingly unnecessary for me to "express a view of my own upon the second question, whether "the phrase 'to such worthy cause or causes,' etc., is itself "capable of constituting an imperfect trust provision. I feel, "as did the judge, considerable difficulty that a formula so "vague and wide as 'for such purposes as the trustees think "'fit' could have been within the contemplation of the Act "merely because such a formula would on the face of it allow the "exclusive selection of charitable purposes. But the phrase in "the present case is 'to such worthy cause or causes in memory "'of the boys who lost their lives . . .' and I feel also the force "of Mr. Buckley's argument that such a phrase has within it "at least the notion of charitable objects or objects analogous "thereto: and that the sense of the phrase would not be "materially different if it had run: 'to such *charitable or* other

[4] [1958] Ch. 300, 306.
[5] [1959] Ch. 62.
[6] Ibid. 75.

"worthy causes,' etc. In the circumstances, therefore, I prefer "to express no view of my own upon this part of the Attorney-"General's case." Romer L.J. also held that section 2 (3) was not applicable and concluded his judgment[7]: "it therefore "becomes unnecessary to consider whether a gift for 'worthy "'causes,' in the context of the 'Daily Telegraph' letter, could "properly be regarded as a disposition in favour of 'an imperfect "'trust provision.' The judge held that it could not and there "appear to be powerful considerations which support his view. "It may be that an 'imperfect trust provision' under section "1 (1) of the Act is confined to cases where, among the declared "objects for which property is to be held or applied, one at least "is charitable; and that, accordingly, whilst a gift to 'charitable "'or benevolent' objects would be within the Act, a gift to "'philanthropic or benevolent' objects would not. It is not "necessary, however, to express any concluded opinion upon the "point, and I refrain from doing so." Ormerod L.J., on the other hand, held[8] that section 2 (3) did apply. It was, therefore, necessary for him to consider whether the trust for "worthy "causes" complied with section 1 (1). In his view the language of that subsection was unambiguous, and he could see no reason why the trust for "worthy causes" did not come within it, since the money applicable for that purpose, although it could be used exclusively for purposes which were not charitable, could be used exclusively for charitable purposes consistently with the terms of the trust. Both the Master of the Rolls[9] and Romer L.J.[10] referred to Harman J. having "held" that the trust for "worthy causes" could not constitute an "imperfect "trust provision" within section 1 (1). If by this they intended to say (as I do not think they did) that this formed part of the ratio decidendi of the decision of Harman J., I would with the utmost deference differ from them in this respect, as I conceive that I am entitled to do.

I will return to consider *In re Gillingham Bus Disaster Fund*[11] further after mentioning the more recent decision of Cross J. in *In re Harpur's Will Trusts*.[12] The testatrix in that case directed her trustees, stating it shortly, to divide her residue between such institutions having for their main object the assistance and care of wounded and incapacitated members of the armed forces in such manner and proportion as they should determine. The judge held that not all such institutions would necessarily be charitable; some would and some would not. In his view, the gift was equivalent to a gift for distribution amongst charitable or benevolent institutions, and he declined to accept a submission that the case should be decided on the ground that this was not so. So construed, unless a distinction ought to be

[7] [1959] Ch. 62, 76.
[8] Ibid. 79.
[9] Ibid. 72.
[10] Ibid. 77.
[11] [1958] Ch. 300; [1959] Ch. 62, C.A.
[12] [1960] 3 W.L.R. 607; [1960] 3 All E.R. 237.

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drawn for the relevant purposes between a gift for charitable or benevolent institutions and one for charitable or benevolent purposes, it is clear that the bequest constituted an "imperfect "trust provision" whether the view of Harman J. of the construction of section 1 (1) was right or wrong, for the bequest as construed by Cross J. (except that it was a gift for institutions and not purposes) fell precisely within the narrower of the possible constructions of section 1 (1). Cross J. went on to hold that trusts for division amongst institutions, as opposed to trusts for the promotion of purposes, could not without violence to the language of section 1 (1) be brought within the Act. He accordingly held that the Act did not apply. Earlier in his judgment [13] the judge referred to *In re Gillingham Bus Disaster Fund* [14] and to the fact that in that case Harman J. had held that the Act applied only to a gift which was expressed to be for charitable purposes as well as for other non-charitable purposes. After referring shortly to the views expressed in the Court of Appeal in that case, Cross J. said [15]: "In these circumstances, I "must clearly treat the view of Harman J. on the point as "binding on me." For the reasons, however, which I have endeavoured to explain, the point did not arise for decision in *In re Harpur's Will Trusts*,[16] and it was, in my respectful opinion, irrelevant whether Cross J. considered the view of Harman J. as binding on him or not. In my view, Cross J. did not decide, and, having regard to his interpretation of the bequest, could not have decided *In re Harpur's Will Trusts* [16] on this ground. If, however, what Cross J. said with regard to the *Gillingham* case [17] was an alternative ground for his decision, then, as it seems to me, what he was in effect saying was that, if his construction of the will was mistaken, then, since he would feel himself bound by what Harman J. had said, he would decide against the Attorney-General on that ground. Cross J. himself, in my view, did not decide that the view of Harman J. of section 1 (1) was correct.

The matter, therefore, stands thus. In the *Gillingham* case [18] Harman J. (as I understand him) said, obiter, that the Act should be construed as applying only to trusts framed in such terms that the objects referred to include some express reference to a charitable purpose but also include other non-charitable purposes (e.g., "for charitable or benevolent pur-"poses"), and not as applying to purposes stated in a general way (e.g., "for public purposes") which could embrace charitable purposes but contain no express reference to charity or any charitable purpose. In the Court of Appeal in the *Gillingham* case [19] the majority decided the case on a ground which rendered

[13] [1960] 3 W.L.R. 607, 611.
[14] [1958] Ch. 300; [1959] Ch. 62, C.A.
[15] [1960] 3 W.L.R. 607, 612.
[16] Ibid. 607.
[17] [1958] Ch. 300; [1959] Ch. 62.
[18] Ibid.
[19] [1959] Ch. 62, C.A.

this point irrelevant and, although they expressed some sympathy with the view of Harman J., abstained from expressing any opinion on the point, while the third and dissenting member of the court, to whose decision alone among the judgments I have mentioned the point was relevant, decided that section 1 (1) should not be construed in the restricted manner favoured by Harman J. but in accordance with its language, which he considered to be unambiguous.

In these circumstances, with deference to Cross J., I conceive I am at least free to adopt the view favoured by Ormerod L.J. if I think it preferable to the view favoured by Harman J.

It is well established that the language of a statute must primarily be construed according to its natural meaning. If the language is ambiguous the long title of the Act may be looked at to help resolve the ambiguity: it may not be looked at to modify the interpretation of plain language. The language of section 1 (1) of the Act is, in my judgment (as in the view of Ormerod L.J.), clear and unambiguous, and its operation cannot be in any way controlled by reference to the long title of the Act. Moreover, the long title does not, in my view, point the way in which Harman J. considered that it did. It refers to instruments "providing for property to be held or applied for objects partly "but not exclusively charitable." If it be conceded, as it must, that an expression such as "public purposes" embraces charitable as well as non-charitable purposes, that expression is, I consider, as aptly described by the language of the long title as the expression "charitable or other public purposes."

It is not surprising that legal minds should be startled by the idea that Parliament may have intended the language of section 1 (1) to have as wide a potential operation as its terms suggest. It must, however, be borne in mind (1) that the Act only applies to trusts contained in instruments which took effect some 19 months before the Act became law (see section 1 (2)), so that any trust which was palpably invalid would be likely to have been recognised as such before the Act was passed; (2) that section 3 preserved the right of anyone who might be concerned to assert the invalidity of a trust to do so within the times limited by that section, so that except in the case of a trust which, having been assumed to be valid, had been in operation since December 16, 1946 (which would not have been the case where the trust was palpably invalid) the rights of those concerned to assail its validity were not abrogated by the Act although a time limit was put upon seeking to enforce them; (3) that the Act has no application to any trust the invalidity of which had been recognised and acted upon before December 16, 1952. (See section 2 (2).) Notwithstanding the wide language of section 1 (1), therefore, the Act was only calculated to validate trusts which were not palpably invalid or in respect of which those interested to assert invalidity had slept upon their rights.

It is also not surprising that it should occur to legal minds that

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one at least of the kinds of trust which the legislature had in mind to validate was the "charitable or benevolent" kind. Although this trap for charitably-minded but unwary or uninstructed testators was well known to the profession at least since the time of the decision in *In re Macduff*,[20] and in fact from much earlier, the celebrated *Diplock* case,[21] reported on appeal to the House of Lords under the name *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson*[22] made this aspect of charity law prominent in the minds of lawyers, and perhaps this may be particularly so of lawyers who were in practice in this branch of the law at and about the time of that decision. The same principle has been applied in other or somewhat more complicated circumstances in more recent cases of which I may perhaps mention *Oxford Group* v. *Inland Revenue Commissioners*[23] and *Ellis* v. *Inland Revenue Commissioners*.[24] It does not follow, however, that this was the only form of defective quasi-charitable trust that the Act was intended to validate. From the year 1895, when Chitty J. decided *In re Foveaux*,[25] until that case was overruled in *Inland Revenue Commissioners* v. *National Antivivisection Society*,[26] the suppression of vivisection was believed to be a charitable purpose, although in the latter case this was held not to be so. There may well be other trusts in operation as charitable trusts at the present time which are similarly vulnerable. Why should it be supposed that the legislature did not intend the Act to apply to such trusts if within the ambit of their objects some charitable purpose can be found? Indeed, the Committee on the Law and Practice relating to Charitable Trusts (Command Paper 8710 of 1952), whose recommendations in this respect, be it said, were not precisely followed by Parliament, suggested legislation in the case of trusts which had been in operation for six years or more on the footing that they were valid charitable trusts, which, as the committee recognised, would have had the effect of validating them even if such trusts should in fact have no charitable object at all (see paragraph 503 of the committee's report). I mention this not, of course, for the purpose of construing the Act in the light of the report, but to demonstrate the danger of speculating about the intention of Parliament.

The intention of the legislature, like the intention of a testator, is primarily to be ascertained by reading the language employed, and it is not for this court to corset that intention, if it be clearly expressed, into some shape which accords better with the fashion of professional legal thought than the natural meaning of the

[20] [1896] 2 Ch. 451.

[21] [1940] Ch. 988; 56 T.L.R. 961; [1940] 3 All E.R. 538; [1941] Ch. 253; 57 T.L.R. 263; [1941] 1 All E.R. 93, C.A.

[22] [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60, H.L.

[23] [1949] 2 All E.R. 537, C.A.

[24] (1949) 31 T.C. 178, C.A.

[25] [1895] 2 Ch. 501.

[26] [1946] 1 K.B. 185; 62 T.L.R. 156; [1946] 1 All E.R. 205, C.A.; [1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217, H.L.

language employed. More particularly, I think, this must be so when one is concerned with a definition section, where one must presume that Parliament would be specially precise and careful in its choice of language. The language of section 1 (1) is, in my view, clear and unambiguous. Construed in its natural sense it produces no absurdity or hardship. There appears to me to be no reason for thinking that so construed its effect exceeds what Parliament may reasonably be expected to have intended. I can discern no justification for declining to allow the language its full and natural effect. For these reasons, with respect to Harman J., I cannot agree with his view of the subsection as expressed in the *Gillingham* case,[27] which I think puts an unjustifiable gloss upon the language of the statute.

I return, therefore, to the language of section 1 (1) of the Act and inquire whether the will of the testator (which in this case both effects the relevant disposition and is the instrument which in clause 9 (c) contains the "imperfect trust provision" if there be one) describes the objects for which this share of residue is to be held or applied in such a way that consistently therewith the property could be used exclusively for charitable purposes, notwithstanding that admittedly it could be used for purposes which are not charitable. If the answer is affirmative, clause 9 (c) by definition constitutes an "imperfect trust provi-"sion." For the reasons indicated at the beginning of this judgment, I think the answer must be affirmative, with the consequence that, in my judgment, the Act applies in the present case.

I will accordingly declare that on the true construction of the will and of the Charitable Trusts (Validation) Act, 1954, the bequest contained in clause 9 (c) of the will was originally invalid but has been validated by the Act in the manner provided by section 1 (2) thereof.

I should add that Mr. Butterfield suggested that the evidence established that there could be no objects of a trust to relieve poverty amongst past, present and future employees of the company, but I feel myself unable to reach this conclusion on the evidence.

I might also add that, just as in the *Gillingham* case[28] the Master of the Rolls discerned in the phrase "worthy causes" a notion of charity, so in the reference to a benevolent or welfare fund and to welfare purposes in the present case a notion or flavour of charity may be discerned. Members of the Bar are well acquainted with a charity in the name of which the word "benevolent" is prominent, and the Family Welfare Association is a very well-known charity which includes the word "wel-"fare" in its name. I prefer, however, not to base my decision

[27] [1958] Ch. 300.

[28] [1959] Ch. 62, 75.

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in any way upon this consideration, but upon the grounds which I have earlier elaborated.

Declaration accordingly.

Plaintiffs' costs on the trustee basis and dependants' costs on the common fund basis to be paid out of the residue of the testator's estate.

Solicitors: *Wilberforce, Allen & Bryant for Headley & Co., Leicester; Neale & Co. for Bray & Bray, Leicester; Treasury Solicitor.*

V. A. M.

[PRIVY COUNCIL.]

J. C.*

1961 *Jan.* 18.

OVERSEAS TANKSHIP (U.K.) LTD. . . APPELLANTS;

AND

MORTS DOCK & ENGINEERING CO. LTD. . RESPONDENTS.

(THE WAGON MOUND.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Damages—Negligence—Remoteness—Damage directly caused by negligent act—Dangerous thing—Furnace oil—Spilled on harbour waters—Fire—Causation—Damage to wharf—Foreseeability of consequences the effective test of liability—One criterion for determining liability and compensation.

Australia—New South Wales—Negligence—Furnace oil spilled on harbour waters—Fire—Foreseeability of consequences the test of liability—Remission of claim founded on nuisance.

Ship's Names—Wagon Mound.

The decision in *In re Polemis and Furness Withy & Co.* [1921] 3 K.B. 560; 37 T.L.R. 940, C.A., that the defendant was responsible for all the consequences of his negligent act—held in that case to have been the direct result of the act—whether reasonably foreseeable or not, is not good law (post, p. 138).

The essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. Liability does not depend solely on the damage being the "direct" or "natural" consequence of the precedent act; but if a man should not be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally he should not escape liability, however "indirect" the damage, if he foresaw or could reasonably have foreseen the intervening events which led to its being done. Foreseeability is thus the effective test—the "direct" consequence test leads to nowhere but the never-ending and insoluble problems of causation (post, p. 142).

There is not one criterion for determining culpability (or

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER, LORD MORRIS OF BORTH-Y-GEST.

liability) and another for determining compensation; unforeseeability of damage is relevant to liability or compensation—there can be no liability until the damage has been done; it is not the act but the consequences on which tortious liability is founded (post, pp. 140, 141).

Dicta of Lord Russell of Killowen in *Bourhill* v. *Young* [1943] A.C. 92, 101; [1942] 2 All E.R. 396, H.L.(Sc.), and of Denning L.J. in *King* v. *Phillips* [1953] 1 Q.B. 429, 441; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A. applied.

Dictum of Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A.C. 956, 983; 36 T.L.R. 640, H.L. disapproved.

Sharp v. *Powell* (1872) L.R. 7 C.P. 253 considered.

Per curiam: It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct" (post, pp. 138, 139).

While an oil-burning vessel, of which the appellants were the charterers, was taking in bunkering oil in Sydney Harbour a large quantity of the oil was, through the carelessness of the appellants' servants, allowed to spill into the harbour. During that and the following day the escaped furnace oil was carried by wind and tide beneath a wharf owned by the respondents, shipbuilders and ship repairers, at which was lying a vessel which they were refitting, and for which purpose their employees were using electric and oxy-acetylene welding equipment. Some cotton waste or rag on a piece of debris floating on the oil underneath the wharf was set on fire by molten metal falling from the wharf, and the flames from the cotton waste or rag set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and thereafter a conflagration developed which seriously damaged the wharf and equipment on it.

In an action by the respondents to recover from the appellants compensation for the damage it was found by the trial judge on the evidence that the appellants "did not know and could not "reasonably be expected to have known that it [the furnace oil] "was capable of being set afire when spread on water"; and that apart from the damage by fire the respondents had suffered some damage in that oil had congealed upon and interfered with the use of their slipways, which was "damage which beyond question "was a direct result of the escape of the oil":—

Held, on the footing that the damage was the direct result of the escape of the oil, that, applying the test of foreseeability, the appellants who, as found by the trial judge, could not reasonably be expected to have known that the oil would catch fire, were not liable for the damage.

In re Polemis and Furness Withy & Co. Ltd. (supra) not followed.

Smith v. *London and South Western Railway Co.* (1870) L.R. 6 C.P. 14; *H.M.S. London* [1914] P. 72; 30 T.L.R. 196; *Weld-Blundell* v. *Stephens* (supra); *Rigby* v. *Hewitt* (1854) 5 Exch. 240; *Greenland* v. *Chaplin* (1850) 5 Exch. 243; *Hadley* v. *Baxendale* (1854) 9 Exch. 341; *Cory & Son Ltd.* v. *France, Fenwick & Co. Ltd.* [1911] 1 K.B. 114; 27 T.L.R. 18, C.A.; *Glasgow Corporation* v. *Muir* [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44, H.L.(Sc.); *Hay or Bourhill* v. *Young* (supra) and *Woods* v. *Duncan* [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420, H.L. considered.

J. C.

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Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound.)

The "strict liability" rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330; (1866) L.R. 1 Exch. 265, H.L. not considered (post, p. 142).

Order of the Supreme Court of New South Wales, so far as it related to damage caused by negligence, reversed, but action remitted for that court to deal with it so far as it relates to damage caused by nuisance.

Appeal (No. 23 of 1960) from an order of the Full Court of the Supreme Court of New South Wales (Owen, Maguire and Manning JJ.) (December 3, 1959) dismissing an appeal by the appellants, Overseas Tankship (U.K.) Ltd., from a judgment of Kinsella J. exercising the Admiralty Jurisdiction of that court (April 23, 1959) in an action in which the appellants were defendants and the respondents, Morts Dock & Engineering Co. Ltd., were plaintiffs.

The following facts are taken from the judgment of the Judicial Committee: In the action the respondents sought to recover from the appellants compensation for the damage which its property known as the Sheerlegs Wharf, in Sydney Harbour, and the equipment thereon had suffered by reason of fire which broke out on November 1, 1951. For that damage they claimed that the appellants were in law responsible.

The relevant facts can be comparatively shortly stated inasmuch as not one of the findings of fact in the exhaustive judgment of the trial judge had been challenged.

The respondents at the relevant time carried on the business of ship-building, ship-repairing and general engineering at Morts Bay, Balmain, in the Port of Sydney. They owned and used for their business the Sheerlegs Wharf, a timber wharf about 400 feet in length and 40 feet wide, where there was a quantity of tools and equipment. In October and November, 1951, a vessel known as the *Corrimel* was moored alongside the wharf and was being refitted by the respondents. Her mast was lying on the wharf and a number of the respondents' employees were working both upon it and upon the vessel itself, using for that purpose electric and oxy-acetylene welding equipment.

At the same time the appellants were charterers by demise of the *s.s. Wagon Mound*, an oil-burning vessel, which was moored at the Caltex Wharf on the northern shore of the harbour at a distance of about 600 feet from the Sheerlegs Wharf. She was there from about 9 a.m. on October 29 until 11 a.m. on October 30, 1951, for the purpose of discharging gasolene products and taking in bunkering oil.

During the early hours of October 30, 1951, a large quantity of bunkering oil was, through the carelessness of the appellants' servants, allowed to spill into the bay, and by 10.30 on the morning of that day it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The

appellants made no attempt to disperse the oil. The *Wagon Mound* unberthed and set sail very shortly after.

When the respondents' works manager became aware of the condition of things in the vicinity of the wharf he instructed their workmen that no welding or burning was to be carried on until further orders. He inquired of the manager of the Caltex Oil Company, at whose wharf the *Wagon Mound* was then still berthed, whether they could safely continue their operations on the wharf or upon the *Corrimal*. The results of the inquiry coupled with his own belief as to the inflammability of furnace oil in the open led him to think that the respondents could safely carry on their operations. He gave instructions accordingly, but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil.

For the remainder of October 30 and until about 2 p.m. on November 1 work was carried on as usual, the condition and congestion of the oil remaining substantially unaltered. But at about that time the oil under or near the wharf was ignited and a fire, fed initially by the oil, spread rapidly and burned with great intensity. The wharf and the *Corrimal* caught fire and considerable damage was done to the wharf and the equipment upon it.

The outbreak of fire was due, as the judge found, to the fact that there was floating in the oil underneath the wharf a piece of debris on which lay some smouldering cotton waste or rag which had been set on fire by molten metal falling from the wharf: that the cotton waste or rag burst into flames: that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil, and that after the floating oil became ignited the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf.

1960. Oct. 26, 27, 31; Nov. 1, 2, 3, 7, 8, 9. *Ashton Roskill Q.C., C. L. D. Meares Q.C.* (Australia) and *Michael Kerr* for the appellants.

R. L. Taylor Q.C. and *Russell Bainton* (both of Australia) for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in in argument: *Smith* v. *London and South Western Railway Co.*[1]; *Haynes* v. *Harwood*[2]; *Horne* v. *Midland Railway Co.*[3]; *Stansbie* v. *Troman*[4]; *Davies* v. *Liverpool Corporation*[5]; *Hambrook* v. *Stokes Brothers*[6]; *Bolton* v. *Stone*[7]; *King* v. *Phillips*[8]; *Carmarthenshire County Council* v.

[1] (1870) L.R. 6 C.P. 14.
[2] [1935] 1 K.B. 146; 51 T.L.R. 100, C.A.
[3] (1873) L.R. 8 C.P. 131.
[4] [1948] 2 K.B. 48; 64 T.L.R. 226; [1948] 1 All E.R. 599, C.A.
[5] [1949] 2 All E.R. 175, C.A.
[6] [1925] 1 K.B. 141; 41 T.L.R. 125, C.A.
[7] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078, H.L.
[8] [1952] W.N. 393; [1952] 2 T.L.R. 277; [1952] 2 All E.R. 459.

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Lewis[9]; *The Argentino*[10]; *The Notting Hill*[11]; *R. and H. Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*[12]; *Smith* v. *Green*[13]; *Pearson* v. *Cox*[14]; *Hyett* v. *Great Western Railway Co.*[15]; *Morrison Steamship Co. Ltd.* v. *Greystoke Castle (Cargo Owners)*[16]; *Clinton* v. *J. Lyons & Co. Ltd.*[17]; *Cox* v. *Burbridge*[18]; *Cobb* v. *Great Western Railway Co.*[19]; *Malcolm* v. *Dickson*[20]; *Gorris* v. *Scott*[21]; *Director of Public Prosecutions* v. *Smith*[22]; *The Oropesa*[23]; *Latham* v. *R. Johnson & Nephew Ltd.*[24]; *Italian State Railways* v. *Mavrogordatos*[25]; *Bartlett* v. *Winnipeg Electric Railway Co.*[26]; *Adelaide Steamship Co.* v. *The King*[27]; *Kilgollan* v. *William Cooke & Co. Ltd.*[28]; *Jones* v. *Livox Quarries Ltd.*[29]; *Dickson* v. *Commissioners for Railways (Qd.)*[30]; *Chester* v. *Waverley Corporation*[31]; *Victorian Railways Commissioners* v. *Speed*[32]; *Hoyt's Pty. Ltd.* v. *O'Connor*[33]; *Malleys Ltd.* v. *Rogers*[34]; *Barrett* v. *Hardie & Thompson Ltd.*[35]; *Cervo* v. *Swinburn (Ferretti, Third Party)*[36]; *Williams* v. *B.A.L.M. (N.Z.) Ltd. (No. 3)*[37]; *Hibberds Foundry Ltd.* v. *Hardy*[38]; *F. W. Jeffrey and Sons Ltd.* v. *Copeland Flour Mills Ltd.*[39]; *Duce* v. *Rourke*[40]; *Honan* v. *McLean*[41]; *Seaway Hotels Ltd.* v. *Consumer's Gas Co.*[42]; *The Arpad*[43]; *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co. Ltd.*[44]; *The Susquehanna*[45]; *Grant* v. *National Coal Board*[46]; *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ltd.*[47]; *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport*[48]; *Eastern Asia Navigation Co. Ltd.* v.

[9] [1955] A.C. 549; [1955] 2 W.L.R. 517; [1955] 1 All E.R. 565, H.L.
[10] (1888) 13 P.D. 191, C.A.; (1889) 14 App.Cas. 519, H.L.
[11] (1884) 9 P.D. 105, C.A.
[12] (1928) 33 Com.Cas. 324, H.L.
[13] (1875) 1 C.P.D. 92.
[14] (1877) 2 C.P.D. 369, C.A.
[15] [1948] 1 K.B. 345; 63 T.L.R. 411; [1947] 2 All E.R. 264, C.A.
[16] [1947] A.C. 265; 63 T.L.R. 11; [1946] 2 All E.R. 696, H.L.
[17] [1912] 3 K.B. 198; 28 T.L.R. 462.
[18] (1863) 13 C.B.N.S. 430.
[19] [1893] 1 Q.B. 459; 9 T.L.R. 253, C.A.
[20] 1951 S.C. 542.
[21] (1874) L.R. 9 Exch. 125.
[22] [1960] 3 W.L.R. 546; [1960] 3 All E.R. 161, H.L.
[23] [1943] P. 32; 59 T.L.R. 103; [1943] 1 All E.R. 211, C.A.
[24] [1913] 1 K.B. 398; 29 T.L.R. 124, C.A.
[25] [1919] 2 K.B. 305, C.A.
[26] [1920] 1 W.W.R. 95.
[27] [1923] 1 K.B. 59; 38 T.L.R. 864, C.A.
[28] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294, C.A.
[29] [1952] 2 Q.B. 608; [1952] 1 T.L.R. 1377, C.A.
[30] (1922) 30 C.L.R. 579.
[31] (1939) 62 C.L.R. 1.
[32] [1928] V.L.R. 150.
[33] [1928] V.L.R. 222.
[34] (1955) 55 N.S.W.S.R. 390.
[35] [1924] N.Z.L.R. 228.
[36] [1939] N.Z.L.R. 430.
[37] [1951] N.Z.L.R. 893.
[38] [1953] N.Z.L.R. 14.
[39] (1922) 52 Ont.L.R. 617.
[40] [1951] 1 W.W.R. 305.
[41] [1953] 3 D.L.R. 193; 1953, 8 W.W.R. 523.
[42] [1959] Ont.L.R. 177; (1959) 17 D.L.R.(2d) 292.
[43] [1934] P. 189; 50 T.L.R. 505, C.A.
[44] (1924) 41 T.L.R. 21, P.C.
[45] [1926] A.C. 665; 42 T.L.R. 639, H.L.
[46] [1956] A.C. 649; [1956] 2 W.L.R. 752; [1956] 1 All E.R. 682, H.L.
[47] [1951] 2 K.B. 405; [1951] 2 T.L.R. 30; [1951] 2 All E.R. 162.
[48] [1942] A.C. 691; 58 T.L.R. 263; [1942] 2 All E.R. 6, H.L.

Fremantle Harbour Trust Commissioners[49]; *Read* v. *J. Lyons & Co. Ltd.*[50]; *Richards* v. *Baker.*[51]

1961. January 18. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: The trial judge also made the all-important finding, which must be set out in his own words: "The raison "d'être of furnace oil is, of course, that it shall burn, but I find "the defendant did not know and could not reasonably be "expected to have known that it was capable of being set afire "when spread on water." This finding was reached after a wealth of evidence, which included that of a distinguished scientist, Professor Hunter. It receives strong confirmation from the fact that at the trial the respondents strenuously maintained that the appellants had discharged petrol into the bay on no other ground than that, as the spillage was set alight, it could not be furnace oil. An attempt was made before their Lordships' Board to limit in some way the finding of fact, but it is clear that it was intended to cover precisely the event that happened.

One other finding must be mentioned. The judge held that apart from damage by fire the respondents had suffered some damage from the spillage of oil in that it had got upon their slipways and congealed upon them and interfered with their use of the slips. He said: "The evidence of this damage is slight and "no claim for compensation is made in respect of it. Neverthe-"less it does establish some damage, which may be insignificant "in comparison with the magnitude of the damage by fire, but "which nevertheless is damage which, beyond question, was a "direct result of the escape of the oil." It is upon this footing that their Lordships will consider the question whether the appellants are liable for the fire damage. That consideration must begin with an expression of indebtedness to Manning J. for his penetrating analysis of the problems that today beset the question of liability for negligence. In the year 1913 in the case of *H.M.S. London*,[1] a case to which further reference will be made, Sir Samuel Evans P. said: "The doctrine of legal causation, in "reference both to the creation of liability and to the measure-"ment of damages, has been much discussed by judges and "commentators in this country and in America. Vast numbers "of learned and acute judgments and disquisitions have been "delivered and written upon the subject. It is difficult to "reconcile the decisions; and the views of prominent commen-"tators and jurists differ in important respects. It would not be "possible or feasible in this judgment to examine them in any-"thing approaching detail." In the near half-century that has passed since the learned President spoke those words the task has not become easier, but it is possible to point to certain landmarks

[49] (1951) 83 C.L.R. 353.
[50] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471, H.L.
[51] [1943] S.A.S.R. 245.
[1] [1914] P. 72, 76; 30 T.L.R. 196.

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and to indicate certain tendencies which, as their Lordships hope, may serve in some measure to simplify the law.

It is inevitable that first consideration should be given to the case of *In re Polemis and Furness Withy & Co. Ltd.*[2] which will henceforward be referred to as *Polemis*. For it was avowedly in deference to that decision and to decisions of the Court of Appeal that followed it that the Full Court was constrained to decide the present case in favour of the respondents. In doing so Manning J., after a full examination of that case, said: "To "say that the problems, doubts and difficulties which I have "expressed above render it difficult for me to apply the decision "in *In re Polemis* with any degree of confidence to a particular "set of facts would be a grave understatement. I can only "express the hope that, if not in this case, then in some other "case in the near future, the subject will be pronounced upon by "the House of Lords or the Privy Council in terms which, even "if beyond my capacity fully to understand, will facilitate for "those placed as I am, its everyday application to current "problems." This cri de coeur would in any case be irresistible, but in the years that have passed since its decision *Polemis* has been so much discussed and qualified that it cannot claim, as counsel for the respondents urged for it, the status of a decision of such long standing that it should not be reviewed.

What, then, did *Polemis* decide? Their Lordships do not propose to spend time in examining whether the issue there lay in breach of contract or in tort. That might be relevant for a tribunal for which the decision was a binding authority: for their Lordships it is not. It may, however, be observed that in the proceedings there was some confusion. The case arose out of a charterparty and went to arbitration under a term of it, and the first contention of the charterers was that they were protected from liability by the exception of fire in the charterparty. But it is clear from the pleadings and other documents, copies of which were supplied from the Record Office, that alternative claims for breach of contract and negligence were advanced, and it is clear, too, that before Sankey J. and the Court of Appeal the case proceeded as one in which, independently of contractual obligations, the claim was for damages for negligence. It was upon this footing that the Court of Appeal held that the charterers were responsible for all the consequences of their negligent act even though those consequences could not reasonably have been anticipated. The negligent act was nothing more than the carelessness of stevedores (for whom the charterers were assumed to be responsible) in allowing a sling or rope by which it was hoisted to come into contact with certain boards, causing one of them to fall into the hold. The falling board hit some substances in the hold and caused a spark: the spark ignited petrol vapour in the hold: there was a rush of flames, and the ship was destroyed.

[2] [1921] 3 K.B. 560; 37 T.L.R. 940, C.A.

The special case submitted by the arbitrators found that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. They did not indicate what damage might have been so anticipated.

There can be no doubt that the decision of the Court of Appeal in *Polemis* plainly asserts that, if the defendant is guilty of negligence, he is responsible for all the consequences whether reasonably foreseeable or not. The generality of the proposition is perhaps qualified by the fact that each of the Lords Justices refers to the outbreak of fire as the direct result of the negligent act. There is thus introduced the conception that the negligent actor is not responsible for consequences which are not "direct," whatever that may mean. It has to be asked, then, why this conclusion should have been reached. The answer appears to be that it was reached upon a consideration of certain authorities, comparatively few in number, that were cited to the court. Of these, three are generally regarded as having influenced the decision. The earliest in point of date was *Smith* v. *London & South Western Railway Co.*[3] In that case it was said that "when it has been once determined that there is evidence of "negligence, the person guilty of it is equally liable for its conse-"quences, whether he could have foreseen them or not." see *per* Channell B.[4] Similar observations were made by other members of the court. Three things may be noted about this case: the first, that for the sweeping proposition laid down no authority was cited: the second, that the point to which the court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind: and the third, that so little was the mind of the court directed to the problem which has now to be solved that no one of the seven judges who took part in the decision thought it necessary to qualify in any way the consequences for which the defendant was to be held responsible. It would perhaps not be improper to say that the law of negligence as an independent tort was then of recent growth and that its implications had not been fully examined. The second case was *H.M.S. London*,[5] which has already been referred to. There the statement in *Smith's* case was followed, Sir Samuel Evans citing Blackburn J.[6]: "What the defendants might reasonably antici-"pate is only material with reference to the question, whether "the defendants were negligent or not, and cannot alter their "liability if they were guilty of negligence." This proposition, which provides a different criterion for determining liability and compensation, goes to the root of the matter and will be discussed later. It was repeated by Lord Sumner in the third case which was relied on in *Polemis*, namely, *Weld-Blundell* v. *Stephens*,[7]

[3] (1870) L.R. 6 C.P. 14.
[4] Ibid. 21.
[5] [1914] P. 72.
[6] Ibid. 77.
[7] [1920] A.C. 956, 983; 36 T.L.R. 640, H.L.

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In that case the majority of their Lordships, of whom Lord Sumner was one, held, affirming a decision of the Court of Appeal, that the plaintiff's liability for damages in certain libel actions did not result from an admitted breach by the defendant of the duty that he admittedly owed to him. Lord Dunedin (another of the majority) decided the case on the ground that there was there no evidence which entitled the jury to give the affirmative answer that they did to the question as put to them that the actions of libel and damages recovered were the "natural and probable consequences" of the proved negligeuce of the defendant. Lord Wrenbury (the third of the majority) summed up his view of the case by saying [8]: "I am quite "unable to follow the proposition that the damages given in the "libel actions are in any way damages resulting from anything "which Stephens did in breach of duty." Lord Sumner, whose speech their Lordships, like others before them, have not found in all respects easy to follow, said [9]: "What a defendant ought "to have anticipated as a reasonable man is material when the "question is whether or not he was guilty of negligence, that is, "of want of due care according to the circumstances. This, "however, goes to culpability, not to compensation." But this observation followed a passage in which His Lordship, directing his mind to the problem of causation, had asked what were "natural, probable and necessary consequences," and had expressed the view that "direct cause" was the best expression. Adopting that test he rejected the plaintiff's claim as too remote. The question of foreseeability became irrelevant and the passage cited from his speech was unnecessary to his decision. Their Lordships are constrained to say that this dictum (for such it was) perpetuated an error which has introduced much confusion into the law.

Before going forward to the cases which followed *Polemis*, their Lordships think it desirable to look back to older authorities which appear to them to deserve consideration. In two cases, *Rigby* v. *Hewitt* [10] and *Greenland* v. *Chaplin*,[11] Pollock C.B. affirmed [12] (stating it to be his own view only and not that of the court) that he entertained "considerable doubt whether a person "who is guilty of negligence is responsible for all the conse-"quences which may under any circumstances arise and in "respect of mischief which could by no possibility have been "foreseen and which no reasonable person would have antici-"pated." It was not necessary to argue this question and it was not argued.

Next, one of many cases may be cited which show how shadowy is the line between so-called culpability and compensation. In *Sharp* v. *Powell* [13] the defendant's servant in breach of the Police Act washed a van in a public street and allowed

[8] [1920] A.C. 956, 999.
[9] Ibid. 984.
[10] (1850) 5 Exch. 240.
[11] Ibid. 243.
[12] Ibid. 248.
[13] (1872) L.R. 7 C.P. 253.

the waste water to run down the gutter towards a grating leading to the sewer about 25 yards off. In consequence of the extreme severity of the weather the grating was obstructed by ice and the water flowed over a portion of the causeway and froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. The defendant was held not to be liable. The judgment of Bovill C.J. is particularly valuable and interesting. "No doubt," he said,[14] "one who "commits a wrongful act is responsible for the ordinary conse- "quences which are likely to result therefrom; but, generally "speaking, he is not liable for damage which is not the natural "or ordinary consequence of such an act unless it be shown "that he knows or has reasonable means of knowing that conse- "quences not usually resulting from the act are by reason of "some existing cause likely to intervene so as to occasion damage "to a third person. Where there is no reason to expect it, and "no knowledge in the person doing the wrongful act that such "a state of things exists as to render the damage probable, if "injury does result to a third person it is generally considered "that the wrongful act is not the proximate cause of the injury "so as to render the wrongdoer liable to an action." Here all the elements are blended, "natural" or "ordinary conse- "quences," "foreseeability," "proximate cause." What is not suggested is that the wrongdoer is liable for the consequences of his wrongdoing whether reasonably foreseeable or not, or that there is one criterion for culpability, another for compensation. It would, indeed, appear to their Lordships that, unless the learned Chief Justice was making a distinction between "one "who commits a wrongful act" and one who commits an act of negligence, the case is not reconcilable with *Polemis*. In that case it was not dealt with except in a citation from *Weld-Blundell* v. *Stephens*.[15]

Mention should also be made of *Cory & Son Ltd.* v. *France Fenwick & Co. Ltd.*[16] In that case Vaughan Williams L.J. citing the passage from the judgment of Pollock C.B. in *Greenland* v. *Chaplin* which has already been read, said[17]: "I do not myself "suppose that although, when these propositions were originally "laid down, they were not intended as positive judgments but "as opinions of the learned judge, there would be any doubt "nowadays as to their accuracy." And Kennedy L.J. said of the same passage "with that view of the law no one would venture "to quarrel." Some doubt was expressed in *Polemis* as to whether the citation of which these learned judges so emphatically approved was correct. That is irrelevant. They approved that which they cited and their approval has high authority. It is probable in any case that it had not occurred to them that there

[14] (1872) L.R. 7 C.P. 253, 258.
[15] [1920] A.C. 956.
[16] [1911] 1 K.B. 114; 27 T.L.R. 18, C.A.
[17] Ibid. 122.

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was any such dichotomy as was suggested in *Polemis*. Nor, clearly, had it at an earlier date occurred to Lord Wensleydale in *Lynch* v. *Knight*,[18] nor to Cockburn C.J. in *Clark* v. *Chambers*.[19] The impression that may well be left on the reader of the scores of cases in which liability for negligence has been discussed is that the courts were feeling their way to a coherent body of doctrine and were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.

Before turning to the cases that succeeded it, it is right to glance at yet another aspect of the decision in *Polemis*. Their Lordships, as they have said, assume that the court purported to propound the law in regard to tort. But up to that date it had been universally accepted that the law in regard to damages for breach of contract and for tort was, generally speaking, and particularly in regard to the tort of negligence, the same. Yet *Hadley* v. *Baxendale*[20] was not cited in argument nor referred to in the judgments in *Polemis*. This is the more surprising when it is remembered that in that case, as in many another case, the claim was laid alternatively in breach of contract and in negligence. If the claim for breach of contract had been pursued, the charterers could not have been held liable for consequences not reasonably foreseeable. It is not strange that Sir Frederick Pollock said that Blackburn and Willes JJ. would have been shocked beyond measure by the decision that the charterers were liable in tort: see Pollock on Torts, 15th ed., p. 29. Their Lordships refer to this aspect of the matter not because they wish to assert that in all respects today the measure of damages is in all cases the same in tort and in breach of contract, but because it emphasises how far *Polemis* was out of the current of contemporary thought. The acceptance of the rule in *Polemis* as applicable to all cases of tort directly would conflict with the view theretofore generally held.

If the line of relevant authority had stopped with *Polemis*, their Lordships might, whatever their own views as to its unreason, have felt some hesitation about overruling it. But it is far otherwise. It is true that both in England and in many parts of the Commonwealth that decision has from time to time been followed; but in Scotland it has been rejected with determination. It has never been subject to the express scrutiny of either the House of Lords or the Privy Council, though there have been comments upon it in those Supreme Tribunals. Even in the inferior courts judges have, sometimes perhaps unwittingly, declared themselves in a sense adverse to its principle. Thus Asquith L.J. himself, who in *Thurogood* v. *Van den Bergh & Jurgens*,[21] had loyally followed *Polemis*, in *Victoria Laundry*

[18] (1861) 9 H.L.C. 577, H.L.
[19] (1878) 3 Q.B.D. 327.
[20] (1854) 9 Exch. 341.
[21] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682, C.A.

(*Windsor*) *Ltd.* v. *Newman Industries Ltd.*,[22] holding that a complete indemnity for breach of contract was too harsh a rule, decided that [23] the aggrieved party is only entitled to recover such "part of the loss actually resulting as was at the time of the "contract reasonably foreseeable as liable to result from the "breach." It is true that in that case the Lord Justice was dealing with damages for breach of contract. But there is nothing in the case to suggest, nor any reason to suppose, that he regarded the measure of damage as different in tort and breach of contract. The words "tort" and "tortious" have perhaps a somewhat sinister sound but, particularly where the tort is not deliberate but is an act of negligence, it does not seem that there is any more moral obliquity in it than in a perhaps deliberate breach of contract, or that the negligent actor should suffer a severer penalty. In *Minister of Pensions* v. *Chennell* [24] Denning J. (as he then was) said: "Foreseeability is as a rule vital in "cases of contract; and also in cases of negligence, whether it "be foreseeability in respect of the person injured as in *Palsgref* "v. *Long Island Railway* [25] (discussed by Professor Goodhart in "his Essays, p. 129), *Donoghue* v. *Stevenson* [26] and *Bourhill* v. "*Young*,[27] or in respect of intervening causes as in *Aldham* "v. *United Dairies* (*London*) *Ltd.*[28] and *Woods* v. *Duncan*.[29] "It is doubtful whether *In re Polemis and Furness Withy &* "*Co.*[30] can survive these decisions. If it does, it is only in "respect of neglect of duty to the plaintiff which is the immediate "or precipitating cause of damage of an unforeseeable kind." Their Lordships would with respect observe that such a survival rests upon an obscure and precarious condition.

Instances might be multiplied of deviation from the rule in *Polemis*, but their Lordships think it sufficient to refer to certain later cases in the House of Lords and then to attempt to state what they conceive to be the true principle. In *Glasgow Corporation* v. *Muir* [31] Lord Thankerton said [32] that it had long been held in Scotland that all that a person can be bound to foresee are the reasonable and probable consequences of the failure to take care judged by the standard of the ordinary reasonable man, while Lord Macmillan said that [33] "It is still left to the judge to decide "what, in the circumstances of the particular case, the reason-"able man would have had in contemplation, and what, "accordingly, the party sought to be made liable ought to have "foreseen." Here there is no suggestion of one criterion for determining culpability (or liability) and another for determining

[22] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.
[23] [1949] 2 K.B. 528, 539.
[24] [1947] K.B. 250, 253; 62 T.L.R. 753; [1946] 2 All E.R. 719.
[25] (1928) 248 N.Y.Rep. 339.
[26] [1932] A.C. 562, H.L.
[27] [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.
[28] [1940] 1 K.B. 507; 56 T.L.R. 201; [1939] 4 All E.R. 522.
[29] [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420, H.L.
[30] [1921] 3 K.B. 560, C.A.
[31] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44, H.L.
[32] [1943] A.C. 448, 454.
[33] Ibid. 457.

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compensation. In *Bourhill* v. *Young*[34] the double criterion is more directly denied. There Lord Russell of Killowen said[35]: "In considering whether a person owes to another a duty a "breach of which will render him liable to that other in damages "for negligence, it is material to consider what the defendant "ought to have contemplated as a reasonable man. This con-"sideration may play a double role. It is relevant in cases of "admitted negligence (where the duty and breach are admitted) "to the question of remoteness of damage, i.e., to the question "of compensation not to culpability, but it is also relevant in "testing the existence of a duty as the foundation of the alleged "negligence, i.e.,to the question of culpability not to compensa-"tion." This appears to be in flat contradiction to the rule in *Polemis* and to the dictum of Lord Sumner in *Weld-Blundell* v. *Stephens*.[36]

From the tragic case of *Woods* v. *Duncan*,[37] the facts of which are too complicated to be stated at length, some help may be obtained. There Viscount Simon analysed the conditions of establishing liability for negligence and stated them to be (1) that the defendant failed to exercise due care, (2) that he owed the injured man the duty to exercise due care, and (3) that his failure to do so was the cause of the injury in the proper sense of the term. He held that the first and third conditions were satisfied, but inasmuch as the damage was due to an extraordinary and unforeseeable combination of circumstances the second condition was not satisfied. Be it observed that to him it was one and the same thing whether the unforeseeability of damage was relevant to liability or compensation. To Lord Russell of Killowen in the same case the test of liability was whether the defendants (Cammell Laird & Co. Ltd.) could reasonably be expected to foresee that the choking of a test cock (itself undoubtedly a careless act) might endanger the lives of those on board; Lord Macmillan asked whether it could be said that they, the defendants, ought to have foreseen as reasonable people that if they failed to detect and rectify the clogging of the hole in the door the result might be that which followed, and later, identifying, as it were, reasonable foreseeability with causation, he said[38]: "The chain of "causation, to borrow an apposite phrase, would appear to be "composed of missing links."

Enough has been said to show that the authority of *Polemis* has been severely shaken though lip-service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an

[34] [1943] A.C. 92.
[35] Ibid. 101.
[36] [1920] A.C. 956, 984.
[37] [1946] A.C. 401.
[38] Ibid. 431.

act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct." It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in *Polemis*. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them. Thus it is that over and over again it has happened that in different judgments in the same case, and sometimes in a single judgment, liability for a consequence has been imposed on the ground that it was reasonably foreseeable or, alternatively, on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in *Polemis*. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the "direct" consequence) be substituted which leads to nowhere but the never-ending and insoluble problems of causation. "The lawyer," said Sir Frederick Pollock, "cannot afford to "adventure himself with philosophers in the logical and meta-"physical controversies that beset the idea of cause." Yet this is just what he has most unfortunately done and must continue to do if the rule in *Polemis* is to prevail A conspicuous example occurs when the actor seeks to escape liability on the ground that the "chain of causation" is broken by a "nova causa" or "novus actus interveniens."

The validity of a rule or principle can sometimes be tested by observing it in operation. Let the rule in *Polemis* be tested in this way. In the case of the *Liesbosch* [39] the appellants, whose vessel had been fouled by the respondents, claimed damages under various heads. The respondents were admittedly at fault; therefore, said the appellants, invoking the rule in *Polemis*, they

[39] [1933] A.C. 449; 49 T.L.R. 289, H.L.

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were responsible for all damage whether reasonably foreseeable or not. Here was the opportunity to deny the rule or to place it secure upon its pedestal. But the House of Lords took neither course; on the contrary, it distinguished *Polemis* on the ground that in that case the injuries suffered were the "immediate "physical consequences" of the negligent act. It is not easy to understand why a distinction should be drawn between "imme-"diate physical" and other consequences, nor where the line is to be drawn. It was perhaps this difficulty which led Denning L.J. in *Roe* v. *Minister of Health*[40] to say that foreseeability is only disregarded when the negligence is the immediate or *precipitating* cause of the damage. This new word may well have been thought as good a word as another for revealing or disguising the fact that he sought loyally to enforce an unworkable rule.

In the same connection may be mentioned the conclusion to which the Full Court finally came in the present case. Applying the rule in *Polemis* and holding therefore that the unforeseeability of the damage by fire afforded no defence, they went on to consider the remaining question. Was it a "direct" consequence? Upon this Manning J. said: "Notwithstanding that, if regard is "had separately to each individual occurrence in the chain of "events that led to this fire, each occurrence was improbable "and, in one sense, improbability was heaped upon improbability, "I cannot escape from the conclusion that if the ordinary man "in the street had been asked, as a matter of common sense, "without any detailed analysis of the circumstances, to state "the cause of the fire at Mort's Dock, he would unhesitatingly "have assigned such cause to spillage of oil by the appellant's "employees." Perhaps he would, and probably he would have added: "I never should have thought it possible." But with great respect to the Full Court this is surely irrelevant, or, if it is relevant, only serves to show that the *Polemis* rule works in a very strange way. After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility. The *Polemis* rule by substituting "direct" for "reasonably foreseeable" consequence leads to a conclusion equally illogical and unjust.

At an early stage in this judgment their Lordships intimated that they would deal with the proposition which can best be stated by reference to the well-known dictum of Lord Sumner: "This however goes to culpability not to compensation." It is with the greatest respect to that very learned judge and to those who have echoed his words, that their Lordships find themselves bound to state their view that this proposition is fundamentally false.

It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of

[40] [1954] 2 Q.B. 66, 85; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131, C.A.

that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. Suppose an action brought by A for damage caused by the carelessness (a neutral word) of B, for example, a fire caused by the careless spillage of oil. It may, of course, become relevant to know what duty B owed to A, but the only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened—the damage in suit? And, if that damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable?

But, it is said, a different position arises if B's careless act has been shown to be negligent and has caused some foreseeable damage to A. Their Lordships have already observed that to hold B liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary. For the same fallacy is at the root of the proposition. It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacre. Again, suppose a claim by A for damage by fire by the careless act of B. Of what relevance is it to that claim that he has another claim arising out of the same careless act? It would surely not prejudice his claim if that other claim failed: it cannot assist it if it succeeds. Each of them rests on its own bottom, and will fail if it can be established that the damage could not reasonably be foreseen. We have come back to the plain common sense stated by Lord Russell of Killowen in *Bourhill* v. *Young*.[41] As Denning L.J. said in *King* v. *Phillips*[42]: "there can be no doubt since *Bourhill* v. *Young* that the test "of *liability for shock* is foreseeability of *injury by shock*." Their Lordships substitute the word "fire" for "shock" and endorse this statement of the law.

[41] [1943] A.C. 92, 101.

[42] [1953] 1 Q.B. 429, 441.

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Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct." In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *Donoghue* v. *Stevenson*[43]: "The liability for negligence, "whether you style it such or treat it as in other systems as a "species of 'culpa,' is no doubt based upon a general public senti-"ment of moral wrongdoing for which the offender must pay." It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural" consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done: cf. *Woods* v. *Duncan*.[44] Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth* v. *Birmingham Waterworks Co.*[45]

It is proper to add that their Lordships have not found it necessary to consider the so-called rule of "strict liability" exemplified in *Rylands* v. *Fletcher*[46] and the cases that have followed or distinguished it. Nothing that they have said is intended to reflect on that rule.

One aspect of this case remains to be dealt with. The respondents claim, in the alternative, that the appellants are liable in nuisance if not in negligence. Upon this issue their Lordships are of opinion that it would not be proper for them to come to any conclusion upon the material before them and without the benefit of the considered view of the Supreme Court. On the other hand, having regard to the course which the case has taken, they do not think that the respondents should be finally shut out from the opportunity of advancing this plea, if they think fit. They therefore propose that on the issue of nuisance alone the case should be remitted to the Full Court to be dealt with as may be thought proper.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed, and the respondents' action so far as it related to damage caused by the negligence of the appellants be dismissed with costs, but that the action so far as it related to damage caused by nuisance should be remitted to the Full Court

[43] [1932] A.C. 562, 580.
[44] [1946] A.C. 401, 442.
[45] (1856) 11 Exch. 781 784.
[46] (1868) L.R. 3 H.L. 330, H.L.

to be dealt with as that court may think fit. The respondents must pay the costs of the appellants of this appeal and in the courts below.

Solicitors: *William A. Crump & Son; Light & Fulton.*

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Trusts — Power of advancement — Contrary intention — Direction to accumulate income—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2).

Revenue—Income tax—Settlement—Trust for accumulation during life of settlor—Contingent interest of settlor's wife—Whether statutory power of advancement applicable—Whether income to be treated as income of settlor—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2); *Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 405 (1) (2).

By a settlement dated October 16, 1947, a fund was settled on trust to accumulate the income therefrom during the life of the settlor, and after his death on trust as to one-third for the children then living of the settlor by the beneficiary, who subsequently became his wife, and as to two-thirds for the beneficiary absolutely; if the beneficiary died during the lifetime of the settlor the fund was to be held on trust for her children living at his death, but if at the death of the settlor there were living no children of his by the beneficiary, then on trust for the beneficiary absolutely; and if she should die during the settlor's lifetime without leaving any children, on trust for her sister absolutely. The settlor appealed against assessments to surtax for the years 1950 to 1954 in respect of income arising under the settlement, and the Crown contended that by virtue of the statutory power of advancement under section 32 of the Trustee Act, 1925,[1] one-half of the property comprised in the settlement

[1] Trustee Act, 1925, s. 32: "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advance-"ment or benefit, in such manner as "they may, in their absolute dis-"cretion, think fit, of any person "entitled to the capital of the trust "property or of any share thereof . . . "Provided that—(*a*) the money so "paid or applied for the advancement "or benefit of any person shall not "exceed altogether in amount one-half "of the presumptive or vested share "or interest of that person in the "trust property; . . . (*c*) no such "payment or application shall be "made so as to prejudice any per-"son entitled to any prior life or "other interest, whether vested or "contingent, in the money paid "or applied unless such person is "in existence and of full age and "consents in writing to such payment "or application."

S. 69 (2): "The powers conferred "by this Act on trustees are in addi-"tion to the powers conferred by "the instrument, if any, creating the "trust, but those powers, unless "otherwise stated, apply if and so "far only as a contrary intention is "not expressed in the instrument, "if any, creating the trust, and have "effect subject to the terms of that "instrument."

Income Tax Act, 1952, s. 405: "(1) If and so long as the settlor has

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might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act, 1952, and that, accordingly, one-half of the income under section 405 (1) was to be treated as his income.

The claim made by the Crown was afterwards limited to apply only to the two-thirds of the trust fund in which the beneficiary had a vested interest liable to be divested if she predeceased the settlor. Both the special commissioners and Danckwerts J. decided in the taxpayer's favour and the Crown appealed:—

Held, that the trust for accumulation of income during the settlor's life showed an intention in conflict with the power of advancement conferred by section 32 (1); that section 69 (2) did not require that the power of advancement conferred on trustees by section 32 (1) should be expressly excluded, but that the power was inapplicable if, on a fair reading of the instrument in question, it could be said that the application of the power would be inconsistent with the purport of the instrument; that in the present case the object of the instrument was plainly to build up a capital sum which would be paid out to the beneficiary or her children, if any, on the settlor's death, and that, therefore, section 32 (1) was inapplicable (post, pp. 152, 154). Accordingly, the claim for tax failed and the appeal should be dismissed.

In re Turner's Will Trusts [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A. applied.

Quaere whether, if the powers of advancement provided by section 32 had been exercisable by the trustees, the interest in income of the beneficiary and her children, if she had had any, would have been prior interests within the meaning of section 32 (1) (*c*) of the Trustee Act, 1925 (post, pp. 152, 155).

Decision of Danckwerts J. [1960] Ch. 444; [1960] 2 W.L.R. 554; [1960] 1 All E.R. 697 affirmed.

APPEAL from Danckwerts J.

A settlor, William Bernstein, appealed against assessments made on him to surtax for the years 1950 to 1951, 1951 to 1952, 1952 to 1953 and 1953 to 1954 in the sums of £6,102 (additional), £6,659, £1,338 (additional) and £4,630 (additional), respectively, on the basis that under section 405 of the Income Tax Act, 1952, one-half the income arising under a settlement made by him on October 16, 1947, was to be treated as his income.

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"an interest in any income arising "under or property comprised in a "settlement, any income so arising "during the life of the settlor in any "year of assessment shall, to the "extent to which it is not distributed, "be treated for all the purposes of "this Act as the income of the settlor "for that year and not as the income "of any other person: Provided that "—(*a*) if and so long as that interest "is an interest neither in the whole "of the income arising under the "settlement nor in the whole of the "property comprised in the settle-"ment, the amount of income to be "treated as the income of the settlor "by virtue of this subsection shall be "such part of the income which, but "for this proviso, would be so treated "as is proportionate to the extent of "that interest . . .

"(2) For the purpose of subsection "(1) of this section, the settlor shall "be deemed to have an interest in "income arising under or property "comprised in a settlement if any "income or property which may at "any time arise under or be com-"prised in that settlement is, or will "or may become, payable to or "applicable for the benefit of the "settlor or the wife or husband of "the settlor in any circumstances "whatsoever: . . ."

Acts, in the case stated for the opinion of the court, found, inter alia, that the settlement, dated October 16, 1947, after reciting that a certain sum of money had been paid by the settlor to the trustees thereof, and after making provision for the investment of the trust fund, provided as follows:

"2. The trustees shall during the life of the settlor accumulate "the income of the trust fund at compound interest by investing "the same and the resulting income thereof in any of the invest- "ments hereby authorised in augmentation of the capital of the "trust fund and for the benefit of the person or persons who "shall eventually become entitled thereto.

"3. After the death of the settlor the trustees shall hold the "trust fund as to one equal third part thereof in trust for all or "any of the children or child then living of the settlor by the "beneficiary [the settlor's present wife] (if more than one in "equal shares) and as to two equal third parts thereof in trust "for the beneficiary absolutely but if the beneficiary dies in the "lifetime of the settlor leaving children or a child her surviving "then the trustees shall hold the trust fund in trust for all or any "of such children or child who shall be living at the death of the "settlor if more than one in equal shares absolutely.

"4. If at the death of the settlor there shall be living no child "of the settlor by the beneficiary the trustees shall hold the trust "fund in trust for the beneficiary absolutely but if the beneficiary "dies in the lifetime of the settlor without leaving any children or "a child by the settlor . . . her surviving then the trustees shall "hold the trust fund in trust for Muriel Clara Selina Thoms "sister of the beneficiary absolutely."

The settlor and his wife were both living, they had had no children, and all income of the trust fund had been accumulated in accordance with clause 2 of the settlement.

It was contended on behalf of the Crown that the trustees of the settlement had, under section 32 of the Trustee Act, 1925, power at any time or times to pay or apply for the advancement or benefit of the settlor's wife one-half of the trust fund; that by virtue of such power one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act, 1952; that by section 405 (1) and proviso (*a*) one-half of the income arising under the settlement in the relevant years was accordingly to be treated as the income of the settlor; and that the assessments were correct in principle and (subject to adjustment of the figures) should be confirmed.

It was contended on behalf of the settlor that the power of advancement contained in section 32 of the Act of 1925 was not applicable to the settlement, inasmuch as on the true construction of the deed of settlement it contained an indication of a contrary intention (Trustee Act, 1925, s. 69 (2)); that if, contrary to his contention, the statutory power of advancement was to be read into the settlement, such power could not be exercised in

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favour of the settlor's wife without the prior consent of the persons (born or unborn) who had "prior interests" within section 32 (1) (*c*) of the Trustee Act, 1925; that possible children of the settlor by his wife had such "prior interests," and their consent being unobtainable at any time during the period of accumulation, the statutory power of advancement could never be exercised in respect of the money in which such children had such prior interests, and that those interests extended to the income of the whole of the trust fund and the accumulations of the income and, alternatively, in one-third of the trust fund; that the settlor could not be deemed to have an interest in the income arising from the settlement within section 405, and that the assessments under appeal should be discharged.

The commissioners considered that the statutory power of advancement in section 32 of the Trustee Act, 1925, was not inconsistent with any express provision of the settlement and should be read into it, but that unborn children had interests in the whole of the capital of the trust fund which were "prior "interests" within proviso (*c*) to section 32 (1). Since the Crown did not dispute that if that were right no advancement could be made owing to the impossibility of obtaining consents, the commissioners allowed the appeal and discharged the assessments.

On the appeal by the Crown the claim was revised and it was contended that the power to advance to the settlor's wife provided by section 32 would be limited to one-half of the two-thirds of the trust fund in which she had a vested interest liable to be divested if she predeceased the settlor.

Danckwerts J. decided in favour of the taxpayer that the trust for accumulation during the settlor's lifetime sufficed as a "con-"trary intention" within section 69 (2) of the Trustee Act, 1925, to negative the powers of advancement contained in section 32, but that (if those powers had been exercisable) as regards the two-thirds interest, the consent of the unborn children would not have been required to an advancement for they were not "prior "interests" within section 32 (1) (*c*).

The Crown appealed.

The Hon. B. Bathurst Q.C., *E. Blanshard Stamp* and *Alan S. Orr* for the appellants, the commissioners.

Sir Lynn Ungoed-Thomas Q.C. and *C. N. Beattie* for the respondent taxpayer.

In addition to the cases referred to in the judgment, the following were cited in argument: *Vestey's Executors* v. *Inland Revenue Commissioners* [2]; *Barr's Trustees* v. *Inland Revenue*

[2] [1949] W.N. 233; [1949] 1 All E.R. 1109, H.L.

Commissioners[3]; *In re Rees*[4]; *In re Gosset's Settlement*[5]; *In re Pilkington*[6]; *In re Beckett's Settlement.*[7]

LORD EVERSHED M.R. By a deed of May 16, 1947, the taxpayer transferred to the trustees of the deed the sum of £500 to be held on the trusts therein declared. In that document the taxpayer was thereafter referred to as "the settlor" and I will, therefore, call the document a settlement, though it is, as will appear, of a somewhat unusual nature and also, if I may say so, not in all respects very elegantly drafted. The object of the document was to make provision for a lady, Sagle Norah Thoms, called "the beneficiary." At the time of the document the settlor and the beneficiary were not married but the court has been informed that at some date two or three years thereafter they did become man and wife. The object of the deed manifestly was to make provision upon the settlor's own death for the beneficiary and for any children they might have, whether born in or out of wedlock, and there is, as will appear, a final trust in favour of the beneficiary's sister.

[His Lordship referred to the first four clauses of the settlement, commented that in the case of the beneficiary's sister only there was no requirement that she had to survive the settlor in order to take a vested interest, and went on:] It follows that there is no resulting trust in favour of the settlor. The other clauses are administrative only.

As I have indicated, the settlor and beneficiary were not at the time married but they did subsequently marry. At some date considerably after the date of the settlement and the marriage, it appears to have occurred to those responsible in the Department of Inland Revenue that here was a case in which, as a result of the application of the provisions of section 32 of the Trustee Act, 1925, a claim for surtax fell to be made upon Mr. Bernstein; and according to the case stated the assessments against which he later appealed were in respect of the four years 1950–51 to 1953–54 inclusive, and those assessments, according to the case (though Mr. Bathurst has said the figures are not to be accepted as correct), amounted to no less than £18,729. On the face of it, the case is a little startling. No advancement pursuant to section 32 of the Trustee Act has ever purported to have been made, and we have been informed by Sir Lynn that at some date, after the claim first arose, by an appropriate instrument, which obviously it would be competent for the parties to execute, the trusts of the settlement have been varied so as henceforth to exclude any possibility of advancement to the beneficiary who is now the wife of the settlor. I do appreciate that those responsible

[3] (1943) 25 T.C. 72.
[4] [1954] Ch. 202; [1954] 2 W.L.R. 59; [1954] 1 All E.R. 7.
[5] (1854) 19 Beav. 529.
[6] [1959] Ch. 699; [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623.
[7] [1940] Ch. 279; 56 T.L.R. 342.

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might well take the view that by instruments of this general nature it might be possible for persons of means to provide, as the phrase goes, for a "rolling up" of the income, yet thereafter to make the resultant capital available to a substantial extent by way of advancement to the settlor's wife, and thus to avoid what otherwise might have been a liability to substantial taxes. As it is, the variation which has been made has shown that in this case, at any rate, that is no longer in any circumstances possible.

I must now turn to the relevant sections of the two Acts of Parliament with which we are concerned. The claim is made by virtue of section 405 of the Income Tax Act, 1952. By subsection (1): "If and so long as the settlor has an interest in any "income arising under or property comprised in a settlement"—and I pause to observe that it is not here in doubt that this instrument is "a settlement" within the meaning of this section—"any income so arising during the life of the settlor in any "year of assessment shall, to the extent to which it is not dis-"tributed, be treated for all the purposes of this Act as the income "of the settlor for that year and not as the income of any other "person. . . ." Subsection (2): "For the purpose of subsection (1) ". . . the settlor shall be deemed to have an interest in income "arising under or property comprised in a settlement if any in-"come or property which may at any time arise under or be com-"prised in that settlement is, or will or may become, payable to or "applicable for the benefit of the settlor or the wife or husband of "the settlor in any circumstances whatsoever." Anticipating the argument for the Crown, it is this: that by the incorporation into the settlement of the power under section 32 of the Trustee Act, 1925, to make advancements, in this case to the beneficiary, so it follows that the settlor must be deemed to have an interest in property comprised in the settlement because property comprised in that settlement may at some time become payable for the benefit of the wife of the settlor in some circumstances, videlicet, upon the exercise of the power of advancement. It will be seen, therefore, that the claim rests on the premise that the provisions of section 32 of the Trustee Act must be treated as available for the trustees of this settlement.

Section 32 is, as I have already indicated, the section which confers upon trustees the power of advancement. I need not read it at length; it is in general terms. Trustees may at any time apply any capital money subject to a trust for the advancement of any person entitled to the capital of the trust property, whether absolutely or contingently. There follows a proviso, paragraph (*a*) of which imposes a limit on the power of advancement in any case of one-half of the presumptive or vested share or interest of the person to whom the advancement is made. Paragraph (*c*) states: "no such . . . application shall be made so as to "prejudice any person entitled to any prior life or other interest, "whether vested or contingent, in the money . . . applied unless "such person is in existence and of full age and consents in

"writing to such payment or application." Subsection (2) confines the application of the section to what I may broadly call personalty settlements but no point turns upon that.

Section 32, like its immediate predecessor relating to maintenance and many other sections in the Trustee Act, is in terms general and unqualified. But section 69 (2) of the same Act states: "The powers conferred by this Act on trustees are in "addition to the powers conferred by the instrument, if any, "creating the trust, but those powers, unless otherwise stated, "apply if and so far only as a contrary intention is not expressed "in the instrument, if any, creating the trust, and have effect "subject to the terms of that instrument." I should have stated, as is indeed obvious from the figures that I have mentioned, that the trust property here involved is by no means confined now to the £500 originally paid over to the trustees. Plainly the settlor has from time to time very substantially increased the capital moneys vested in the trustees.

Having read the relevant sections, I may restate the problem in this way. Put in the form of a question, it is whether the power of advancement conferred by section 32 of the Trustee Act applies in this case or whether its application is excluded by the general terms of section 69 (2). A second point arises: if the power of advancement does here apply, then is its effect for practical purposes wholly negatived by the third paragraph of the proviso, seeing that there are not in existence any children of the settlor and the beneficiary, on the ground that such children, if in existence, would have a "prior life or other interest" in the money which might be applied by the exercise of the power? If that paragraph does apply, the circumstances are plainly such that the consent of the non-existent children cannot, of course, be obtained.

When the case was before the special commissioners it was the second point which appealed to them and caused them to reject the Crown's claim to assess the settlor. At that time, in fairness to the commissioners, as Mr. Bathurst pointed out, the Crown's claim had not been limited to any share in the trust property—particularly to the two-thirds share of capital in which the beneficiary has a vested interest liable to be divested on her failing to survive the settlor, now her husband. Subsequently the Crown revised their claim and limited their case to that two-thirds share. In other words, their claim became thenceforth a claim that, by virtue of section 32, there was a power to advance to Mrs. Bernstein up to one-half of that two-thirds. The claim was so limited when the matter came before Danckwerts J., and regarding the interest created by this instrument in that two-thirds, his view was that it could not here be said that these unborn children had a prior interest of any kind in any sums which might be paid out of that two-thirds. He did not, therefore, accept the ground of the commissioners for rejecting the Crown's claim. He did, however, take the view, differing in this

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respect from the commissioners, that on a true view of this instrument, section 32 must, by the effect of section 69, be treated as excluded. I shall read the passage in his judgment which states that conclusion. The judge had referred to *In re Turner's Will Trusts*,[1] in which the Court of Appeal had to consider the application of the excluding provisions of section 69 (2) in relation not to the powers of advancement given by section 32 but to the maintenance powers given by section 31. I shall make a reference presently to what Sir Mark Romer L.J. in delivering the judgment of this court said in concluding that case. Danckwerts J. in the present case said[2]: "Although that"—that is, *In re Turner*[3]—"was a decision on a different section it "may be applicable in the present case for this reason: from the "way this settlement is drawn, and in particular from the fact "that clause 2"—that is, the accumulation paragraph—"is an "entirely separate provision from clause 3"—which states the rights to capital—"and in the plainest possible terms provides for "accumulation during the lifetime of the settlor, it seems to me "that there is an intention that no income shall be distributed "before the death of the settlor. It is true that section 31 deals "directly with income, but this case is very closely allied, for if "the power of advancement be exercised, the effect is to cut off "the appropriate portion of the income after that advancement, "and of necessity the operation must put an end to the trust for "accumulation to that extent. This trust for accumulation is "thus inconsistent with the trust for advancement contained in "section 32 of the Trustee Act, 1925. Section 32, therefore, is "not applicable in the present case and, accordingly, no advances "can be made of either capital or income to the beneficiary "during the settlor's lifetime. That, of course, is the end of "the claim of the Inland Revenue under this particular section, "if it is correct."

Section 69 (2), which I have read, uses the language "so far "only as a contrary intention is not expressed in the instrument ". . . creating the trust," though those words are followed by this later phrase "and have effect subject to the terms of that instru- "ment." At a first reading of the subsection it might seem that in order to exclude the power of advancement there would have to be an express exclusion or something equivalent thereto. But Mr. Bathurst for the Crown has not here contended that the section requires anything so positive in expression. He has conceded (and for reasons which will in a moment appear, I think, if I may say so, rightly conceded) that it suffices to make the statutory power of section 32 inapplicable if, on a fair reading of the instrument in question, one can say that such application would be inconsistent with the purport of the instrument. One

[1] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A.

[2] [1960] 1 Ch. 444, 453; [1960] 2 W.L.R. 554; [1960] 1 All E.R. 697.

[3] [1937] Ch. 15.

ground for taking that view does, I think, clearly emerge from *In re Turner's Will Trusts*,[4] to which I have already alluded. I have said that there the question was whether the powers of section 31 as to maintenance were applicable and not whether section 32 was applicable. At the end of the judgment of the court read by Romer L.J. there is this language[5]: "Another "contention, advanced on behalf of the appellant Jessie Turner, "was that the interest of the persons who should ultimately "become entitled to the residuary estate in the accumulations of "income directed by the will was a prior interest affecting the "property within the meaning of section 31 (1). The question "involved in this contention was adverted to but left undeter-"mined by Clauson J. in *In re Spencer*."[6] That is a reference to a point analogous to the second point which arises in this case. Romer L.J. continued[7]: "It is a question of some difficulty "upon which we need not express an opinion. For in view of "the construction that we have put upon section 69 (2) of the "Act, the question can never arise again, inasmuch as the "direction to accumulate is in any case an expression of a con-"trary intention within the meaning of that subsection." It follows, therefore, that in *In re Turner's Will Trusts*[8] the Court of Appeal was, as I apprehend the judgment, saying that section 69 (2) will have its exclusive effect if one finds upon a proper reading of the instrument a contrary intention and one need not seek for an express exclusion. As Danckwerts J. observed, this present case obviously bears an analogy, at any rate, to *In re Turner's Will Trusts*,[8] though it involves the problem of excluding a different section. I confess I have felt great difficulty about this case and have been aware of changes of view as the case has been argued. I was much impressed, if I may say so, with Mr. Bathurst's main argument which I can, I hope, adequately summarise thus. He said that when one is dealing with the exclusion of section 31, one is dealing with a section which is primarily directed to an application of income, and that is nonetheless true though section 31 does contain provisions for accumulation. Since an accumulation clause is directed to income, one, therefore, gets at once an obvious conflict between a direction to accumulate income and a power to apply income. But when one comes, says he, to section 32, one is dealing with a power given to deal with capital or what has become capital, and there is, therefore, no such inevitable conflict between a trust to accumulate income and a power to deal with capital, albeit the capital will consist in part of capitalised income. And Mr. Bathurst pointed out with great force, if he will allow me to say so, that to take too easily the view that a trust for accumulation excludes the powers of section 32 might have very far-reaching effects. Take, says he, the ordinary case of a settlement strictly so

[4] [1937] Ch. 15.
[5] Ibid. 28.
[6] [1935] Ch. 533.
[7] [1937] Ch. 15, 28.
[8] Ibid. 15.

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described, where one gets a life interest to A and then afterwards the capital is payable upon the happening of some event to B or to a class of persons, and where there is a trust for accumulation during some part, for example, of A's life interest. It is, says he, and he says it with force, nothing to the point here that one could not, of course, make advances without A's consent; but in such a settlement there would be nothing inconsistent with the application of income either by way of accumulation (if there was such a provision in the clause) or by paying it to A and in saying you can pay out capital by way of advancement and thus diminish the income of the trust fund which thereafter would be payable to the life-tenant with or without a provision for accumulation at the same time. From that argument Mr. Bathurst says that the view which commended itself to Danckwerts J. would have an effect so wide as almost to exclude the application of the powers in any kind of case.

I have, as I say, been much impressed with that argument, but in the end of all I have come to the conclusion that the passage which I have read from the judgment of Danckwerts J. ought not in this court to be held to be wrong. It is, after all, a question in every case of examining the instrument and seeing what really was its effect or purpose. In this case it is quite apparent that the whole object of the instrument was to build up a capital sum which would be paid out to the beneficiary or her children, if any, upon the settlor's death. The trust for accumulation has, therefore, in this case a special importance and emphasis. Moreover, that circumstance is, I think, emphasised by the language of the clause to which Mr. Bathurst referred us in Key and Elphinstone (15th ed. (1953), vol. 2, p. 635); for from that precedent this clause does in a material respect slightly differ. I refer to that part of it which states that the resulting investments of income are to go in augmentation of the capital of the trust fund and for the benefit of the person or persons who shall become entitled thereto (that is, to the trust fund); and by definition, taking the two clauses together, it is clear that the trust fund is meant to comprehend whatever from time to time shall be capital in the hands of the trustees. As I have said, there are no other purposes in this instrument save to provide for the event on the settlor's death of distributing a sum of capital to the persons who then become entitled to it. I cannot, I think, in the circumstances improve upon the occasion by trying to add anything to the passage of the judgment of Danckwerts J. which I have read. It seems to me, if I may say so, lucid, it refers to the particular character of this settlement, and on that basis reaches the conclusion which he states and from which, in the end of all, I do not feel that I should dissent.

Taking that view it is unnecessary to pursue the second point raised by Sir Lynn Ungoed-Thomas, the point that the children, though unborn, have here a prior interest in any sums paid out because they are, as he puts it, concerned, or they would be

concerned if they lived, to see that the income in each year is, in its totality, applied in augmentation of the capital. I confess that the argument has a refinement and philosophical quality which I am not sure I have entirely been able to appreciate as I should have done. The point is a difficult one and its difficulty is emphasised by the circumstance that in *In re Spencer*[9] Clauson J. adverted to a similar argument. He stated that it would involve grave difficulties at least if it were applicable in a case where accumulation was not specifically directed by the instrument. And as the Court of Appeal said in *In re Turner's Will Trusts*,[10] it is "a question of some difficulty upon which we need "not express an opinion." I am glad to be able to follow that precedent in this case by refraining also from expressing an opinion upon it, save only to say upon this part of the argument I am not to be taken as intimating that I think, as at present advised, that Danckwerts J. was wrong in saying that the point was not one which should decide the case in the respondent's favour. But I put it no higher than that. I rest my conclusion, as did the judge, upon the view that under the rather special circumstances of this case it is not right to say that the power of advancement given by section 32 of the Trustee Act, 1925, ever was available to the trustees, and it follows, accordingly, that there is no property which might become available in any circumstances to the settlor's wife so as to attract liability for tax upon the settlor.

For these reasons I would dismiss the appeal.

HARMAN L.J. I agree. That the questions agitated before us are of some difficulty is well illustrated by the fact that though the judge reached the same conclusion at the end of the road as the commissioners, he reached it by a precisely opposite route. The commissioners preferred the "prior interest" point; the judge rejected that point and preferred the other.

I need not say anything more about the document, the so-called "settlement," though I should prefer to call it a "trust" rather than a settlement, beyond saying that I take the view, as at present advised, that the interest of "the beneficiary" is not a contingent one but is a vested interest subject to being divested if ever she predeceased the settlor leaving children her surviving or (if she predecease the settlor) whether she had children or not. It is a very inelegantly drawn document, but that seems to be how it works out.

As to section 32 of the Trustee Act, 1925, I think it is to be remembered that it ends by providing that it shall have effect subject to the terms of the instrument. It is said that the way to test the matter is to write section 32 into the instrument, the trust, and then see whether clause 2 supplies a contrary intention. One should also, I take it, read section 32 as being subject to

[9] [1935] Ch. 533.

[10] [1937] Ch. 15, 28, C.A.

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the terms of that instrument, including here clause 2. No doubt if one had an express clause for advancement in this instrument it would be construed as a proviso to operate notwithstanding clause 2, and in some settlements I do not doubt such a clause would be held so to operate. The judge, however, felt that he ought to hold that there was a contrary intention having regard to *In re Turner's Will Trusts* [11] which my Lord has mentioned.

That case was not concerned with section 32, but with section 31, and it was held by the court, and seems to have been assumed on all sides (because there does not appear to have been any argument about it), that if the so-called trust in section 31 (2) should be construed as merely being a power, so as to be reached by section 69 at all, there was a contrary intention which overrode it in the terms of the accumulation clause. That accumulation clause was only a subsidiary part of that settlement. The Court of Appeal did so hold, and as a result in the passage which my Lord the Master of the Rolls has read, Romer L.J. concluded that this question could never arise again because the court had assumed that the accumulation clause did provide a contrary intention. It is, accordingly, admitted by the Crown that here the statutory power to maintain included in section 31 of the Act is overridden by the express trust to accumulate, and the Gilbertian position is thus reached that though the children of this union may not be maintained out of income, they may be advanced out of capital.

When one reaches that conclusion it is time to draw the foot back before one slips into the pond of absurdity. The justification is this, that a decision on section 31, which goes to income, does not cover an advancement of capital under section 32. This is true in terms and might, I think, perhaps be justified if the direction to accumulate were merely an ancillary or administrative provision dealing with some contingent event, but here the main object of the settlement is to accumulate income during the settlor's life in order to provide a fund for this lady and his children by her after his death.

I do not think that we should be justified in the suspicion or the possibility suggested by the Crown as being the real object, which is, so they say, to provide the lady during her husband's life, and perhaps him through her, with a sum of money free of surtax and so to be a rich man's dodge for avoiding surtax. I think that the paramount object of the document, made as it was on a lady who was not his wife, was that which is stated in it, and that being the object, accumulation being in the forefront of the battle, it seems to me to operate as an expressed contrary intention so as to override the statutory power in section 32. If (as the statute enjoins) one reads the statutory power as also subject to clause 2, one cannot allow it to operate. It is said that proves too much, but I do not think in a case of this sort

[11] [1937] Ch. 15.

that it is anything more than a matter of construing the document with section 32 added on at the end of it, and seeing whether it is overridden by the trust to accumulate, and I think it is. The judge treated it as a question of income. In that I do not agree with him, for the sum advanced, as counsel for the Crown pointed out, is taken for all purposes out of the settlement, and this income after the advancement cannot be said to be income of the settled property. (See *In re Fox.*[12])

In that proposition I concur. But section 405 of the Income Tax Act, 1952, speaks not only of income, but of "property," which would include capital advanced and so taken out of the settlement. If my view be right it is an end of the case, and an end which is in consonance with the judge's finding. Whether, if I took a different view, I should agree with the judge in his second finding rejecting the so-called "prior interest" point, I do not know. Clauson J. shrank from it in *In re Spencer*,[13] the Court of Appeal did the same in *In re Turner's Will Trusts*,[14] and I think we need not be ashamed to follow those examples. The point, Romer L.J. said, was of some difficulty. Clauson J. thought it of great difficulty. It may be that the answer to it is in the argument submitted in *In re Turner's Will Trusts* [15] and reported in these words: "A difficulty in the way of this contention is, how-"ever, that prior interest presumably means an interest which, "during the period of accumulation, confers a paramount right to "call for the income." Here there is in a sense a prior interest in income in the lady herself and in her children if she has any, but whether that ought to be called a prior interest is a matter, as I say, of doubt, although I myself feel some inclination towards the view of the commissioners upon it. But that is not a matter we need decide; the first point concludes the matter. There is no power of advancement here. The danger which the Crown purports to anticipate cannot, therefore, happen, and the income cannot be treated as the settlor's income.

DONOVAN L.J. The effect of this disposition operating on the initial £500 and the added funds has been to remove a maximum of some £6,000 per annum of the settlor's income from the surtax net: and one can hardly suppose him to have been so unsophisticated as not to foresee and intend that result, whether as a primary object or only a secondary one. If so, it is unlikely that he would want anything in the deed to produce at any time the opposite result. But no evidence was called as to the circumstances surrounding the creation of the trust and one is confined to the document itself when looking for any contrary intention within the meaning of section 69 (2).

The document has a number of distinctive and unusual features. There is no power to apply income for maintenance, no express power to advance capital, no power of appointment or

[12] [1904] 1 Ch. 480.
[13] [1935] Ch. 533.
[14] [1937] Ch. 15.
[15] Ibid.

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of revocation and no resulting trust. The one reasonable explanation which fits all these omissions is an intention on the part of the settlor that his surtax saving shall be secure. A resulting trust, for example, would have done no harm if estate duty were alone in mind. Accordingly, the document itself raises, to my mind, a presumption that the settlor wanted no power of advancement in it which would substantially reduce his surtax saving the moment he married the beneficiary.

I do not found my conclusion on these considerations. I agree that a contrary intention is here to be found for the reasons which my brothers have given. But having reached that conclusion, I think that the features of the deed which I have indicated do tend to confirm that it is right. Accordingly, I would also dismiss this appeal.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue; Gouldens.*

E. D.

[PRIVY COUNCIL.]

J. C.*
1961
Jan. 17.

THE QUEEN . . . . . APPELLANT;

AND

PANIKKAPODY EDIRIMANASINGHAM . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON.

Crime—Court of Criminal Appeal—Substitution of sentence—Conviction on three counts—Sentence passed on one only—Conviction on that count quashed on appeal—Power of appellate court to impose sentence on the other counts—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (1)—*Court of Criminal Appeal Ordinance* (*Ceylon*), *No.* 23 *of* 1938, *s.* 6 (1).

Ceylon—Criminal law—Court of Criminal Appeal—Statutory power to substitute sentence—Construction—Court of Criminal Appeal Ordinance, No. 23 *of* 1938, *s.* 6 (1).

By section 6 (1) of the Court of Criminal Appeal Ordinance, 1938, of Ceylon (which is identical in terms with section 5 (1) of the English Criminal Appeal Act, 1907): "If it appears to the Court "of Criminal Appeal that an appellant, though not properly "convicted on some charge or part of the indictment, has been "properly convicted on some other charge or part of the indict-"ment, the court may either affirm the sentence passed on the

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* *Present*: LORD REID, LORD TUCKER, LORD DENNING, LORD MORRIS OF BORTH-Y-GEST, the RT. HON. L. M. D. DE SILVA.

"appellant at the trial or pass such sentence in substitution "therefor as they think proper and as may be warranted in law "by the verdict on the charge or part of the indictment on which "the court consider that the appellant has been properly convicted."

The respondent, who had been indicted on three charges, one of murder and two of attempted murder, was found guilty on all three counts. The trial judge sentenced him to rigorous imprisonment for life on the murder count, but passed no sentence on him in respect of either of the other two counts. On his appeal, the Court of Criminal Appeal quashed his conviction on the murder count, and held that section 6 (1) of the Court of Criminal Appeal Ordinance gave them no jurisdiction to pass the appropriate sentences on the other two counts on which the jury's verdict stood, and which was not challenged on the appeal. On appeal by the Crown against the court's decision that it lacked such jurisdiction:—

Held, that the Court of Criminal Appeal could under section 6 (1) of the Ordinance pass the appropriate sentences on the two counts on which the judge had omitted so to do. Where the sentence passed on the appellant at the trial had been quashed the words of the subsection in their ordinary and natural meaning conferred power on the Court of Criminal Appeal to substitute a proper sentence for that which had been quashed, which could only be done by passing sentence on the remaining good counts.

Rex v. *O'Grady* (1941) 28 Cr.App.R. 32 and *Reg.* v. *K. G. Sediris* (unreported, Ceylon Court of Criminal Appeal, March 5, 1956) approved.

Judgment of the Court of Criminal Appeal of Ceylon reversed, and case remitted to that court for such action as they might consider appropriate in the circumstances.

APPEAL (No. 12 of 1960), by special leave, from a judgment and order of the Court of Criminal Appeal of Ceylon (Basnayake C.J., Pulle and H. N. G. Fernando JJ.) (January 26, 1959), in so far as that court (having quashed the conviction of the respondent for murder) refused to apply the provisions of section 6 (1) of the Court of Criminal Appeal Ordinance for the purpose of passing sentence on the respondent in respect of his convictions on the two other counts.

The following facts are taken from the judgment of the Judicial Committee: In an indictment dated April 8, 1958, the respondent was charged jointly with his son in the first count that on or about July 27, 1957, they did murder one Sembakutti Kandapodi and thereby committed an offence punishable under section 296 of the Penal Code of Ceylon. The second count charged them at the time and place aforesaid and in the course of the same transaction with shooting one Palipody Nagamany with a gun and causing him hurt with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Palipody Nagamany they would have been guilty of murder, and that they thereby committed an offence punishable under section 300 of the Penal Code. The third count charged them at the time and place aforesaid and in the course of the same transaction with shooting at one Eliyathamby Palipody with a gun with such intention or knowledge and under such circumstances that had they by such act caused the death of the said

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Eliyathamby Palipody they would have been guilty of murder, and thereby committed an offence punishable under section 300 of the Penal Code.

The two accused were tried at a session of the Supreme Court of Ceylon in its Criminal Jurisdiction for the Eastern Circuit at Batticaloa on September 8, 1958, and following days.

On September 12, 1958, after the judge's summing-up the jury retired, and on their return to court were asked with regard to each separate count whether they were unanimously agreed on their verdict in respect of each of the accused, and by their foreman answered on each count that they found both accused guilty.

The judge thereupon said: "Inform the verdict to the "accused. Tell the first accused that I sentence him to rigorous "imprisonment for life. I sentence the second accused for "rigorous imprisonment for life." The verdict and sentence were formally recorded as follows:—

"The unanimous verdict of the jurors sworn to try the matter "of accusation in this case is that the prisoners (1) P. Edirimana-"singham and (2) E. Gopalapillai are guilty of the offences as set "out in counts (1), (2) and (3).

"Sgd.
Foreman."

"Sgd. O. W. Wanniachy
"Clerk of Assize, S.C.
"Batticaloa.

"On this indictment the sentence of the court, pronounced "and published this day, is that the prisoners (1) P. Edirimana-"singham and (2) E. Gopalapillai be kept in rigorous imprison-"ment for life.

"Sgd. O. W. Wanniachy
"Clerk of Assize, S.C.
"Batticaloa."

A sentence of rigorous imprisonment for life exceeded the maximum permitted by the Code for the offences charged in counts 2 and 3.

On January 26, 1959, on appeal to the Court of Criminal Appeal by both accused, the appeal of the second accused was dismissed but the appeal of the first accused (the present respondent) against the verdict and sentence on the first count of the indictment was allowed on the ground that the verdict was not warranted by the evidence and a verdict of acquittal in his case was directed to be entered in respect of that charge. The jury's verdict against the respondent on the second and third counts was not challenged by counsel on the appeal.

The Court of Criminal Appeal, having quashed the conviction of the respondent on count 1, held they had no jurisdiction under section 6 (1) of the Court of Criminal Appeal Ordinance, 1938, to pass the appropriate sentences on counts 2 and 3 on which the jury's verdict of guilty stood.

The Crown now appealed against the decision of the Court of

Criminal Appeal that they had no jurisdiction under section 6 (1) to pass such sentences.

1960. Dec. 5, 6. *F. H. Lawton Q.C.* and *T. O. Kellock* for the Crown.

E. F. N. Gratiaen Q.C. Ceylon, *Walter Jayawardena* and *Miss M. K. de Silva* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Reg.* v. *Lovelock* [1]; *Rex* v. *Grubb* [2]; *Rex* v. *Hervey and Goodwin* [3]; *O'Connell* v. *The Queen* [4]; *Castro* v. *The Queen* [5]; *In re Hastings* [6]; *Reg.* v. *Adair* [7]; *MacDougall* v. *Paterson* [8]; *Julius* v. *Lord Bishop of Oxford* [9]; *Reg.* v. *Bertrand* [10]; *Attorney-General for Ceylon* v. *Perera.* [11]

1961. Jan. 17. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: It is clear from the above narrative of events that the trial judge passed sentence on the respondent on one count only and that no question of the effect of what is generally referred to as a "general sentence," i.e., a sentence intended by the judge to cover more than one count, arises in the present case. Such a sentence, which is sometimes to be found in cases in England both before and since the establishment of the Court of Criminal Appeal and the Indictments Act of 1915, appears to be unknown in Ceylon having regard to the provisions of the Criminal Code and may well be illegal, but it is not necessary further to explore this question as no such sentence was in fact imposed in this case.

In Ceylon, where the trial judge has omitted to pass sentence forthwith, he may of his own motion or at the instance of the prosecution pass sentence at a later date, but not after the close of the sessions. The relevant part of section 251 of the Criminal Procedure Code is as follows: "251. If the accused is convicted "the judge shall either forthwith or before the close of the "sessions pass judgment on him according to law." Accordingly, the sessions having closed no question of remitting the case to the trial judge for sentence arose on the appeal.

The Attorney-General on behalf of the prosecution obtained special leave by Order in Council of August 12, 1959, to appeal against the decision of the Court of Criminal Appeal.

The sole question in the appeal is whether or not the Court of Criminal Appeal were right in holding that section 6 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, does not

[1] [1956] 1 W.L.R. 1217; [1956] 3 All E.R. 223; 40 Cr.App.R. 137, C.C.A.
[2] (1945) 61 T.L.R. 288; 30 Cr.App.R. 148, C.C.A.
[3] (1939) 27 Cr.App.R. 146, C.C.A.
[4] (1844) 11 Cl. & F. 155, H.L.
[5] (1881) 6 App.Cas. 229, H.L.
[6] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707; 42 Cr.App.R. 132, D.C.
[7] [1958] 1 W.L.R. 786; [1958] 2 All E.R. 629, C.C.A.
[8] (1851) 11 C.B. 755.
[9] (1880) 5 App.Cas. 214, H.L.
[10] (1867) L.R. 1 P.C. 520, P.C.
[11] [1953] A.C. 200; [1953] 2 W.L.R. 238, P.C.

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give them jurisdiction in a case such as this to impose the appropriate sentences on those counts of an indictment on which the judge has omitted so to do.

[His Lordship stated the terms of section 6 (1) of the Ordinance (set out in the headnote) and continued:] The Court of Criminal Appeal accepted the argument of counsel for the present respondent that the subsection only conferred power on the court to pass sentence in substitution for the sentence passed by the trial judge, and that when the trial judge has passed no sentence at all the question of substitution does not arise. After referring to certain English decisions, and in particular *Rex* v. *O'Grady*,[1] the Chief Justice, delivering the judgment of the court, said they were unable to accept *O'Grady's* case as having any persuasive force as no reasons were given in that case for what seemed to them a disregard of the words of section 5 (1) of the English Criminal Appeal Act of 1907, which are identical with those of section 6 (1) of the Ceylon Ordinance

The judgment proceeded: "In the instant case as the learned "judge has not passed any sentence at all on the second and "third charges we are unable to pass a sentence in substitution "of that passed at the trial. The Ordinance does not empower "this court to supply the omission of the trial judge."

Their Lordships, with respect, feel unable to accept this interpretation of the section. It is in terms dealing with a case where an appellant has not been properly convicted on some charge or part of an indictment. This applies to count 1 in the present case. The conviction and sentence thereon no longer stand, but the court is empowered to substitute for that which has disappeared such sentence as may be warranted in law by the verdict on the charge or part of the indictment on which the appellant has been properly convicted. This, in their Lordships' view, can only mean that in place of the sentence that has been quashed the court can pass the sentence appropriate to the convictions on the remaining counts on which the appellant has been convicted but not sentenced. The section refers to "the sentence "passed on the appellant at the trial." Where the court affirms such sentence the application of the subsection may be restricted to cases where there has been a general sentence, but where the sentence passed on the appellant at the trial—in this case rigorous imprisonment for life—has been quashed, the words of the subsection in their ordinary and natural meaning appear to their Lordships to confer power on the Court of Criminal Appeal to substitute a proper sentence for that which has been quashed, which can only be done by passing sentence on the remaining good counts. This was the course adopted in *O'Grady's* case [1] in this country and their Lordships see no reason to suppose that this was done per incuriam.

It is not necessary to express any opinion as to whether or not the subsection warrants the court in increasing a sentence passed

[1] (1941) 28 Cr.App.R. 33, C.C.A.

at the trial on some other count with regard to which there has been no appeal against sentence. Their Lordships prefer the view taken by the Court of Criminal Appeal in Ceylon in the unreported case of *Regina* v. *K. G. Sediris* [2] to that reached in the present case.

For these reasons their Lordships will humbly advise Her Majesty that this appeal be allowed and that the case be remitted to the Court of Criminal Appeal in Ceylon for such action as they may consider appropriate in the circumstances.

Solicitors: *T. L. Wilson & Co.; Goodman, Derrick & Co.*

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[2] Unreported, C.C.A.Cey., March 5, 1956.

[QUEEN'S BENCH DIVISION.]

GOVERNMENT OF CEYLON *v.* SOCIETE FRANCO-TUNISIENNE D'ARMEMENT-TUNIS.

1960
Nov. 10, 11.
Diplock J.

Shipping — Charterparty — Demurrage — Lay time — Commencement —Cargo overstowed by other cargo—Time waiting for berth—Notice of readiness to discharge—Given before ship ready—Whether further notice necessary.
Ships' Names—The Massalia.

By a charterparty in Gencon form dated July 16, 1956, charterers chartered a vessel from shipowners to proceed to Antwerp and Bordeaux and there to load a part cargo of flour in bags for shipment to Colombo. The charterparty provided: "6 (see clause "16 attached) Time to commence at 2 p.m. if notice of readiness "to discharge is given before noon . . . Time lost in waiting for "berth to count as discharging time . . . 16. Cargo to be dis-"charged . . . at the rate of 750 tons of 2,240 lb. per weather "working day, Sundays and holidays excepted." By clause 30 the owners were at liberty to complete the cargo en route with other goods. The vessel duly proceeded to Antwerp and Bordeaux and then loaded a quantity of flour in bags, and thereafter proceeded to Colombo via Port Said. At Port Said the vessel loaded a completion cargo which was shipped by a number of shippers who were in no way connected with the charterers. Much of this cargo was overstowed above the flour cargo. The vessel arrived at and anchored in the outer anchorage of the port of Colombo at 0612 hours on October 18, 1956. Notice of readiness to discharge was given at 0900 hours on the same day. No berth was available until 0615 hours on Wednesday, October 24. Although the vessel was ready in every respect to begin discharging, it would not have been possible to discharge the flour cargo which was overstowed until most of the Port Said cargo had been discharged. The vessel began discharging her cargo at 0730 hours on October 24 and completed the discharge by 0300 hours on November 3. The permitted lay time under clause 16 was 5 days 19 hours 45 minutes. All the flour cargo was not freely accessible for discharging until 0400 hours

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on Saturday, October 27. But for the unavailability of a berth between 1400 hours on October 18 and 0615 hours on October 24, the vessel would have been totally discharged 5 days 16 hours and 15 minutes earlier than she was. On a claim for demurrage:—

Held, (1) that on the true construction of clauses 6 and 16 of the charterparty "readiness to discharge" referred to readiness to discharge the flour cargo and not the cargo overstowed on the flour cargo.

Dictum of Lush J. in *Straker* v. *Kidd* (1878) 3 Q.B.D. 223, 225 not followed.

(2) That lay time did not begin to run until all the flour cargo was accessible, namely, 0400 hours on Saturday, October 27.

(3) That the owners were entitled pursuant to clause 6 to add the time spent waiting for a berth to the discharging time.

North River Freighters Ltd. v. *H.E. President of India* [1956] 1 Q.B. 333; [1958] 2 W.L.R. 117; [1956] 1 All E.R. 50, C.A. and *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers Ltd.* [1957] 1 Q.B. 109; [1956] 3 W.L.R. 620; [1956] 3 All E.R. 383; [1956] 2 Lloyd's Rep. 211 applied.

(4) That notice of readiness having been given at 0900 hours on October 18, 1956, no further notice of readiness needed to be given when the vessel was ready to discharge, so that lay time started at 0400 hours on October 27, 1956.

(5) That time lost waiting for a berth should be added at the end of the lay days.

SPECIAL CASE stated by an umpire.

By a charterparty executed in Paris in the Gencon form on July 16, 1956, between the charterers, the Government of Ceylon, and the owners of the vessel *Massalia*, it was agreed: That the said "vessel shall proceed to Antwerp and Bordeaux: two loading ports "in this rotation (one good and safe place at each port) . . . and "there load a part cargo of 4,450/4,700 long tons minimum/maxi-"mum of flour in bags, quantity in owners' option (owners to "provide all mats and/or wood for dunnage and any separations "required), which the charterers bind themselves to ship, and "being so loaded the vessel shall proceed to Colombo (one good and "safe berth) as ordered on signing bills of lading or so near thereto "as she may safely get and lie always afloat and there deliver the "cargo on being paid freight on delivered net weight quantity. . . "Freight to be paid in pounds sterling in London, 90 per cent. "on signing bills of lading and balance after right and true "delivery, on net delivered weight, payable in British sterling ". . . ." Clause 2 was the ordinary Gencon exceptions clause. Clause 3 was the ordinary deviation clause. Clause 4 was as to payment of freight.

"5. Cargo to be brought alongside in such a manner as to "enable vessel to take the goods with her own tackle and to "load the full cargo (see clause 16 attached). Time to commence "at 2 p.m. if notice of readiness to load is given before noon "and at 8 a.m. next working day if notice given during office "hours after noon. The notice to be given to the shippers. "Time lost in waiting for berth to count as loading time.

"6. (See clause 16 attached.) Time to commence at 2 p.m.

" if notice of readiness to discharge is given before noon, and at " 8 a.m. next working day if notice given during office hours " after noon. Time lost in waiting for berth to count as dis- " charging time.

" 7. Any demurrage at the rate of £250 (two hundred and " fifty pounds) per day or pro rata for any part of a day, payable " day by day, at ports of loading and discharging. . . .

" 16. Cargo to be loaded and stowed, free of expense to the " vessel, at the rate of 1,000 tons of 2,240 lb. per weather " working day, Sundays and holidays excepted, and to be dis- " charged at receiver's risk and expense at the rate of 750 tons " of 2,240 lb. per weather working day, Sundays and holidays " excepted.

" 30. Owners to have liberty to complete cargo ' en route ' " with other goods, if shipped in same holds as flour cargo, these " goods to be well separated of flour cargo to avoid mixing or " damage to the said cargo. Cost of separation being for owners' " account, and owners to be also responsible of damage, if any, " done to the flour cargo."

The following facts were found by the umpire. The vessel loaded at Antwerp and Bordeaux a total of 4373 metric tons of flour in bags for carriage to Colombo. Pursuant to clause 30 of the charterparty the vessel loaded at Port Said, en route to Colombo, a total of 398·73 metric tons of general cargo together with 633·6 cubic feet of cartons containing household utensils. The cargo loaded at Port Said was shipped by a number of local shippers and was destined for delivery to order or to consignees in Colombo. None of the cargo was shipped by or destined to either the charterers or the shipowners. The cargo which was shipped at Port Said was overstowed above the flour cargo in holds 2, 4 and 5. Practically the whole of the flour cargo was overstowed by the Port Said cargo. The vessel arrived at and anchored in the outer anchorage of the port of Colombo at 0612 hours on Thursday, October 18, 1956. Notice of readiness to discharge was given and received at 0900 hours on the same day. At the time of the vessel's arrival at Colombo, and at all times thereafter until Wednesday, October 24, 1956, no berth was available at which the vessel could discharge either the flour or the Port Said cargo. In the absence of an available berth, the vessel was on her arrival directed by the master attendant's department to anchor in the outer anchorage. The outer anchorage was within the legal, fiscal and geographical limits of the port of Colombo and was the place at which vessels ordinarily lay while awaiting berths. The vessel lay at anchor in the outer anchorage until 0615 hours on October 24 and was during this period as near as circumstances permitted to her actual discharging berth. She was not, however, in a loading or discharging area of the port, no cargo operations being carried out in the outer harbour. The vessel was at 0900 hours on October

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18, and at all material times thereafter, as far as she was concerned, ready in every respect to begin discharging. In particular all the winches and derricks at each hatch were in good working order, and there was sufficient steam available to drive them. The certificate in respect of the vessel's cargo gear was current and still valid. It would not have been possible to begin to discharge those portions of the flour cargo which were overstowed, until some or all of the Port Said cargo overstowing those portions had first been discharged. A berth became available for the vessel on October 24, 1956, in the inner harbour, and she shifted to this berth between 0615 and 0720 hours on the same day. The discharge of the vessel had begun by 07.30 hours on October 24 and was completed by 0300 hours on November 3. The permitted lay time under clause 16 of the charterparty was 5 days 19 hours 45 minutes. All the flour cargo was not freely accessible for discharging until 0400 hours on Saturday, October 27. At all times between the time when she berthed in the inner harbour and 0400 hours on October 27 the vessel could have discharged flour from certain of her cargo compartments, but it was not until 0400 hours on October 27 that all the cargo compartments containing flour became freely accessible for discharge, since it was not until 0400 hours on October 27 that the impediment to discharging flour from certain of the cargo compartments presented by the overstowage of that flour by the Port Said cargo was removed. These facts were at all material times known to the charterers. The last of the Port Said cargo was not finally discharged from the vessel until 0400 hours, October 30, 1956. But for the unavailability of a berth between 1400 hours on October 18 and 0615 hours on October 24 the vessel could and would have been totally discharged 5 days 16 hours 15 minutes earlier than she in fact was.

The charterers contended that lay time only began to run when access to all the holds was available, namely, on October 27, and that it did not begin to run until 1400 hours on that day.

The owners contended that time began to run at 0720 hours on October 24, when the vessel was alongside the berth. They also contended that the additional time taken to discharge the cargo as a result of having to wait for a berth was time lost in waiting for a berth within clause 6 and should count as discharging time in the calculation of demurrage.

The question of law for the opinion of the court was whether on the facts found and upon the true construction of the charterparty any, and if so what, parts of the period between 1400 hours on October 18, 1956, and 0300 hours on November 3, 1956, count as discharging time.

Michael Kerr and *A. E. Diamond* for the shipowners.

T. O. Kellock for the charterers.

The following cases, in addition to those referred to in the

judgment, were cited in argument: *Darling* v. *Raeburn* *; *Nelson* v. *Dahl* †; *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* ‡; *Budgett & Co.* v. *Binnington & Co.* §

DIPLOCK J. This is a consultative case stated by an umpire in a dispute between the charterers and the shipowners as to the amount of demurrage payable in respect of the discharging of a vessel called the *Massalia* at Colombo in October of 1956. It illustrates well the advantages in economy and speed of London arbitration! It has been before the arbitrator twice, before the commercial court once, and the Court of Appeal once. This is the second "go" before the commercial court, and I have no doubt there will be another "go" before the Court of Appeal! [His Lordship referred to the terms of the charterparty and to the findings of fact by the umpire and continued:] A dispute arose between the parties as to the amount of demurrage which was payable. I do not think it is necessary for me to go into the circumstances in which the matter first came before the commercial court [1] and the Court of Appeal,[2] save to say that in the course of it McNair J. expressed, wholely obiter, a view upon which the charterers seek to rely in the present case. I will deal with that when I come to it.

There are really two substantial matters in dispute between the parties. The first is: When did lay time begin to run? The owners contend that it began to run at 0720 hours on October 24, when the vessel was alongside the berth. The charterers, on the other hand, argue that it only began to run when access to all the holds was available, that is to say, at 0400 hours on Saturday, October 27. The charterers, indeed, want a little more time than that, but I will deal with that as a subsidiary point when I come to it.

I think the answer to the first point depends upon the true construction of the charterparty. It seems to me that lay time began to run only when the vessel was ready to discharge the flour cargo. I say that because it seems to me that, upon the true construction of this charterparty, the expression "cargo," unless the contrary appears from the context, means, and means only, the flour cargo. When, for example, one reads clause 1 and finds the obligation to deliver "the cargo on being paid "freight" in a particular way and on particular terms, that must mean the flour cargo, and not include any other goods loaded pursuant to the liberty contained in clause 30 of the charterparty. So also when one comes to clause 5 as to loading—"cargo to "be brought alongside in such a manner as to enable vessel to "take the goods with her own tackle and to load the full cargo

* [1907] 1 K.B. 846; 96 L.T. 437; 23 T.L.R. 354; 12 Com.Cas. 262, C.A.

† (1879) 12 Ch.D. 568, C.A.

‡ [1920] A.C. 88; 122 L.T. 1; 35 T.L.R. 709; 25 Com.Cas. 13, H.L.

§ [1891] 1 Q.B. 35; 63 L.T. 742; 7 T.L.R. 15, C.A.

[1] [1959] 1 Lloyd's Rep. 244.

[2] [1959] 1 W.L.R. 789; [1959] 3 All E.R. 25, C.A.

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"(see clause 16 attached)"— the expression "cargo" must mean the same in clause 5. So also in clause 16. When one looks at clause 16 and finds that the first words of it are "Cargo "to be loaded and stowed, free of expense to the vessel, at the "rate of 1,000 tons of 2,240 lb. per weather working day, "Sundays and holidays excepted," and then goes back to clause 5 and see "Time to commence at 2 p.m. if notice of readiness "to load is given before noon," etc., I think it is quite plain that the "cargo," so far as the loading clause is concerned, refers and is limited to the flour cargo and not the additional goods.

I now turn to the vital clause, clause 6, which starts with the normal words struck out and says "(See clause 16 attached)." So it seems to me that when one is considering clause 6 one must start by reading clause 16, which, having referred to "cargo to be loaded and stowed" in the terms which I have already mentioned, goes on "and to be discharged at receiver's risk and "expense at the rate of 750 tons . . . per weather working day" etc. It seems to me that "cargo" there must mean the same throughout that clause, and is limited to the flour cargo. Accordingly, when one goes back to clause 6, and reads on: "Time to commence at 2 p.m. if notice of readiness to discharge "is given before noon and at 8 a.m. next working day if notice "given during office hours after noon," the readiness to discharge must refer to readiness to discharge the flour cargo and not readiness to discharge a cargo overstowed upon the flour cargo.

Mr. Kerr, on behalf of the owners, has made two points in answer to this. First of all, he relies upon the judgment of Lush J. in *Straker* v. *Kidd*.[3] That was a case where a vessel was chartered "for the conveyance of a cargo of wheat from Danzig "to London. Eight bills of lading were given by the master for "various portions of the wheat shipped by the charterers, one "of which had been indorsed to the defendants. Each of them "contained the following clause: 'Three working days to dis-"'charge the whole cargo, or £30 sterling per day demurrage.'" Lush J. held that the bills of lading containing that clause placed upon each of the indorsees an obligation to pay demurrage if the whole cargo was not discharged within the lay time. So far as that decision is concerned, and the similar one of *Porteus* v. *Watney*,[4] they are simply cases upon the proper construction of the bills of lading, and lay down no general principle of law. I have to construe an entirely different document. But Mr. Kerr says that there is, hidden away in the judgment of Lush J., a dictum which shows that Lush J., if he had had the present case before him, would have decided in the owners' favour. This is the passage on which he relies. Having expressed his view as

[3] (1878) 3 Q.B.D. 223.

[4] (1878) 3 Q.B.D. 534, C.A.

to the meaning of the clause, Lush J. said[5]: "The objection "raised against this rendering of the clause is undoubtedly "striking. It virtually makes each holder of such a bill of lading "answerable for the others as well as for himself, though he has "no control over their acts. But no other construction can be "put upon the clause, without doing violence to the words or "introducing a qualification which destroys their force. If the "words had been, as the defendants contend they should read, "'Three days to discharge the goods in this bill of lading or "'demurrage,' the defendants would have been in no better "position; for the words must have been construed as an abso-"lute contract to clear the goods within that time." Looking back, one sees that these particular goods were understowed with other goods above them. Mr. Kerr argues that Lush J. was then deciding that the three working days to discharge the goods in this bill of lading would have started at the date at which any part of the cargo could be discharged. I doubt if Lush J. was directing his mind to that problem. If he was, the observation is only dicta, and somewhat obscure dicta at that, and I do not propose to follow it.

The other line on which Mr. Kerr has sought to say that the lay time started to run before all the holds were available is that he points out, rightly, that, although there is authority as respects loading, that a vessel is not ready to load unless she is discharged and ready in all her holds so as to give the charterers complete control of every portion of the ship available for cargo—see *Lyderhorn Sailing Ship Co. Ltd.* v. *Duncan Fox & Co.*,[6] as approved by Scrutton L.J. in *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[7]—there is no authority that the same principle applies as to discharging. Well, someone has got to decide whether it does or whether it does not. I can, in this respect, see no reason for distinguishing between loading and discharging. It seems to me common sense that the same principle as regards availability of holds would apply to discharging as to loading, and I propose, at any rate temporarily, to fill the gap in the authority upon this subject.

I take the view, therefore, that the charterers are right in their contention that lay time did not begin to run until all the flour cargo was accessible, which time, on the findings of the umpire, is 0400 hours on Saturday, October 27.

I will turn now to the next main point of contention, one on which a substantial amount of demurrage depends, and that is whether or not the owners are entitled to add the time which they spent in fact waiting for a berth to the discharging time. I will have to consider in a moment whether they add it at the end or the beginning, because that may affect the figures. What the owners say is very simple. They say that clause 6 provides

[5] (1878) 3 Q.B.D. 225.

[6] [1909] 2 K.B. 929; 25 T.L.R. 739; 14 Com.Cas. 293, C.A.

[7] [1917] 2 K.B. 204, 211, C.A.

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that "Time lost in waiting for berth to count as discharging "time." This vessel was obliged to wait for 5 days 16 hours and 15 minutes for a berth, as a result of which it took her that amount longer to discharge the cargo from the moment at which she was ready to proceed to the berth, and, say the owners, the additional length of time taken to discharge the cargo as a result of having to wait for the berth is "Time lost in waiting "for berth." That is an attractive argument. It seems to me that it is what the words say. Similar words were thought by the Court of Appeal in *North River Freighters Ltd.* v. *H.E. President of India* (the *Radnor* case)[8] and by Sellers J. in *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers Ltd.* (the *Werrastein* case),[9] to mean precisely that. Mr. Kellock, however, seeks to draw a distinction between those two cases and the present case, because he says that, in those two cases, while it is true that the vessel was not in a position to give notice of readiness to load because she was not at a geographical place where she could load or discharge—one was loading and the other was discharging—nevertheless she was in a physical condition in each case to start loading or start discharging the cargo as soon as she got to the berth. He says in the present case, relying on my finding that the relevant cargo for the purpose of clause 6 was the flour cargo, that this vessel was not ready to discharge the flour cargo as soon as she got to the berth because of the overstowing, and he relies in particular upon the dictum of Parker L.J. in the *Radnor* case[10] where he says: "If in any "case a charterer could show that, even if a berth had been "available, the vessel could not have been ready for cargo, he "would be able to say that all the time occupied in waiting for "a berth had not been 'lost,' but the finding here is that at "9.30 a.m. on June 3, 1951, the vessel was 'dunnaged, matted "and all hatches ready for cargo.'" I am quite sure that Parker L.J., in making that dictum, did not have in mind the sort of case with which I am concerned here. I see no reason, in reason or authority, to make me depart from what seems to be the natural meaning of the words, that time lost as a result of this waiting for a berth should count as, and be, extra time which it took her to finish discharging this cargo as a result of waiting for a berth.

In my opinion, therefore, the contention of the owners is correct as regards the second point, and they are entitled to have counted for the purposes of calculating demurrage the time lost in waiting for a berth. The owners concede that that time did not start until the notice of readiness which they gave expired, and, in view of that concession, it is unnecessary for me to decide

[8] [1956] 1 Q.B. 333; [1956] 2 W.L.R. 117; [1956] 1 All E.R. 50, C.A.

[9] [1957] 1 Q.B. 109; [1956] 3 W.L.R. 620; [1956] 3 All E.R. 383; [1956] 2 Lloyd's Rep. 211.

[10] [1956] 1 Q.B. 333, 350.

whether or not that would have been the case. In those circumstances, the time lost waiting for a berth starts ex concessi by the owners at 1400 hours on October 18, 1956, and ends at 0615 hours on Wednesday, October 24, 1956, when the vessel shifted to her berth. That I am told is a time of 5 days 16 hours and 15 minutes.

Two—and I hope only two—minor points arise. The first is whether, when all the flour cargo was accessible, that is to say at 0400 hours on Saturday, October 27, 1956, the starting of lay time was nevertheless deferred until 1400 hours, because, had a notice of readiness been given at that time, it would not have expired under clause 6 until 2 o'clock on the day in which it was given. I think there is a good deal to be said for either view on this interesting problem of arithmetic. There is no authority on it that I know of; certainly no one has drawn my attention to it. There is authority that, when notice of readiness is given (as this one was) before the vessel was in fact ready, no further notice of readiness is required. On the whole, I see no reason why I should treat the position as if a further notice of readiness had been given at 0400 hours on the Saturday. There was a notice of readiness already given. It could not take effect until the vessel was in fact ready for discharge, and, as the charterers were in fact discharging the cargo at the other hatches at that time, and so needed no notice to get ready, I do not think I shall be doing any substantial injustice if I take the view, which prima facie I think would be the correct one here, namely, that lay time started at 0400 hours on Saturday, October 27.

The last matter which I have to decide is whether one adds the time lost in waiting for a berth at the beginning or at the end of the lay days. That sounds to an arithmetician as if the sum must come to the same, but in this particular case I understand that it makes a difference of a day, because, if one adds it at the beginning, the Sunday, October 28, is excluded from the lay time and therefore counts as demurrage. If, on the other hand, one adds it at the end, then the Sunday comes during lay time, and does not count. So it does make a difference of 24 hours. Without giving any reason, I hold that it should be added at the end.

[The following agreed form of answer was given by the court to the question of law stated for the court's opinion: (1) The period of 5 days 16 hours and 15 minutes from 1400 hours on October 18, until 0615 hours on October 24, 1956, counted as discharging time pursuant to clause 6 of the charterparty. (2) The permitted lay time under clause 16 of the charterparty of 5 days 19 hours and 45 minutes began to run at 0400 hours on October 27, 1956. (3) In order to ascertain the owners' entitlement to demurrage at Colombo under the charterparty the period of 5 days

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16 hours and 15 minutes under (1) was to be added at the end of the time used for discharging, with the result that Sunday, October 28, 1956, did not count against the charterers.]

Order accordingly. No order as to costs.

Solicitors: *Holman, Fenwick & Willan; T. L. Wilson & Co.*

J. D. P.

[COURT OF APPEAL.]

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Nov. 4, 7, 8; *Dec.* 15.

Sellers, Pearce and Devlin L.JJ.

ARCHBOLDS (FREIGHTAGE) LTD. *v.* S. SPANGLETT LTD.

RANDALL (THIRD PARTY).

[1957 A. No. 1131.]

Contract — Illegality — Contract prohibited by statute — Illegality in performance—Contract not ex facie illegal—Illegality known only to defendants—Whether plaintiffs entitled to recover for breach—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 1, 2.

Road Traffic—Licence—Carriage of goods for reward—Vehicles with "A" licence required—Contract performed by vehicles with "C" licence—Defect only known to one party—Effect on claim under contract—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 1, 2.

The defendants were furniture manufacturers in London and owned a number of vans with "C" licences under the Road and Rail Traffic Act, 1933,[1] which enabled them to carry their own goods, but did not allow them to carry for reward the goods of others. The plaintiffs were carriers with offices in London and Leeds, and their vehicles had "A" licences under the Act, which enabled them to carry the goods of others for reward. The plaintiffs' London office, as a result of a telephone conversation with some unidentified person from the defendants' office, believed that the defendants' vehicle had "A" licences, and employed the

[1] Road and Rail Traffic Act, 1933, s. 1: "(1) . . . no person shall use "a goods vehicle on a road for the "carriage of goods . . . except under "a licence. . . ."

S. 2: "(1) Licences shall be of "the following classes:—(*a*) public "carriers' licences . . . (*c*) private "carriers' licences. (2) A public "carrier's licence (in this Part of "this Act referred to as 'an A "'licence') shall entitle the holder "thereof to use the authorised "vehicles for the carriage of goods "for hire or reward . . . (4) A "private carrier's licence (in this "Part of this Act referred to as 'a "'C licence') shall entitle the holder "thereof to use the authorised "vehicles for the carriage of goods "for or in connection with any trade "or business carried on by him, "subject to the condition that no "vehicle which is for the time being "an authorised vehicle shall be used "for the carriage of goods for hire "or reward."

S. 9: "(1) . . . any person who "fails to comply with any condition "of a licence held by him, shall be "guilty of an offence under this Part "of this Act."

defendants to carry a part of a load for them on the defendants' van which was taking some of their (the defendants') furniture from London to Leeds.

The defendants' driver, having delivered those goods, spoke on the telephone to the traffic manager of the plaintiffs' office at Leeds to see if he could obtain a load for his empty van from Leeds to London, and said that he had just carried goods from the plaintiffs' London office to Leeds. The traffic manager replied that he had a load, which was in fact 200 cases of whisky, but he made no inquiries from the driver as to whether he had an "A" licence. The defendants' van was duly loaded with the whisky, which was stolen on the way to the London docks owing to the driver's negligence.

On a claim by the plaintiffs for damages for the loss of the whisky, the defendants pleaded the illegality of the contract, in that their van did not have an "A" licence as required by the Act of 1933:—

Held, (1) that there was no justification for any finding that the plaintiffs knew or should have known that the defendants' van had only a "C" licence (post, p. 175).

(2) That the plaintiffs could not assert a right of action without relying on the contract (post, p. 176).

(3) That the contract was not expressly forbidden by statute (post, (pp. 177, 180).

In re Mahmoud and Ispahani [1921] 1 K.B. 716; 37 T.L.R. 489 and *J. Dennis & Co. Ltd.* v. *Munn* [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A. distinguished.

(4) That the contract was not prohibited by implication under the Act, since loading the van by the plaintiffs did not constitute a "use" of the vehicle within the meaning of section 1 of the Road and Rail Traffic Act, 1933, nor were they aiding or abetting the defendants' illegal act, since they were unaware of the true facts (post, pp. 177, 180).

St. John Shipping Corporation v. *Rank* [1957] 1 Q.B. 267; [1957] 3 W.L.R. 870; [1956] 3 All E.R. 683 applied.

(5) That the contract was not ex facie illegal, and public policy did not constrain the court to refuse aid to the plaintiffs, who did not know that the contract would be performed illegally (post, p. 179).

Dictum of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513, P.C. applied.

Per Devlin L.J. The fact that it may be known to one of the parties at the time of making the contract that he cannot perform it legally, and therefore that it will inevitably be broken, does not make the contract itself illegal (post, p. 183).

Decision of Slade J. affirmed.

APPEAL from Slade J.

The following statement of facts is taken from the judgment of PEARCE L.J. Judgment was given for the plaintiffs, Archbolds (Freightage) Ltd., on December 3, 1959, for £3,674 18s. 3d. damages in respect of the loss of a consignment of whisky which was stolen from the defendants, S. Spanglett Ltd., owing to their negligence, while they were transporting it as carriers for the plaintiffs from Leeds to the London docks. Various matters raised in the defence were decided in the plaintiffs' favour, The issue on this appeal was whether the judge should have

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held that the plaintiffs could not recover damages because the contract of carriage was illegal.

The following facts were material to this issue: the defendants were furniture manufacturers in London and owned five vans for use in their business. Those vans had "C" licences under the Road and Rail Traffic Act, 1933, which enabled them to carry the defendants' own goods but did not allow them to carry for reward the goods of others. The plaintiffs were carriers with offices at London and Leeds and also had a clearing house to assist with sub-contracting contracts of carriage. Their vehicles had "A" licences which enabled them to carry the goods of others for reward. When some other carrier was returning home with an empty van having made a delivery, he might ask the plaintiffs if they had a load available for him; and if they had one available, it was an economy for them to sub-contract that load to him instead of sending their own van with the risk of its having to return empty.

At the time of the Suez crisis there was a shortage of petrol and the Minister enlarged the scope of "C" licences to permit licensees to carry the goods of others which would normally be carried under "C" licences. This limited extension was presumably designed to leave the trade of "A" licence-holders unaffected. Although it was not strictly proved, it was assumed that the whisky in question was not whisky that would normally be carried under a "C" licence. Therefore it could not legally be carried for reward on any of the defendants' vans.

The plaintiffs' London office, as a result of a telephone conversation on March 25, 1956, with some unidentified person who spoke from the defendants' office, believed that the defendants' vehicles had "A" licences and were entitled to carry general goods. They therefore employed the defendants to carry for them a part load of goods on the defendants' van which was taking some of the defendants' own furniture from London to the Leeds area.

On March 27, 1956, Randall, the defendants' driver, having delivered those goods, spoke on the telephone to one Field, the traffic manager at the plaintiffs' office in Leeds, in order to see if he could obtain a load for his empty van back from Leeds to London. Randall said who he was, that he was from the defendants and that he had just carried goods from the plaintiffs' London office to Leeds and "if possible would like a return "load." He then said: "Have you anything for a covered "van?" Field replied that he had 3¾ tons. He left the telephone to make certain that the load was suitable for a covered van, returned to the telephone and told Randall to come to the plaintiffs' Leeds office. Field made no inquiry about Randall's licence because, to use his own words, "I knew he had been "loaded by our London office." Randall came to the office, the van was loaded with 3¾ tons, which was in fact 200 cases

of whisky, and set off for the London docks. The whisky was stolen owing to Randall's negligence.

Slade J. held that the plaintiffs did not know that the contract was to be carried out in an illegal manner and that their claim for damages succeeded.

The defendants appealed.

David Karmel Q.C. and *Montague Waters* for the defendants.
J. C. Leonard and *H. K. Woolf* for the plaintiffs

The following cases in addition to those referred to in the judgment were cited in argument: *Davies* v. *Collins* [2]; *Edwards* v. *Newland & Co. Ltd., E. Burchett Ltd., Third Party* [3]; *The Winkfield* [4]; *Vinall* v. *Howard* [5]; *Commercial Air Hire Ltd.* v. *Wrightways Ltd.* [6]

Cur. adv. vult.

December 15, 1960. SELLERS L.J. When the argument on this appeal was concluded I was inclined to view the facts differently from those accepted by Slade J., who tried the case.

[His Lordship stated an alternative view of the facts from that set out above, and continued:] However, I feel no regret in the circumstances of this case that both my brethren, whose judgments I have had the advantage of reading, are in accord with Slade J., at least to the extent that the plaintiffs did not know that the vehicle on which the goods were placed for carriage held only a "C" licence, nor did they deliberately shut their eyes to the matter. There are, therefore, concurrent findings of fact with which I do not feel justified in disagreeing, and that leaves the case open for argument.

The facts which the court accepts are those stated by Pearce L.J., and on those facts I am in agreement with the views of my brethren that the contract so entered into was not prohibited by statute and was not ex facie illegal, and I do not wish to add to the reason and authority by which my brethren conclude this case in favour of the plaintiffs.

I would dismiss the appeal.

PEARCE L.J. stated the facts substantially as above set out and continued: On the issue of illegality the judge said this: "This case is one which falls within the class of case where the "contract is not ab initio illegal, or, indeed, illegal at all vis-à-vis "the plaintiffs in this action. In the contract of carriage, no "stipulation was made as to what form the carriage should take.

[2] (1945) 61 T.L.R. 218; [1945] 1 All E.R. 247, C.A.

[3] [1950] 2 K.B. 534; 66 T.L.R. (Pt. 2) 321; [1950] 1 All E.R. 1072, C.A.

[4] [1902] P. 42; 18 T.L.R. 178, C.A.

[5] [1954] 1 Q.B. 375; [1954] 2 W.L.R. 314; [1954] 1 All E.R. 458, C.A.

[6] [1938] 1 All E.R. 89.

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"It was open to the defendants to carry the goods in any vehicle "they liked so far as the plaintiffs were concerned. It is, of "course, true that Field would contemplate that, as it was a "return load, it would in fact be taken back by Randall in the "vehicle in which he brought the goods to Leeds on the outward "journey, but Field never even saw the vehicle. As I have said, "no one whose knowledge could possibly be imputed to these "plaintiffs ever did see the vehicle, and I have already found as a "fact that they did not know that the vehicle in which Randall "intended to take the goods to the Royal Albert Docks had in "fact only a 'C' licence. In so far, therefore, as it is a "question of fact, and in so far as it is a question of law, I hold "as a matter of law that this contract was not of itself illegal, "and that any illegality arose only in the method of its perform-"ance by the defendant company. I therefore find that the plea "of illegality fails."

Mr. Karmel, in a concise and powerful argument, contended that the judge should have found as a fact that the plaintiffs knew, or that they ought to have known, that the defendants' van had only a "C" licence and, therefore, could not legally carry the whisky. He also argues that even assuming that the plaintiffs were imposed on (as the judge found), and did not know of the "C" licence and were not negligent in failing to find out, yet the plaintiffs must fail because the contract of carriage was in fact unlawful, since it was a contract for carriage in that particular van (Randall's van) which could not be performed legally. The judge is in error, he contends, in saying: "It was "open to the defendants to carry the goods in any vehicle they "liked so far as the plaintiffs were concerned."

On the question of the plaintiffs' knowledge, the matters which were urged before us were urged before the trial judge, but he heard the witnesses and he decided otherwise. He said: "What "is clear is that the most wilful piece of deception was practised "upon Archbolds, London by the defendants to persuade them to "be allowed to carry this load, and to carry this load as I now "know it was carried, on a 'C' licence vehicle. That is material "only to the issue of illegality which is raised on the pleadings "in this case."

Later the judge said: "As to the words 'as the plaintiffs well "'knew,' I asked Mr. Waters, and he conceded that there was "no evidence at all that the plaintiffs well knew, and I find as a "fact that the plaintiffs did not know. I think the high-water "mark of what can be imputed to the plaintiffs or any servant "of theirs—and of this there is no evidence—is that during the "loading of the cases of whisky at Archbolds' Leeds warehouse, "somewhere about a mile or some distance away from their "offices, there was the vehicle as large as life, stamped all over "as what I may call a furniture van, and anyone who had taken "the trouble to look would have seen a "C" licence on its

"windscreen. There is no evidence that anyone did look or that "the people whose sole task, having been instructed by their "foreman, who authorised the loading, was to load the cases on-"to the lorry, directed their minds for one moment to the ques-"tion of whether it was a 'C' licence vehicle or a furniture van "or a Carter Paterson van, or anything of the kind. As I say, "I find as a fact that the plaintiffs did not know."

Again he says: "No one whose knowledge could possibly be "imputed to these plaintiffs ever did see the vehicle, and I have "already found as a fact that they did not know that the vehicle "in which Randall intended to take the goods to the Royal Albert "Docks had in fact only a 'C' licence." He also held that any suggestion that Field ought to have inquired what licence was held by Randall's vehicle was completely answered by the fact that Field knew that Randall had made the journey to Leeds with a load put on the lorry by the plaintiffs' London office.

The judge dealt very fully and carefully with the evidence, he heard the witnesses and he came to conclusions on their credibility. It is in just such a case as this, cases that turn on bona fides and knowledge and half-knowledge, that the trial judge has so great an advantage over a court that relies on the colourless, impersonal and sometimes misleading transcript. There were cogent arguments based on cross-examination of the witnesses that the plaintiffs must have known or suspected the true facts about the licence of Randall's vehicle, but in spite of them he came to the conclusion that the plaintiffs were imposed upon and did not know, and he acquitted them of any bad faith in the matter. I am not prepared to disturb that finding. In so many cases of deception it is hard even for the persons deceived to imagine in retrospect how they could have made such a mistake, yet the fact remains that people are misled into foolish errors. In my judgment, we should not be justified in making any finding that the plaintiffs knew or that they should have known that Randall's van had only a "C" licence.

It having been proved, therefore, that the plaintiffs were imposed on and believed that the goods could be lawfully carried on Randall's van, are they disentitled to sue?

Mr. Karmel argues that the goods had to be carried in Randall's van alone and no other, and that the judge was wrong in holding that this contract of carriage was a general one to be performed by the defendants in any way that they might choose. Mr. Leonard argues, on the other hand, that this contract, like many others, was made with a particular method of performance in mind, but was not restricted to that particular method of performance, and that haulage contracts are not so personal to the carrier that they cannot be vicariously performed. The point is not easy. I incline to the view held by the judge, but I do not find it necessary to express a concluded view on it.

Let us assume (although I am far from satisfied on this point)

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that the judge was in error in holding that the haulage contract could have been performed by the defendants in any way they liked (that is to say, lawfully as well as unlawfully). Let us assume first that it was a contract for carriage in Randall's van only and, secondly, that it was not by the nature of the contract one which could be performed vicariously. It must then inevitably be carried out unlawfully if (but only if) one adds the fact that Randall's van had a "C" licence and therefore could not lawfully carry the goods in question. But that fact, though known to the defendants, was unknown to the plaintiffs.

This is not a case where the plaintiffs can assert a cause of action without relying on the contract. Mr. Leonard put forward an ingenious alternative argument based on the plaintiffs' rights against the defendants as voluntary bailees of the plaintiffs' property: see *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*,[1] so that he might claim in negligence or conversion without having any recourse to the contract or exposing to the court as part of his cause of action its alleged illegality. But I do not think that he can make good that argument. His cause of action comes from the contract, and if the contract is such that the court must refuse its aid, the plaintiffs cannot recover their damages.

If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law.

The first question, therefore, is whether this contract of carriage was forbidden by statute. The two cases on which the defendants mainly rely are *In re an Arbitration between Mahmoud and Ispahani*[2] and *J. Dennis & Co. Ltd.* v. *Munn*.[3] In both those cases the plaintiffs were unable to enforce their rights under contracts forbidden by statute. In the former case the statutory order said[4]: "a person shall not . . . buy or sell . . . [certain] "articles . . . except under and in accordance with the terms of "a licence." In the latter case the statutory regulation provided[5]: "subject to the provisions of this regulation . . . the "execution . . . of any operation specified . . . shall be unlawful "except in so far as authorised." In neither case could the plaintiff bring his contract within the exception that alone would have made its subject-matter lawful, namely, by showing the existence of a licence. Therefore, the core of both contracts was the mischief expressly forbidden by the statutory order and the statutory regulation respectively.

[1] [1945] 1 K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.
[2] [1921] 2 K.B. 716; 37 T.L.R. 489.
[3] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, C.A.
[4] [1921] 2 K.B. 716.
[5] [1949] 2 K.B. 329.

In *Mahmoud's* case [6] the object of the order was to prevent (except under licence) a person buying and a person selling, and both parties were liable to penalties. A contract of sale between those persons was therefore expressly forbidden. In *Dennis's* case [7] the object of the regulation was to prevent (except under licence) owners from performing building operations, and builders from carrying out the work for them. Both parties were liable to penalties and a contract between these persons for carrying out an unlawful operation would be forbidden by implication.

The case before us is somewhat different. The carriage of the plaintiffs' whisky was not as such prohibited; the statute merely regulated the means by which carriers should carry goods. Therefore this contract was not expressly forbidden by the statute.

Was it then forbidden by implication? The Road and Rail Traffic Act, 1933, section 1, says: "no person shall use a goods "vehicle on a road for the carriage of goods . . . except under "licence," and provides that such use shall be an offence Did the statute thereby intend to forbid by implication all contracts whose performance must on all the facts (whether known or not) result in a contravention of that section?

The plaintiffs' part of the contract could not constitute an illegal use of the vehicle by them since they were not "using" the vehicle. If they were aware of the true facts they would, of course, be guilty of aiding and abetting the defendants, but if they acted in good faith they would not be guilty of any offence under the statute: see *Davies Turner & Co. Ltd.* v. *Brodie* [8] and *Carter* v. *Mace*.[9] In this case, therefore, the plaintiffs were not committing any offence.

In *St. John Shipping Corporation* v. *Rank* [10] Devlin J. held that the plaintiffs were entitled to recover although there had been an infringement of a statute in the performance of a contract, but in that case the contract was legal when made. Though not directly applicable to the present case, it contains an observation (with which I entirely agree) on the point which arises here. He said [11]: "For example, a person is forbidden by statute "from using an unlicensed vehicle on the highway. If one asks "oneself whether there is in such an enactment an implied "prohibition of all contracts for the use of unlicensed vehicles, "the answer may well be that there is, and that contracts of "hire would be unenforceable. But if one asks oneself whether "there is an implied prohibition of contracts for the carriage of "goods by unlicensed vehicles or for the repairing of unlicensed "vehicles or for the garaging of unlicensed vehicles, the answer "may well be different. The answer might be that collateral "contracts of this sort are not within the ambit of the statute." In my judgment that distinction is valid.

[6] [1921] 2 K.B. 716.
[7] [1949] 2 K.B. 327.
[8] [1954] 1 W.L.R. 1364; [1954] 3 All E.R. 283, D.C.
[9] [1949] 2 All E.R. 714, D.C.
[10] [1957] 1 Q.B. 267; [1956] 3 W.L.R. 870; [1956] 3 All E.R. 683.
[11] [1957] 1 Q.B. 267, 287.

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The object of the Road and Rail Traffic Act, 1933, was not (in this connection) to interfere with the owner of goods or his facilities for transport, but to control those who provided the transport, with a view to promoting its efficiency. Transport of goods was not made illegal but the various licence holders were prohibited from encroaching on one another's territory, the intention of the Act being to provide an orderly and comprehensive service. Penalties were provided for those licence holders who went outside the bounds of their allotted spheres. These penalties apply to those using the vehicle but not to the goods owner. Though the latter could be convicted of aiding and abetting any breach, the restrictions were not aimed at him. Thus a contract of carriage was, in the sense used by Devlin J., "collateral," and it was not impliedly forbidden by the statute.

This view is supported by common sense and convenience. If the other view were held it would have far-reaching effects. For instance, if a carrier induces me (who am in fact ignorant of any illegality) to entrust goods to him and negligently destroys them, he would only have to show that (though unknown to me) his licence had expired, or did not properly cover the transportation, or that he was uninsured, and I should then be without a remedy against him. Or, again, if I ride in a taxicab and the driver leaves me stranded in some deserted spot, he would only have to show that he was (though unknown to me) unlicensed or uninsured, and I should be without remedy. This appears to me an undesirable extension of the implications of a statute.

Lord Wright said in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[12]: ,' Each case has to be considered on its merits. Nor "must it be forgotten that the rule by which contracts not express-"ly forbidden by statute or declared to be void are in proper cases "nullified for disobedience to a statute is a rule of public policy "only, and public policy understood in a wider sense may at "times be better served by refusing to nullify a bargain save on "serious and sufficient grounds." If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence. But if the court makes no such implication, it still leaves itself with the general power, based on public policy, to hold those contracts unenforceable which are ex facie unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute: see *Nash* v. *Stevenson Transport Ltd.*,[13] or which though apparently lawful are intended to be performed illegally or for an illegal purpose, for example, *Pearce* v. *Brooks*.[14]

It is for the defendants to show that contracts by the owner for the carriage of goods are within the ambit of the implied

[12] [1939] A.C. 277, 293; 55 T.L.R. 402; [1939] 1 All E.R. 513.

[13] [1936] 2 K.B. 128; 52 T.L.R. 331.

[14] (1866) L.R. 1 Ex. 213.

prohibition of the Road and Rail Traffic Act, 1933. In my judgment they have not done so.

The next question is whether this contract though not forbidden by statute was ex facie illegal. Must any reasonable person on hearing the terms of the contract (which presumed knowledge of the law) realise that it was illegal." There is nothing illegal in its terms. Further knowledge, namely, knowledge of the fact that Randall's van was not properly licensed, would show that it could only be performed by contravention of the statute, but that does not make the contract ex facie illegal.

However, if both parties had that knowledge the contract would be unenforceable as being a contract which to their knowledge could not be carried out without a violation of the law: see *per* Lord Blackburn in *Waugh* v. *Morris*.[15] But where one party is ignorant of the fact that will make the performance illegal, is it established that the innocent party cannot obtain relief against the guilty party? The case has been argued with skill and care on both sides, and yet no case has been cited to us establishing the proposition that where a contract is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only, it should be held illegal so as to debar the innocent party from relief. In the absence of such a case I do not feel compelled to so unsatisfactory a conclusion, which would injure the innocent, benefit the guilty, and put a premium on deceit. Such a conclusion (in cases like this where a contract is not forbidden by statute) can only derive from public policy. For the reasons given by Lord Wright above, an extension of the law in this direction would be more harmful than beneficial. No question of moral turpitude arises here. The alleged illegality is, so far as the plaintiffs were concerned, the permitting of their goods to be carried by the wrong carrier, namely, a carrier who unknown to them was not allowed by his licence to carry that particular class of goods. The plaintiffs were never in delicto since they did not know the vital fact that would make the performance of the contract illegal.

In my view, therefore, public policy does not constrain us to refuse our aid to the plaintiffs and they are therefore entitled to succeed. I would dismiss the appeal.

DEVLIN L.J. The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he

[15] (1873) L.R. 8 Q.B. 202, 208.

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may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

The defendants do not seek to bring this case under either of the first two heads. They cannot themselves enforce the contract because they intended to perform it unlawfully with a van that they knew was not properly licensed for the purpose: but that does not prevent the plaintiffs, who had no such intent and were not privy to it, from enforcing the contract. Nor can it be said that the plaintiffs committed any illegal act. To load a vehicle is not to use it on the road, which is what is forbidden; no doubt loading would be enough to constitute aiding and abetting if the plaintiffs knew of the defendants' purpose (*National Coal Board* v. *Gamble* [16]), but they did not.

So what the defendants say is that the contract is prohibited by the Road and Rail Traffic Act, 1933, s. 1. In order to see whether the contract falls within the prohibition it is necessary to ascertain the exact terms of the contract and the exact terms of the prohibition. For reasons which I shall explain later, I shall begin by ascertaining the latter. Section 1 of the Act provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward except under a licence. Section 2 provides for various classes of licences, "A," "B" and "C." It is agreed that the carriage of the goods which were the subject-matter of this contract required an "A" licence. The fact that the van had a "C" licence does not therefore help one way or the other; and it is admitted that the defendants' use of this van for the carriage of these goods was prohibited. As I have noted, the plaintiffs are not to be treated as using the van because they supplied the load. Section 1 (3) provides that the driver of the vehicle or, if he is an agent or servant, his principal, shall be deemed to be the person by whom the vehicle is being used.

The statute does not expressly prohibit the making of any contract. The question is therefore whether a prohibition arises as a matter of necessary implication. It follows from the decision of this court in *Nash* v. *Stevenson Transport Ltd.*[17] that a contract for the use of unlicensed vehicles is prohibited. In that case the plaintiff held "A" licences which the defendant wanted to purchase. But the Act of 1933 provides that licences may not be transferred or assigned, and it was therefore agreed that the defendant should run the vehicles in the plaintiff's name so that they might obtain the benefit of his licences. It was held

[16] [1959] 1 Q.B. 11; [1958] 3 W.L.R. 434; [1958] 3 All E.R. 203, D.C.

[17] [1936] 2 K.B. 128; 52 T.L.R. 331; [1936] 1 All E.R. 906, C.A.

by the court that that was an illegal agreement because the defendant was the person who was using the vehicles and the plaintiff the person who was licensed to use them; thus the user was not the licensee. In the present case there was no contract for the use of the vehicle.

On the other hand it does not follow that because it is an offence for one party to enter into a contract, the contract itself is void. In *In re Mahmoud and Ispahani* [18] Scrutton L.J. said: "In "*Bloxsome* v. *Williams* [19] the position was that the defendant, a "horse dealer, was prohibited from trading on Sunday, but "there was nothing illegal in another person making a contract "with a horse dealer, except that if he knew that the person "with whom he was dealing was a horse dealer and was guilty "of breaking the law he might be aiding and abetting him to "break the law. But merely to make a contract with a horse "dealer, without knowing he was a horse dealer, was not "illegal."

The general considerations which arise on this question were examined at length in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[20] and Pearce L.J. has set them out so clearly in his judgment in this case that I need add little to them. Fundamentally they are the same as those that arise on the construction of every statute; one must have regard to the language used and to the scope and purpose of the statute. I think that the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute.

I conclude therefore that this contract was not illegal for the reason that the statute does not prohibit the making of a contract for the carriage of goods in unlicensed vehicles and this contract belongs to this class. I am able, therefore, to arrive at my judgment without an examination of the exact terms of the contract. It would have been natural to have begun by looking at the contract; I have not done so because it is doubtful whether the state of the pleadings permits a thorough examination. But as Mr. Karmel's argument before us turned upon its terms, I think that I should deal with them.

The defendants contend that this was a contract of carriage by a specified vehicle, namely, the van SXY902 then being driven by Randall. The plaintiffs agree that it was contemplated that the van SXY902 should be used for the contract but dispute

[18] [1921] 2 K.B. 716, 730.
[19] (1824) 3 B. & C. 232.
[20] [1957] 1 Q.B. 267, 285.

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that the contract was so limited. The words used in the contract were "a covered van" and the plaintiffs submit, and the judge has so held, that "it was open to the defendants to carry "the goods in any vehicle they liked."

I have reached no final conclusion on this point. Assuming, as for the purposes of this argument I do, that the statute prohibits every contract for the carriage of goods in an unlicensed vehicle, I do not think that the question whether this contract falls within the statute depends on whether it was limited to the use of the vehicle SXY902. According to the defendants' argument, the significance of the point lies in the fact that they have to accept the burden of proving that there was no way in which they could have performed the contract legally. If only the one van could have been used under the contract, they claim to have discharged that burden; otherwise they concede that they cannot prove that they could not, if they had tried, have got hold of some other licensed van. In my judgment, this is not the decisive test.

It is a familiar principle of law that if a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally. That statement of the law is meaningful if the contract is one which is by its terms open to two modes of performance; otherwise it is meaningless. Almost any contract—certainly any contract for the carriage of goods by road—can be performed illegally; any contract of carriage by road can be performed illegally simply by exceeding the appropriate speed limit. The error in the defendants' argument, I think, is that they are looking at the facts which determine their capacity to perform and not at the terms of the contract. Suppose that the contract were for a vehicle with an "A" licence, or—what is substantially the same thing—for a specified vehicle warranted as holding an "A" licence. That would not be an illegal contract for it would be a contract for the use of a licensed vehicle and not an unlicensed one. If those were the express terms of the contract, it would not be made illegal because all the carrier's vehicles, or the specified vehicle as the case might be, had "C" licences. The most that that could show would be that the carrier might well be unable to perform his contract. Or suppose that the contract were for any "A" vehicle owned by the defendant and the defendant had a fleet of five "A" vehicles and five "C" vehicles. That would be a legal contract and it would not be made illegal because, at the time when it was made, it was physically impossible for the defendant to get any of his "A" vehicles to the loading place in time. If the contract is for a specified vehicle with an "A" licence, loading to begin within a week, it is not illegal because when the contract was made the vehicle had no "A" licence; one might be obtained in time

and the court will not decide the question of legality by inquiring whether an "A" licence could or could not have been obtained for it within the week. So in this case it is irrelevant to say that the van SXY902 had in fact not got an "A" licence and could not conceivably have got one in time. The error in the defendants' argument is that they assume that because the parties were contracting about a specified vehicle and because that specified vehicle had in fact (a fact known to one party and not to the other) only a "C" licence, therefore they were contracting about a vehicle with a "C" licence. It is the terms of the contract that matter; the surrounding facts are irrelevant, save in so far as, being known to both parties, they throw light on the meaning and effect of the contract. The question is not whether the vehicle was in fact properly licensed but whether it was expressly or by implication in the contract described or warranted as properly licensed. If it was so described or warranted, then the legal position is, not that the contract could only be performed by a violation of the law, but that unless it could be performed legally, it could not be performed at all. The fact that, as in this case, it may be known to one of the parties at the time of making the contract that he cannot perform it legally and therefore that it will inevitably be broken, does not make the contract itself illegal.

So the correct line of inquiry into the terms of the contract in this case should have been not as to whether it provided for performance by a specified vehicle or by any vehicle that the defendants chose to nominate, but as to whether the defendants warranted or agreed that the vehicle which was to do the work, whether a specified vehicle or any other, was legally fit for the service which it had to undertake, that is, that it had an "A" licence.

I think there is much to be said for the argument that in a case of this sort there is, unless the circumstances exclude it, an implied warranty that the van is properly licensed for the service for which it is required. It would be unreasonable to expect a man when he is getting into a taxicab to ask for an express warranty from the driver that his cab was licensed; the answer, if it took any intelligible form at all, would be to the effect that it would not be on the streets if it were not. The same applies to a person who delivers goods for carriage by a particular vehicle; he cannot be expected to examine the road licence to see if it is in order. But the issue of warranty was not raised in the pleadings or at the trial and so I think it is preferable to decide this case on the broad ground which Pearce L.J. has adopted and with which, for the reasons I have given, I agree.

There are many pitfalls in this branch of the law. If, for example, Mr. Field had observed that the van had a "C" licence and said nothing, he might be said to have accepted a mode of performance different from that contracted for and so varied

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Archbolds (Freightage) Ltd. v. S. Spanglett Ltd. Randall (Third Party).
Devlin L.J.

the contract and turned it into an illegal one: see *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[21] where that sort of point was considered. Or, to take another example, if a statute prohibits the sale of goods to an alien, a warranty by the buyer that he is not an alien will not save the contract. That is because the terms of the prohibition expressly forbid a sale to an alien; consequently, the question to be asked in order to see whether the contract comes within the prohibition is whether the buyer is in fact an alien, not whether he represented himself as one. *In re Mahmoud*[22] is that sort of case. The statute forbade the buying and selling of certain goods between unlicensed persons. The buyer falsely represented himself as having a licence. It is not said that he so warranted but, if he had, it could have made no difference. Once the fact was established that he was an unlicensed person the contract was brought within the category of those that were prohibited. *Strongman* v. *Sincock*[23] exemplifies another sort of difficulty. It was an action brought by a builder against a building owner to recover the price of building work done. The statute forbade the execution of building operations without a licence. The building owner expressly undertook to obtain the necessary licence and failed to do so; and it was held that the builder could not recover. The builder, I dare say, might have contended that, having regard to the undertaking, the contract he made was for licensed operations and therefore legal. But unfortunately he had himself performed it illegally by building without a licence and he could not recover without relying on his illegal act because he was suing for money for work done. The undertaking might make the contract legal but not the operations. All these cases are distinguishable from the present one, where the contract is not within the prohibition and the plaintiffs themselves committed no illegal act and did not aid or abet the defendants. Apart from the pleading point, it might not matter if the last two cases were not distinguishable, since the plaintiffs could obtain damages for breach of the warranty as in *Strongman* v. *Sincock*.[24]

Appeal dismissed with costs.

Solicitors: *Hart Leverton & Co.; Herbert Baron & Co.*

I. G. R. M.

[21] [1957] 1 Q.B. 267, 283, 284.
[22] [1921] 2 K.B. 716.
[23] [1955] 2 Q.B. 525; [1955] 3 W.L.R. 360; [1955] 3 All E.R. 90, C.A.
[24] [1955] 2 Q.B. 525.

[PROBATE, ETC., DIVISION.]

PURNELL *v.* PURNELL.

1960
Dec. 7, 8, 16.

Cairns J.

Husband and Wife—Settlement—Variation—Adopted child—Interest of natural children—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

Adoption—Divorce—Settlement—Variation—Position af adopted child—Interests of other children—Matrimonial Causes Act, 1950, *s.* 25.

A wife who had been granted a decree absolute of divorce applied under section 25 of the Matrimonial Causes Act, 1950,[1] for the variation of a marriage settlement in which provision had been made for the husband during his life and, after his death, for his widow and, thereafter, for the issue of the marriage, namely two sons, by seeking to restore her own life interest and to restrict the rights of the husband under the settlement. She also sought a decision whether the adopted daughter of the family should be given an interest under the settlement. The registrar reported and applications to vary his report in certain respects were made by both parties. On the question whether the registrar's decision to admit the adopted daughter of the parties to an interest under the settlement should be confirmed:—

Held, (1) that it was well established that the court had jurisdiction under section 25 of the Matrimonial Causes Act, 1950, to vary a marriage settlement so as to confer a benefit on a child who was a stranger to the settlement provided that the variation also conferred an adequate benefit on the natural children of the marriage interested in the settlement which must, in some measure, be pecuniary.

Scollick v. *Scollick* [1927] P. 205; *Newson* v. *Newson* (1934) 50 T.L.R. 399; *Tagart* v. *Tagart and White* (1934) 50 T.L.R. 399; *Garforth-Bles* v. *Garforth-Bles* [1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308; *Best* v. *Best* [1956] P. 76; [1955] 3 W.L.R. 334; [1955] 2 All E.R. 839 applied.

(2) That the other variations which were to be made in the settlement resulted in such substantial benefits to the natural children of the marriage as to compensate them for the loss incurred by the admission of the adopted daughter to benefit thereunder, but that both the pecuniary and the sentimental interest of the natural children of the marriage would be best served if the interest of the three children were to be in the proportion of three-eighths for each of the natural children of the marriage and one-quarter for the adopted daughter, and that the settlement should be varied accordingly.

Per curiam. The question whether the words in section 25 of the Matrimonial Causes Act, 1950, "for the benefit of the children "of the marriage or of the parties" qualify the word "settled," thus leaving the court's discretion at large, or the word "application" so that the variation must be such as to benefit the natural children of the marriage of the parties is not of such importance as might appear since the variations must be considered

[1] Matrimonial Causes Act, 1950, s. 25: "The court may after pronouncing a decree for divorce or for "nullity of marriage enquire into the "existence of ante-nuptial or post-"nuptial settlements made on the parties whose marriage is the subject of "the decree, and may make such "orders with reference to the application of the whole or any part of the "property settled either for the benefit of the children of the marriage "or of the parties to the marriage, "as the court thinks fit. . . ."

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as a whole, and the court is bound, according to its general equitable jurisdiction, not to sanction any variation which would be detrimental to the natural children of the marriage.

Whitton v. *Whitton* [1901] P. 348 considered.

APPLICATIONS to vary a registrar's report as to variation of a settlement.

The following statement of facts is summarised from those set out in the judgment. The parties were married in 1942 and on November 5, 1959, a decree dissolving the marriage on the ground of the husband's cruelty was made absolute. There were three children of the family, two boys who, at the time of the hearing were aged 17 and 15, and a girl who was born on November 25, 1949, and was adopted by the parties on November 15, 1951. On February 3, 1947, the husband's father settled a sum, worth at the date of the hearing approximately £29,000 and yielding a gross annual income of £1,180, on protective trusts to pay the income to the husband for life and then to his widow "during her widowhood" with remainder as to both capital and income to each of the husband's children or remoter issue to whom he should appoint and in default thereof equally between his children; with ultimate remainder to the husband's sister. The trustees of the settlement had unrestricted powers of investment and under clause 4 could, in their discretion, raise up to £8,000 from the fund to start the husband in business or otherwise for his benefit or advancement in the world as they saw fit. The wife applied under section 25 of the Matrimonial Causes Act, 1950, for the registrar to vary the settlement by, inter alia, restoring the second life interest to her, notwithstanding that she was not the widow, and extinguishing the husband's power to appoint: (a) to the children of an after-taken wife; and (b) as to one-half of the trust fund. She also asked for a decision as to whether the adopted girl had an interest in the settlement.

On October 10, 1960, Mr. Registrar Russell reported on the wife's application and submitted, inter alia, that if a variation were made in favour of the wife by giving her the interest she would have enjoyed as a widow, she should make some sacrifice and he proposed that her second life interest should accordingly be reduced to three-quarters of the total fund. The registrar further proposed that the husband should retain the right under clause 4 of the settlement of receiving up to £8,000 of the fund but that no capital should be paid to him without his first giving to the trustees a charge on a reversionary interest held by him under his father's will, and that the husband's power of appointment as to either the capital or income should be extinguished. Taking account of the benefit that would thereby enure to the children of the marriage and of the fact that at the hearing before him it had been agreed that the adopted daughter should, if possible, be brought within the settlement by some variation, the registrar considered that the adopted girl could be brought into the

settlement on equal terms with the boys without there being on balance any detriment to them, and accordingly, proposed that the term "child or children" used in the settlement should in all respects include the adopted child of the parties as if such child were a child of the body of the husband and wife.

On October 25, 1960, the wife gave notice to vary the registrar's report by, inter alia, deleting the recommendation that her interest should be reduced to three-quarters of the income of the settlement and substituting a provision that she should be entitled to receive the whole of the income of the settlement for her life interest and by providing that no after-taken wife, or the children of any after-taken wife, should have any interest in the settlement save upon the failure of the children of the family of the parties to attain a vested interest in the settlement.

On November 10, 1960, the husband gave notice to vary the registrar's report by, inter alia, the inclusion of a proviso specifying certain purposes for which sums could be paid to him under clause 4 of the settlement without a charge by him on his reversionary interest. If the variation were acceded to, the husband in a letter to the wife's solicitors proposed making a settlement of one-sixth of the reversionary interest upon all three children of the family in the proportion of three-eighths for each boy and one-quarter for the girl.

Cairns J., having acceded to the variations proposed by both parties, proceeded to consider the question of the variation of the settlement in the interest of the adopted daughter of the parties on which the application is reported.

D. Armstead Fairweather for the wife.
J. R. Macgregor for the husband.
J. Ambrose Crawley for the two sons of the parties.
W. Glanville Brown for the adopted daughter.

The following cases were cited in argument in addition to those referred to in the judgment: *In re Brittlebank* [2]; *In re Gilpin* [3]; *Chapman* v. *Chapman*.[4]

CAIRNS J. stated the facts and dealt with the proposed variations of the report, and continued: Having thus disposed of all the issues raised by the two notices to vary I now come to the really difficult problem in the case, namely, whether I can and should confirm the giving to the adopted daughter of an interest under the marriage settlement, and, if I can, and if I am satisfied that such provision should be made, how matters may be arranged so that the variation will benefit, or at least not damnify, the natural children of the marriage.

[2] (1881) 30 W.R. 99.
[3] [1954] Ch. 1; [1953] 3 W.L.R. 746; [1953] 2 All E.R. 1218.
[4] [1954] A.C. 429; [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798, H.L.

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To start with, it is, in my opinion, rightly conceded that the adopted daughter has no interest in the settlement as it stands. She is not a "child" of the husband at common law, and the Adoption Act, 1926, does not assist her. The settlement was made before the passing of the Adoption Act, 1950, and she had not been adopted at the time of the settlement. For these reasons no rights under the settlement are conferred on her by that Act or by the Adoption Act, 1958. (See the Act of 1950, section 13 (2), and the Act of 1958, section 16 (2) and the Fifth Schedule, paragraph 4, sub-paragraphs (1) and (2).) Nor is there any statutory provision which expressly authorises the variation of a settlement in her favour. The variation of settlements is provided for in section 25 of the Matrimonial Causes Act, 1950, while maintenance is dealt with in section 26. The Matrimonial Proceedings (Children) Act, 1958, section 1 (1), expressly provides that section 26 of the Act of 1950 is to be applied to adopted children but no such provision is made in relation to section 25. The Variation of Trusts Act, 1958, does not assist the adopted daughter since she has no interest under the settlement as it stands.

I have, therefore, to construe section 25 of the Matrimonial Causes Act, 1950, in the light of the relevant authorities and to consider whether, and if so on what conditions, I can bring the adopted daughter into the settlement. [His Lordship then referred to the section and continued:] A section in similar terms was first enacted in section 5 of the Divorce and Matrimonial Causes Act, 1859, and was thereafter carried into section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and eventually into section 25 of the Matrimonial Causes Act, 1950. One of the difficulties of the section is that it is not clear from it whether the words "for the benefit of the children of the marriage "or of the parties" qualify the word "settled" or the word "application." If it is the former then, so long as the settlement is a settlement for the benefit of the children or the parties, the court's discretion is at large; but if it is the latter then the variation has to be such as will benefit the parties or the children. It was, I think, the submission of all counsel before me that the former meaning is the right one. I find it difficult to adopt that construction because it seems a strained reading, and also because a comparison with the language of section 24 (1) tends to support the other reading. This point is not, however, of so much importance as I was inclined to think during the argument. The variations must be considered as a whole: see *Whitton* v. *Whitton*,[1] where Sir Francis Jeune P. said[2]: "But I think I am "entitled to consider what the effect of the whole order I ought "to make will be, and not that of any particular portion alone." Considered as a whole, the variations are at least clearly for the benefit of one of the parties, namely, the wife. It is a recognised

[1] [1901] P. 348. [2] Ibid. 353.

principle that the variations must not, taken as a whole, be to the disadvantage of the children, but this principle is, I think, derived from broad equitable considerations and not from the words of the Act. To quote again from the same judgment of Sir Francis Jeune P.[3]: "But one has in these cases to consider "what is really for the benefit of the children, because I think "the authorities show that nothing must be done that on the "whole would be for the disadvantage of the children. This does "not so much turn on the words of the Act of Parliament, but "generally on the principle that the children, being innocent "parties, ought not to have their interests injuriously affected by "the conduct of either of their parents."

Now it is well established by authority that the variation may be such as to confer a benefit on a stranger to the settlement provided it also confers a benefit on children interested in the settlement, and I think the authorities establish that it is sufficient if the variation contains some benefit to those children which can be regarded as being approximately equivalent to what is taken from them for the benefit of the stranger. In *Scollick* v. *Scollick*[4] Hill J. varied a settlement under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, by introducing into it a power of appointment for the wife in favour of any children she might have by a second marriage which had already taken place. He considered that this would be for the benefit of the existing child, because her step-father would be more likely to be generous in her upbringing and education if he did not have to save money to provide for any further children of his own. Hill J. said[5]: "It must always be in the interest of "a child, if she has half-brothers and half-sisters, that she should "not be in some superior position in her expectations to them. "I do not think that that is an important consideration. But "unless there is some pecuniary interest I do not think I ought "to interfere on that ground taken by itself." That passage reads rather curiously, and I cannot help feeling that what Hill J. intended to say was "I *do* think that that is an important "consideration." What is clear is that he did think it was *a* consideration, but that there must be some pecuniary benefit to the child as well, to justify the variation. The pecuniary benefit which he did find sufficient was not one which could be measured precisely and set against the detriment involved in giving rights to unborn children who were strangers to the settlement. Nevertheless, Hill J. approved the variation which conferred such rights. In *Newson* v. *Newson*,[6] Sir Boyd Merriman P., under the same section, made a similar variation, being satisfied that the variation itself and certain collateral arrangements ancillary to the proposed scheme were sufficient compensation to the child there concerned for the disadvantage

[3] [1901] P. 348, 353.
[4] [1927] P. 205.
[5] Ibid. 205, 209.
[6] (1934) 50 T.L.R. 399.

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accruing to him from the variation. In *Tagart* v. *Tagart and White* [7] Sir Boyd Merriman P. refused a similar variation, saying that in such cases the court would require to be satisfied that the variation as a whole was clearly for the benefit of the existing child or children, and in that case he was not so satisfied. The section was re-enacted in 1950, after the cases I have referred to, and it must be taken, therefore, that Parliament intended it to be applied as it had been in those cases: see *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*[8]

In *Garforth-Bles* v. *Garforth-Bles* [9] Pearce J., in approving a variation, attached [10] weight to the probable effect of the variation in maintaining happy relations between father and child. In *Best* v. *Best*,[11] Karminski J. was asked to approve a variation conferring an interest on an adopted child. No financial compensation at all was afforded to the natural child of the marriage and the variation was supported solely on the ground that it would provide equality between two boys who had been brought up as brothers and that it was for the benefit of the natural son of the marriage that there should be such equality. It is clear that Karminski J. considered that he had jurisdiction to make a variation bringing in an adopted son provided a sufficient benefit to the natural son of the marriage was thereby achieved. But he said [12]: "Mr. Ormrod emphasised that in none of the reported "authorities had the power to appoint to a future spouse or to "the children of a subsequent marriage been given on senti-"mental or personal grounds alone. In all the authoritities to "which I was referred the variation was accompanied by a "substantial monetary benefit to the child or children of the "marriage. I can well understand the desire of the wife here to "put these two boys on an equality in respect of financial "matters, since to do so would at least remove any feeling of "future inequality between them. But in my view, although "I fully appreciate the importance of this argument, I feel myself "unable to obtain equality of this kind at the price of so large "a financial sacrifice on the part of Anthony." Anthony was the natural son of the marriage.

In my opinion, the result of these cases is to establish that the court has jurisdiction to admit an adopted child to benefit under the settlement, provided that anything which the natural children of the marriage are called upon to give up is compensated for in some sufficient way. In considering this compensation the court cannot do any exact sum, because such intangible factors as the benefit of equality, or something approaching equality, within the family can be taken into account, though there must be some pecuniary benefit as well.

[7] (1934) 50 T.L.R. 399, 402.

[8] [1933] A.C. 402, 411; 49 T.L.R. 391, 392, H.L.

[9] [1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308.

[10] Ibid. 218, 222.

[11] [1956] P. 76; [1955] 2 All E.R. 839.

[12] Ibid. 76, 86.

The conclusion that I have come to is, that it is possible to bring the adopted daughter into the settlement and to make other variations which on the whole will be an adequate quid pro quo for the boys. But I should not feel satisfied that this could be effected, without undue detriment to the husband and the wife, if the adopted daughter were placed, as the registrar proposed, on an equal footing with the boys. In my opinion, the right way to divide the interests of the children is the same as that which the husband has put forward for the new settlement, namely, in the proportion of three-eighths for each boy and one-quarter for the girl. I consider that this is fair, partly because the needs of a girl may be considered to be rather less than those of a boy and partly because the boys are entitled as of right to benefit under the settlement and she is not. I think that as far as the "sentimental" aspect of the case is concerned, the boys, assuming them to be normal boys, would be pleased that their adopted sister should have this share, though they might resent it if she were placed on an exact equality with them.

What financial gain do the boys get from the variation as a whole? That depends partly on whether the husband could have been required to restore that part of the £8,000 which has been advanced to him and to obtain no more similar advances. This issue was not fully argued before me and I do not consider that there is any need for me to determine it. The registrar was of opinion that the husband was "almost certainly" entitled to these sums. It is sufficient for me to say that it is a very substantial benefit to the boys to have the £8,000 restored to the settled fund or, alternatively, to have the three-quarters share of the new settlement which the husband has promised, rather than to be left with a very doubtful disputed claim to have the £8,000 restored.

As I have differed from the registrar's view that the wife's interest should be reduced by a quarter, I cannot, of course, take that reduction into account as part of the benefit to the boys. This would not, however, be a very important benefit to them: actuarially it would amount to approximately one year's income (the husband being about four years older than the wife, and one-quarter of the income being involved). The fact that I do not confirm this reduction of the wife's interest is, however, one of the factors that have led me to think that the boys should each retain a greater interest than the adopted daughter receives.

Finally, there is the benefit to the boys of having the power of appointment extinguished and the rights of any future wife or children of the husband postponed to their own. The termination of the power of appointment as between the boys is, in itself, I consider, a benefit to each of them. The assurance of obtaining a fixed share of a fund is of more value than the uncertain prospect of obtaining a greater or less share of it. It has been said that the husband is unlikely to marry or to have another

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family. Though there exists a circumstance that may make remarriage less likely than usual, it was one which, so far as I know, has always existed, and which did not prevent the marriage recently dissolved, nor the birth of the two children of that marriage. The husband is a reasonably well-to-do man of 42, and the risk of his remarrying, and of his leaving a widow (who would have had a life interest prior to that of the boys if the settlement had not been varied), and children (who might have shared with or been altogether preferred to the boys I am concerned with), is, in my opinion, quite sufficient to make the variation which excludes the interests of such persons a very useful one from the boys' point of view. I am satisfied that the benefits I have mentioned are sufficient to enable me to approve a variation of the settlement bringing in the adopted daughter to the extent I have named.

[Upon counsel for the two natural sons of the marriage raising the question of the disposition of the share in the settlement of any of the children who failed to obtain a vested interest, his Lordship continued:] In the event of the adopted daughter dying before attaining a vested interest in the settlement, her interest would go to the natural sons of the marriage equally. My intention would be that if both sons were to die before attaining a vested interest then the whole should go to the adopted daughter, but that if one of the sons so dies, then the fund should vest in the proportion of three-fifths for the surviving son and two-fifths for the adopted daughter.

Solicitors: *Barnett, Janner, Davis & Janner; Cripps, Harries, Hall & Co.*

E. J.

[QUEEN'S BENCH DIVISION.]

1961
Jan. 11, 12, 13, 16.

Lawton J.

WESTON *v.* LAWRENCE WEAVER LTD.

[1956 W. No. 1377.]

Easement—Right of way—Excessive user—Damage by one dominant owner to servient tenement—Whether other dominant owner entitled to sue him for physical damage to servient tenement.

The plaintiff and the defendant company were both entitled to rights of way over a private road which separated their respective properties. Neither of them owned the private road. The plaintiff brought an action against the defendant company for damages for (inter alia) churning up and destroying the surface of the right of way so as to impede its use by the plaintiff:—

Held, that the plaintiff, as the owner of a right of way, could not recover damages for physical damage to the servient tenement, for his right to damages lay in an unlawful interference with his right to pass and repass over it; and, since, on the evidence, the

damage caused to the servient tenement did not substantially interfere with his right to pass and repass, he had no cause of action under that head of claim.

ACTION.

The plaintiff, Maurice Weston, was at all material times the owner and occupier of certain property known as Elibank, St. Mary's Hill, Sunninghill, Berkshire. The plaintiff's property was bounded on the south and east by two public highways, and on the north by a private road which gave access from the plaintiff's property to one of the public highways, St. Mary's Hill. The defendant company's property was situated immediately to the north of the private road. At the end of the private road farthest from St. Mary's Hill there was access to the defendant company's property and also to another property, known as Hayning, situated immediately to the west of the plaintiff's property. The only entrance to the plaintiff's property for vehicular traffic was the entrance on the private road.

The private road was about 10 feet wide with a narrow grass verge on the plaintiff's side and a wider grass verge, with a shallow ditch, bank and hedge, on the defendant company's side. The owner of the soil of the private road was unknown.

The plaintiff's property was conveyed to him on May 23, 1955, "together with the right of way so far as the vendor can lawfully "convey the same to pass and repass with or without vehicles "along the private road . . . which right has been enjoyed by the "predecessors in title of the vendor since the year 1899."

The defendant company's property was conveyed to it by a conveyance dated August 31, 1955, "together with (so far as the "vendor can grant the same) a right of way for all purposes as at "present enjoyed (in common with the vendor and all others "entitled to a like right) over" the private road. Neither the plaintiff nor the defendant could prove any right to a right of way by grant.

After the plaintiff had purchased his property, he demolished the house then standing on it and built a new house. The plaintiff went into occupation of his property on June 20, 1956. In about March, 1956, the defendant company began building 49 houses on its property with an access road to St. Mary's Hill, which ran parallel to the private road at a distance of about 20 feet therefrom. In the course of the building operations, the bank and hedge on the north side of the private road were removed and the ditch filled in.

On June 1, 1956, the plaintiff started an action in which he claimed that he had a right of way over the private road and that the defendant company had created a nuisance on the right of way by (i) wrongfully obstructing it with heaps of building materials intended for the building estate on the defendant company's property; (ii) using it wrongfully and/or excessively for the passage, turning and parking of lorries and other heavy

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vehicles or equipment; (iii) by churning up and destroying the surface of the right of way so as to impede its use by the plaintiff and his licensees, and (iv) wrongfully removing the bank and hedge and filling in the ditch on the north side of the way thereby causing damage to the surface of the way and impeding its user by the plaintiff and his licensees. The plaintiff claimed damages, an injunction restraining the defendant company, its servants or agents from the repetition or continuance of the acts of nuisance and interference, and an order that the defendant company replace the bank and replant the hedge.

The defendant company claimed that it had a right of way over the private road and denied that it had committed any nuisance thereon.

On July 30, 1956, an interlocutory injunction was granted restraining the defendant company from wrongfully obstructing the private road with heaps of aggregate, gravel or other building materials, and from wrongfully or excessively using the private road for the passage, turning and parking of lorries and other heavy vehicles or equipment until August 14, 1956. On August 14, 1956, this injunction was discharged, on the defendant company undertaking until trial or further order that it would not (whether by itself, its servants or agents) obstruct the passage of vehicles to and from the plaintiff's property over the private road whether by depositing heaps of gravel or other materials thereon or otherwise, provided that the undertaking should not restrict the defendant company from exercising the right of way claimed in its defence over the private road.

In 1959, the plaintiff sold his property. When the action came on for hearing, the claim for an injunction and for an order that the bank be replaced and the hedge replanted were not proceeded with. Evidence was given as to the user of the private road by the plaintiff and defendant company, and by their respective predecessors in title, and as to alleged obstruction of the road by vehicles belonging to the defendant company, and by heaps of building material intended for use on the defendant company's building estate. The evidence as to the condition of the surface of the private road showed that there was some wear and tear to the whole surface, and that at the place where traffic going to the plaintiff's property would turn off the private road into the entrance to the plaintiff's property, ruts had formed in which rain-water was inclined to stand forming large puddles.

John Bradburn for the plaintiff.

A. Leolin Price and *Miss V. A. Moxon*, for the defendant company.

The case is reported only on the question whether the plaintiff, as dominant owner of a right of way, had a right of action against the defendant company, as another dominant owner of a right of way over the same servient tenement, for physical

damage to the servient tenement by excessive user of the defendant company's right of way.

LAWTON J. found, on the evidence, that the owners of the plaintiff's property had a right of way over the private road for general purposes connected with the use of that property as a residential property, and the owners of the estate, of which the defendant company's property had been part, had a right of way limited to the disposing of timber and horticultural purposes connected with the good management of the estate, and to foot passengers who were the owner's or occupier's licensees; that the defendant company had no right to use the private road for any purpose connected with the building of houses on its building estate so that the lorries which obstructed the plaintiff on three or four occasions had no right to be on the private road, and that this obstruction was a substantial interference with the plaintiff's right of way, for which he was entitled to damages of £50; that there was no substantial interference with the plaintiff's right of way by spillage of building materials on to the private road; that the wear and tear to the surface of the private road was not substantial to any part other than the part by the entrance to the plaintiff's property, and that the traffic to the defendant company's building estate was responsible for two-thirds of that wear and tear and the traffic to the plaintiff's property for one-third. His Lordship continued: A somewhat novel problem arises with regard to the plaintiff's claim for damages for wear and tear caused by the extra traffic on the private road. I have been told by counsel that their combined researches have not revealed any case similar to this where there has been excessive user by one dominant tenement causing damage to the surface of the servient tenement in circumstances where the servient tenement has not sought any remedy, but another dominant tenement has. The damage suffered here is primarily damage to the servient tenement. It seems to me on principle that the plaintiff cannot claim for physical damage to the servient tenement. His right to damages lies in an unlawful interference with his right to pass and repass, and, unless the damage caused to the servient tenement substantially interferes with his right to pass and repass, in my judgment he has not succeeded in establishing a cause of action. It is interesting to see that the pleader who drafted the statement of claim on behalf of the plaintiff—it was not Mr. Bradburn—pleaded in this way: "The defendants have created a nuisance on the said way . . . "by churning up and destroying the surface of the said right of "way so as to impede its use by the plaintiff and his licensees." I am not satisfied that the word "impede" is really the best word to use, but, if one substitutes the phrase "interfere with," it seems to me that the pleader has put the matter in its correct legal form.

In my judgment, I have to ask myself whether the plaintiff has proved that such damage to the surface of the private road

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as I have found to have been caused by the defendants' excessive use substantially interfered with the use of the private road by the plaintiff and his licensees, and the evidence with regard to that seems to me to be non-existent.

[His Lordship referred to the evidence, and continued:] In the circumstances I do not find that there was a substantial interference with the plaintiff's rights of access from and to his property, and I award no damages in respect of that. I also hold, as a matter of law, that the plaintiff cannot claim in respect of physical damage done to the surface of the servient tenement.

[His Lordship indicated that if the plaintiff were entitled to damages he would assess the amount of damage to the servient tenement caused by the defendant company's excessive user at £30, and held that the plaintiff was not entitled to recover damages for nuisance caused by the removal of the hedge and bank and the filling in of the ditch on the north side of the private road, which hedge, bank and ditch his Lordship held belonged to the defendant company.]

Judgment for the plaintiff in the sum of £50. Plaintiff to be entitled to three-fourths of the general costs of the action, including the costs reserved, to be taxed on a party and party basis on the High Court scale. No special order with regard to the costs of amendments.

Solicitors: *H. E. Aston & Co.; Gamlen, Bowerman & Forward for Lovegrove & Durant, Windsor.*

V. A. M.

[COURT OF APPEAL.]

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1960 *Nov.* 22, 23, 24; *Dec.* 7.

WINDSOR REFRIGERATOR CO. LTD. AND ANOTHER *v.* BRANCH NOMINEES LTD. AND OTHERS.

[1958 W. No. 1431.]

Lord Evershed M.R., Harman and Donovan L.JJ.

Company—Debenture—Receiver—Appointment by debenture holder—Validity—Whether document capable of operating as instrument "by writing" if executed as deed.

Practice — Preliminary point — Questions of mixed fact and law — Whether procedure appropriate.

Writing—Instrument in—Purported deed—Written before intended to take effect—Whether it could operate as an "instrument in writing" —Appointment of receiver.

Deed — Purported deed — Whether an "instrument in writing" — Appointment of receiver.

A debenture issued by a company on April 30, 1946, to secure a bank advance, contained a condition that at any time after the principal moneys thereby secured became payable, the registered holder of the debenture might by writing appoint a receiver. On the same day an agreement was made between the company, the bank, and the debenture holders, which provided that the debenture holders should hold the debenture and the moneys secured thereby on trust for the bank as a continuing security, and subject thereto on trust for the company, and that the debenture holders might at the request of the bank at any time thereafter in case of default in payment of the sum secured on demand, exercise the power to appoint a receiver. Two further debentures were issued accompanied by similar agreements.

On February 24, 1958, the advance department of the bank asked the debenture holders to prepare a formal demand for payment of the total sum due under the debentures and a letter authorising I., the branch manager of the bank, to receive payment: on the same day, or early on the following day, an instrument purporting to appoint G. as receiver was sent with a request for its sealing by the debenture holders. On February 25 the instrument was sealed and signed by two of the directors of the debenture holders, but the date was left blank. A formal demand for payment and a letter to the secretary of the company authorising I. to receive payment were also prepared and signed on behalf of the debenture holders. The advance department sent the instrument, the formal demand and the letter to I., instructing him to present the demand and the letter personally at the company's registered office, that, failing immediate payment, the instrument of appointment should be handed to G., and that he was to settle beforehand with G. the amount of G.'s remuneration. The defendants alleged that on the morning of February 28, I. inserted that date in the instrument of appointment and went with G. to the company's office, where, according to the defence, he handed the demand and the letter to the managing director. After a discussion G. entered the office. According to the defence, I. stated that G. was to be appointed receiver and gave him the instrument and G. then gave the director a letter dated February 28 in which he stated that he had been appointed receiver under the debentures. The company and the managing director claimed a declaration that the appointment of G. was invalid.

On the trial of the preliminary points of law whether the steps taken were invalid to effect the appointment of G., the judge made certain assumptions as to material facts not before the court and decided that the instrument was not effective to operate either as a deed or as an instrument under hand to appoint G. as receiver. The defendants (the bank, the debenture holders and the receiver) appealed: —

Held, (1) that, assuming that the instrument of appointment was ineffective as a deed, it would be effective according to its tenor as an instrument in writing in various events which might have happened—for example, if before the purported appointment was made formal demand for payment had been made by I. acting with authority as agent for the debenture holders and had not been complied with—and that the appointment had been communicated to G. (post, pp. 208, 211, 212).

(2) That an appointment by writing could be made out before it was intended to take effect, and could take effect on a subsequent date (post, pp. 209, 211).

Decision of Cross J. [1960] 3 W.L.R. 108; [1960] 2 All E.R. 568 reversed on this ground.

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Per curiam. The preliminary so-called "points of law" involved questions of fact and law and ought not to be determined prior to the trial.

Appeal on preliminary points of law set down for hearing before trial.

The following statement of facts is taken substantially from the judgment of Cross J.: The Windsor Refrigerator Co. Ltd., the plaintiff, had an account at the Reading branch of the National Provincial Bank Ltd., the second defendants (hereinafter called "the bank"). The defendants, Branch Nominees Ltd., the debenture holders, were a wholly-owned subsidiary of the bank, and securities given to the bank to secure advances were commonly taken in the name of and issued to the debenture holders as trustees for or nominees of the bank. The functions of the debenture holders in that regard were carried out as part of the department of the bank known as "the security department," while control and superintendence of advances made by the bank through its various branches by way of overdrafts or otherwise were exercised by the department of the bank known as "the advance department." The advance department had therefore control and superintendence of the company's account with the bank at its Reading branch.

On April 30, 1946, the plaintiff company issued under the seal of the company a debenture in common form, containing a promise by the company to pay to the debenture holders on demand the sum of £3,000 with interest at 5 per cent. per annum, and a floating charge on all the property of the company to secure the payment of capital and interest. The debenture was issued subject to and with the benefit of the conditions indorsed on it. Condition 12 (1) was in the following terms: "At any time after "the principal moneys hereby secured shall have become payable the registered holder of this debenture may at any time "appoint by writing any person or persons to be a receiver or "receivers of the property charged by this debenture and may "from time to time by writing remove any receiver so appointed "and appoint another in his stead." Sub-paragraphs (2), (3) and (4) of paragraph 12 contained the usual provisions with regard to the powers, duties and remuneration of any receiver so appointed.

On April 30, 1946, the same day as the debenture was issued, an agreement (called a "Buckley agreement") was made between the company, the bank and the debenture holders. Clause 1 of that agreement provided that the debenture holders, therein described as "the trustees," should stand possessed of the debenture and the money secured by it on trust in the first place as a continuing security for payment by the company to the bank on demand of all moneys owing by the company to the bank and, subject to such trust in favour of the bank, on trust for the company. Clause 2 provided that it should be lawful for the

debenture holders, at the request of the bank at any time thereafter in case of default in payment of such sum or sums or any part thereof on demand, to exercise all and every or any of the powers vested by the debenture in the holders thereof, including (inter alia) the power to appoint a receiver, and that the debenture holders should execute all such assurances and do all such acts as the bank should require or think proper.

On December 11, 1947, and January 31, 1951, similar debentures for securing sums of £2,000 and £5,000 respectively were issued by the company to the debenture holders, accompanied in each case by similar agreements between the company, the bank and the debenture holders.

On February 24, 1958, the advance department of the bank, by a memorandum in writing, requested the debenture holders to prepare a formal demand for payment of the full amount of £10,000 owing by the company under the three debentures, and a letter authorising Noel David Inkin or Vernon Penrose Hobby, the manager and senior clerk of the Reading branch of the bank, to receive payment of that sum on behalf of the debenture holders.

On the same day, or early on the next day, the advance department sent to the security department an instrument of appointment of Philip Clarkson Greenwood, the third defendant (hereinafter called "the receiver"), as receiver under the debentures, with a request in writing for its sealing by the debenture holders. That document was in the following terms: "We, "Branch Nominees Limited, being the registered holders of the "debentures referred to in the schedule hereunder written and "under and in accordance with the provisions of the conditions "endorsed upon the said debentures and all other powers us "enabling, hereby appoint Mr. Philip Clarkson Greenwood, "A.C.A., to be receiver of the undertaking and all of the property "and assets of Windsor Refrigerator Co. Ltd. comprised in and "charged by the said debentures upon the terms and with and "subject to the powers and provisions contained in the said "debentures, and we declare that the said receiver shall be "entitled to remuneration at the rate already arranged between "us and the said receiver or at such higher rate not exceeding "5 per cent. as shall or may from time to time be agreed by us "with him as witness our common seal this —— day of —— "1958." The schedule contained details of the three debentures.

At about 10 o'clock on the morning of February 25, the common seal of the debenture holders was affixed to that instrument of appointment in the presence of two of the directors of the debenture holders, who signed their names in the space provided for the purpose on the instrument, but the date was left blank. The debenture holders thereupon returned the instrument so sealed to the advance department, together with a formal demand for payment by the company to the debenture holders of £10,000, signed by a director, and a letter to the secretary of the company, also signed by a director, authorising the manager or the senior

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clerk of the Reading branch to receive payment of the £10,000 on behalf of the debenture holders.

On the same day, the advance department of the bank sent the instrument of appointment and the two letters to the bank manager, together with a letter in the following terms: "In "reply to your letters of the 19th and 21st instant, the directors "desire you to call up the debt and guarantees and we confirm "our recent telephone conversation to this effect. They have "appointed Mr. Philip Clarkson Greenwood, A.C.A., to act as "receiver and have transferred the account to realisation section, "who will instruct you further in due course. A formal demand "by Branch Nominees Ltd. for payment of the amount due under "the debentures is enclosed, together with a letter from Branch "Nominees Ltd., authorising Mr. Noel David Inkin or Mr. Vernon "Penrose Hobby to receive payment. It is essential that these "should be presented personally by Mr. Inkin or Mr. Hobby at "the company's registered office and he should take with him the "debentures so as to produce them in case of need. Failing "immediate repayment, you may then hand the enclosed deed of "appointment to Mr. Philip C. Greenwood. As you are no doubt "aware, the deed of appointment requires to be stamped 10s., "and realisation section should be advised of the date inserted "by return of post in order that the necessary notice may be "filed with the registrar of joint stock companies within the "prescribed period of seven days. We should like you to discuss "and settle beforehand with Mr. Greenwood the question of his "remuneration as receiver and in this connection we consider "that 5 per cent. on realisations would be a reasonable scale, "but in the event of its being necessary for the receiver to "employ agents for the disposal of the assets and commissions, "fees, etc., have to be paid to such agents, then the amount "payable to the receiver in respect of such realisations should be "2½ per cent. only. We return the debentures totalling £10,000, "Buckley agreements and certificates of registration, receipt of "which kindly acknowledge."

The following statement of subsequent events prior to the issue of the writ is as alleged by the defendants: On February 26, the bank manager, having received this letter and its enclosures, made an appointment by telephone with Harry Fletcher Wood, the second plaintiff, the managing director of the company, to meet him at 11 o'clock on February 28, to discuss the company's account, which was then overdrawn to the extent of £8,032 14s. 9d. At about 10.20 a.m. on the morning of February 28, the bank manager inserted the date "February 28" in the instrument of appointment and went with the receiver to the company's office at Maidenhead, where they arrived at about 11 a.m. The bank manager first saw the company's managing director alone, without the receiver being present. He informed him that he had bad news for him, as the bank required repayment of the company's debt, and handed him the two letters addressed to the company

by the debenture holders and requested him to read them, which he did. There then followed a discussion between the bank manager and the managing director which lasted for about 15 minutes, at the end of which the receiver came in and was introduced by the bank manager to the managing director. During the next 10 minutes or thereabouts, a further conversation took place, mainly consisting of an account by the managing director of the difficulties experienced by the company. The bank manager then said: "The fact remains that Mr. Greenwood is to be "appointed receiver," and thereupon handed to the receiver the deed of appointment. The receiver then handed to the managing director a letter dated February 28, which he had signed and brought with him, in the following terms: "Dear Mr. Wood, I "wish to inform you that I have today been appointed receiver "of the Windsor Refrigerator Co. Ltd. under a series of deben- "tures in favour of the bank. You will, of course, appreciate that "I shall have to be responsible for the running of the company "during my period of office. I trust that with care and co-opera- "tion from all concerned the company will emerge from its "difficulties and after my release as receiver continue trading and "go from strength to strength. Yours sincerely, Philip C. "Greenwood." The meeting then continued until about 1 p.m.

The plaintiff company issued a writ claiming against the debenture holders, the bank and the receiver, a declaration that the appointment of the receiver was invalid. By the particulars of their defence the defendants stated, inter alia, "(e) The requests "for the preparation of the formal demand and the sealing of the "instrument of appointment were made by the bank (through its "advance department) with the intention thereafter of procuring "the said demand to be served on the company and the said "instrument of appointment to be dated and delivered to Mr. "Greenwood so as to effect his appointment as receiver. The "debenture holders complied with such requests (as they were "bound to under clause 2 of each of the said agreements) in the "knowledge that such was the intention of the bank and in order "to enable such intention to be carried into effect and the bank "had the express or alternatively implied authority from the "debenture holders on their behalf to serve or procure the serving "on the company of the said demand and to date and deliver to "Mr. Greenwood the said instrument or procure the same to be "so dated and delivered. It was not the intention either of the "debenture holders or the bank that the said instrument of "appointment should have any effect until so dated and "delivered." It was further stated in the particulars that the bank manager, in handing to the receiver the deed of appointment, was exercising on behalf of the bank the authority which the bank had from the debenture holders as stated in paragraph (e) above.

On May 27, 1959, the following was ordered to be set down for argument as a preliminary point of law before the trial of the action: Whether the procedure set out above was invalid to effect

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the appointment by the debenture holders of the receiver on February 28, 1958, by reason of any of the following facts: (1) the debenture holders had sealed on February 25, 1958, an undated instrument of appointment prior to any demand being made on the company for payment of the principal money secured by the debentures or of the sum owed by the company to the bank; (2) the bank sent the instrument of appointment to their branch manager with instructions (a) to demand from the company at their registered office payment of the principal money, (b) to date the instrument, and (c) failing immediate payment, to hand the instrument to the receiver; (3) the bank manager on February 28, 1958, inserted the date into the instrument before making a demand for payment; (4) the bank manager on February 28, 1958, made a demand for payment to the company's managing director at its principal place of business and did not receive payment; and (5) the bank manager thereupon handed the instrument to the receiver.

On the trial of the preliminary points Cross J. assumed (on the construction of the particulars of the defence) that if the instrument of appointment was delivered at all on February 25, 1958, it was delivered subject to the following conditions: (1) that Greenwood agreed to act on acceptable terms; (2) that a demand for payment was made by Inkin and not complied with; (3) that Inkin dated the deed; and (4) that Inkin handed the deed to Greenwood after the demand was made and not complied with. His Lordship further assumed that Inkin was acting as an agent for the debenture holders, and that his instructions could have been countermanded at any time. On these assumptions his Lordship decided that the document was not effective to appoint Greenwood as receiver. The defendants appealed.

John L. Arnold Q.C. and *L. J. Morris Smith* for the defendants.

Muir Hunter and *David Graham* for the plaintiffs.

In addition to the cases referred to in the judgment of Lord Evershed M.R., the following were cited in argument: *Davis* v. *Jones* [1]; *Al Baker* v. *Alford* [2]; *Macdonald* v. *Twiname (John)* [3]; *Thompson* v. *McCullough* [4]; *Hunter* v. *Hunter* [5]; *Kasofsky* v. *Kreegers*.[6]

Lord Evershed M.R. We need not trouble you, Mr. Arnold. This action is of a somewhat unusual character; and though the writ in it was issued in the month of June, 1958, it has now come before this court on appeal from Cross J.'s decision upon a submission made pursuant to an order of May 27, 1959. The

[1] (1856) 17 C.B. 625.
[2] [1960] 3 W.L.R. 121, P.C.
[3] [1953] 2 Q.B. 304; [1953] 3 W.L.R. 347; [1953] 2 All E.R. 589, C.A.
[4] [1947] 1 K.B. 447; 63 T.L.R. 95; [1947] 1 All E.R. 265, C.A.
[5] [1936] A.C. 222, H.L.
[6] [1937] 4 All E.R. 374, D.C.

form of that order, so far as relevant, is as follows: "And it is "ordered that the preliminary point of law raised by paragraph 8 "of the defence and paragraph 4 of the said draft reply be set "down to be argued before this court as a preliminary point of "law before the trial of this action, that is to say, whether the "procedure described in paragraphs 5 and 8 of the defence read "with the further and better particulars thereof delivered on "February 24, 1959, was invalid to effect the appointment by "the defendants, Branch Nominees Ltd., of the defendant, "Philip Clarkson Greenwood, on February 28, 1958, to be the "receiver under their debentures by reason of all or any of the "following facts that is to say." There then follow five further paragraphs of facts or assumed facts.

From what I have said it will be apparent that the nature of the action is to challenge the validity of the appointment of the defendant Greenwood as receiver of the property of the first plaintiff, Windsor Refrigerator Co. Ltd., the appointment purporting to have been made under the powers in certain debentures which were issued by the Windsor company in favour of Branch Nominees Ltd. by way of security for moneys which the Windsor company owed to their bankers.

The plaintiffs challenge the validity of the appointment, and sue, accordingly, for damages against the defendants including the receiver. As I have said, it is a very unusual form of action, but I daresay none the worse for that. On the other hand, I do venture to echo and emphasise what Cross J. said in his judgment: "The fact that there was this dispute"—and that refers to certain disputes as to facts—"between the parties shows how "unsuitable this form of procedure is for the determination of a "question of this sort." It is no doubt easy to be wise after the event; and I do not want to be thought offensive in any sense at all to those who drafted the order if I say that its language is a little startling—"whether the procedure" described "was invalid "to effect the appointment," etc.

I shall not take up time in reading all the facts which are referred to expressly or by inference, but one of the particulars under paragraphs 5 and 8 of the defence was as follows: "The "requests for the preparation of the formal demand and the "sealing of the instrument of appointment were made by the "the bank (through its advance department) with the intention "thereafter of procuring the said demand to be served on the "company and the said instrument of appointment to be dated "and delivered to Mr. Greenwood so as to effect his appointment "as receiver. The debenture holders complied with such requests "(as they were bound to under clause 2 of each of the said "agreements)"—that refers to contemporary agreements made when the debentures were issued—"in the knowledge that such "was the intention of the bank and in order to enable such "intention to be carried into effect and the bank had the express

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"or alternatively implied authority from the debenture holders "on their behalf to serve or procure the serving on the company "of the said demand and to date and deliver to Mr. Greenwood "the said instrument or procure the same to be so dated and "delivered. It was not the intention either of the debenture "holders or the bank that the said instrument of appointment "should have any effect until so dated and delivered."

Suffice it to say that for the purpose of determining the so-called preliminary issue, what I have read was to be assumed, and it has become quite manifest that those circumstances which I have narrated are by no means conceded. Very briefly, it is said by the defendants that the following course of events took place: On February 25, 1958, Branch Nominees Ltd. (who were the debenture holders, but who are a company wholly-owned by the Windsor company's bankers, the National Provincial Bank Ltd.) proceeded to affix the seal of the company to an instrument in the following terms: "We, Branch Nominees Ltd., being the "registered holders of the debentures referred to in the schedule "hereunder written and under and in accordance with the "provisions of the conditions endorsed upon the said debentures "and all other powers us enabling hereby appoint Mr. Philip Clark-"son Greenwood, A.C.A., to be receiver of the undertaking and all "of the property and assets of Windsor Refrigerator Co. Ltd. "comprised in and charged by the said debentures upon the "terms and with and subject to the powers and provisions con-"tained in the said debentures"—and then there was a reference to remuneration—"as witness our common seal this (blank) day "of (blank) 1958." The affixing of the common seal was on the face of the document witnessed by two gentlemen of the names of Brooks and Wheeler, who are said to be directors of Branch Nominees Ltd.

That was on February 25, 1958. According to the defendants' story, after correspondence passing between Branch Nominees Ltd., the bank, and also to some extent the Windsor company, a Mr. Inkin, who was the manager of the local branch of the bank which kept the Windsor company's account, at about 20 minutes past 10 on the morning of February 28, filled in the figure "28th" and the word "February" where the blanks occur at the end of the document of appointment. He then proceeded, in the company of Mr. Greenwood, to go to the office of the Windsor company. Mr. Greenwood remained decorously outside for a short period. When Mr. Inkin saw Mr. Wood, the managing director of the Windsor company (according to the defendants' story) after expressing suitable condolence he demanded payment of what was due to the bank, or alternatively under the debentures. Having made that demand, which not surprisingly was not then and there met, there entered Mr. Greenwood. Thereupon Mr. Inkin handed to Mr. Greenwood the document which I have read, and thereby (again according to the defendants'

story) indicated that he (Greenwood) was appointed receiver by virtue of the powers in the debenture; and Greenwood thereupon proceeded or began to proceed so to act. In the 2½ years that have elapsed since that event, it seems that one result has been that the existing overdraft of the bank has been somewhat more than doubled; and in order to protect what there is to protect, Greenwood has since been appointed receiver by the court.

The debentures are in a form common enough, and contain in condition 12 the following: "(1) At any time after the principal "moneys hereby secured shall have become payable the regis- "tered holder of this debenture may at any time appoint by "writing any person or persons to be a receiver or receivers of "the property charged by this debenture and may from time to "time by writing remove any receiver so appointed and appoint "another in his stead." Sub-condition (2) states what the receiver's powers are, and to those I shall return briefly hereafter. There cannot be, of course, any doubt that the document to which I have referred as the appointment was intended—at least I should have thought there cannot be any doubt—to be a deed. That view is supported not only by the fact that the common seal of the company is affixed in the presence of two directors, but also by the fact that it was stamped as a deed with a 10s. stamp, and is referred to as a deed of appointment in various letters which are before the court, but which I need not read.

The first challenge which the plaintiffs have made (and which has been agitated on this issue) is that the deed was for the purposes intended wholly ineffective. That argument, which found favour with Cross J., was based on certain considerations; and before I state them it is right that I should say at once that upon this part of the case we did not hear Mr. Arnold fully in argument, and we have not heard Mr. Muir Hunter at all. But the basis of the attack rested upon this: This appointment must in the circumstances have one of three possible results. In the first place it operated (and was intended to operate) without qualification as a deed executed and delivered on February 25, 1958. If that was the result, then it is conceded, as I follow, that it must have been ineffective to appoint Mr. Greenwood, because at that date no demand for payment under the debentures had been made. Another view is that it was executed and delivered not as a deed, but as an escrow—that is to say, that its operation would be suspended pending the fulfilment of whatever was or were the condition or conditions implicit in the execution as an escrow. To that possible view I will return in a moment. The third (and it was on this ground that Cross J. based his decision) is that the deed, though executed, was executed subject to the suggested condition that pending the delivery of a demand, and its not being satisfied, Branch Nominees could at any moment recall it. If that were the effect, then it was not a deed, it was nothing; and for that view Cross J. cited *Foundling*

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Hospital (*Governors and Guardians*) v. *Crane*,[1] which was also cited in a recent judgment of this court (*Beesly* v. *Hallwood Estates Ltd.*[2]). If either of the first and third effects was achieved by this document, then, as I understand, the results are not in doubt, and those results would be fatal to the defendants.

There remains the possibility of the escrow, and that raises the problem what were the conditions upon which the deed was so executed. In view of the fact that we have not heard fully this part of the argument and (consequently) since I shall not myself express any concluded view upon it, I do not propose to go into it at length. But the judge indicated[3] that there were, or might have been, four conditions, fulfilment of which was necessary before the deed took effect as such, namely, first, Greenwood agreeing to act on acceptable terms; second, the demand for payment was made by Inkin, but not complied with; third, that Inkin dated the deed; and fourth, that he handed the deed to Greenwood after the demand was made, and not complied with.

In addition to other difficulties in the defendants' way on this part of the case, there is this further point which I mention, but upon which again I express no view, that if this instrument was executed as an escrow subject to some or all of the conditions made or other conditions, then upon the fulfilment of the condition or conditions prima facie, so it is argued, it would become retrospectively operative from its date or the date when it was actually executed, namely, February 25. Mr. Arnold indicated, but did not pursue the point, that that general principle would not apply in a case of this kind. If it did then, of course, again the result would be fatal to the defendants, for on February 25, 1958, beyond a peradventure, the power to appoint a receiver had not arisen, there having been no demand.

As I have indicated, however, Cross J. based himself upon the third possible result of the instrument in the circumstances. "I prefer, therefore," he said,[4] "to rest my decision on this part "of the case on the ground that a deed cannot be delivered as an "escrow at all subject to an overriding power in the grantor to "recall the deed altogether, rather than on the fact that on "February 25 the debenture holders had no power to make an "unconditional appointment."

I propose to say no more upon this aspect of the case, but to mention only this further matter. Though this point of law has been tried as a preliminary issue on various elaborate hypotheses, few of them appeared to be matters of undisputed facts. But I assume it will be a point to be decided at the trial what exactly did happen in the board room or other office of Branch Nominees Ltd. when the common seal of the company was affixed to this instrument in the presence of Brooks and Wheeler, and some

[1] [1911] 2 K.B. 367, C.A.
[2] [1961] 2 W.L.R. 36; [1961] 1 All E.R. 90, C.A.
[3] [1960] 3 W.L.R. 108; [1960] 2 All E.R. 568.
[4] [1960] 3 W.L.R. 108, 119.

conclusions may be drawn from the evidence of what then occurred, or was said or recorded. But for the purpose of the rest of my judgment I shall assume that on the grounds stated by the judge, or for some other good reason, this instrument was ineffective at any relevant date as a deed for the purpose of making any appointment of Greenwood or otherwise.

On that basis Mr. Arnold then developed his alternative argument, which was that although the instrument might not be a deed, still it was an instrument in writing; and since what the debenture required was appointment "by writing," it would suffice to satisfy the condition albeit that it was ineffective (for its survival) for any purpose as a deed. I emphasise at once the two words "by writing" because, according to the judgment of Cross J., this alternative appears to have been put somewhat differently before him. What was argued and decided was not whether this instrument operated as a writing sufficient to satisfy the condition, but whether it could be treated as a document under hand, which I conceive is not the same thing, or at least not necessarily so.

Cross J. rejected that argument. He was content to assume first, that the condition might not require appointment by deed; second, that by virtue of the Law of Property Act, 1925, the directors of Branch Nominees Ltd. could have appointed an agent to execute on their behalf a document under hand; third, that such an appointment under hand by an agent could have been made, with the effective intention that it should not bind unless certain events happened, including the prior making of the demand, etc. In other words, it did not have the disability in this respect that a deed executed as an escrow might have. But Cross J. stated [5]: "If this appointment cannot take effect as an "escrow, I ought to treat it as being equivalent to an appointment under hand made by the directors, who signed it as agents "for the debenture holders" and the judge decided the question adversely to the defendants upon that last point. He said [6]: "I am prepared to accept proposition (3), but I am quite unable "to see how the facts, which I must assume to be correct, justify "proposition (4). The debenture holders were asked by the bank "to prepare and seal a deed. I have not seen any resolution of "the board of debenture holders, but I assume that it accorded "with this request. I have, therefore, no reason to think that "the two directors who put their names on the appointment were "authorised to do anything else than to witness the affixing of "the seal. I cannot assume that they had any authority to bind "the company by a document under hand or were purporting "to do so."

It seems to me that the point as it has now been developed is not the same point as was in the mind of the judge, and which was decided by him. The question is not whether these two

[5] [1960] 3 W.L.R. 108, 120. [6] Ibid.

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gentlemen, when they put their names on this document, were purporting to execute a document under their hands as agents for the company, or had any authority so to do. The question, as I conceive it to be, is: Can this document purporting though it may have been originally to operate as a deed, but failing so to do—can it nonetheless be the instrument of the company in writing? I have come to the conclusion that that question ought to be answered in the affirmative. So to decide is not, of course, to decide—far from it—that Greenwood's appointment was valid. There remain matters of fact plainly in issue, and all that we can say, as it seems to me, is that assuming those facts are found eventually in a sense which would be favourable to the defendants' case, then this document could operate as an instrument in writing within the contemplation of condition 12 of the debenture so that it could be said by the defendants that Branch Nominees Ltd. had by writing appointed Greenwood.

But in order to make clear the limitations of what I am saying, I must also make plain what would have to be the necessary basis of fact before such a conclusion could be reached. I will repeat that the question of what did happen on February 25 might have some reflection upon later events. But in addition it will be first plainly necessary to establish as a fact that before anything was done which could be called an appointment on February 25, there had been a demand. I gather from Mr. Muir Hunter that that fact is by no means conceded, and that someone will have to prove it. If a demand were made, it was made, as I assume, by Inkin, the branch manager; but Inkin was the officer of the National Provincial Bank Ltd., and not of Branch Nominees Ltd. So there is the second question: Had he authority to make the demand not as manager of the National Provincial Bank (Reading Branch) but as agent for the debenture holders, Branch Nominees Ltd.? That is a further question for investigation. Then assuming that he did make demand, and had authority to make it for Branch Nominees Ltd., what then happened? The suggested events, according to the defendants—which I have perhaps already sufficiently indicated—are that after the entry of Greenwood into the room, the document was handed to Greenwood, and some words were used which were understood to mean (so they say) that thereupon Greenwood was appointed, and the instrument was a writing, and evidence to that effect. Once more, that will have to be gone into at the trial.

But if all those facts are established in a way which is in support of the defendants' case, then as I have indicated it appears to me not fatal to the defendants' case that this appointment started by being (or by being intended to be) a deed, but was ineffective so to be. I conceive that if an individual sets out to execute a deed, and for some reason the instrument is not effectively a deed (say, because of the absence of a seal, or the absence of attestation) it cannot be said that therefore it is not,

and cannot be, an instrument in writing, and his instrument in writing. Mr. Muir Hunter has argued that in considering matters of this kind, one must apply a strict construction and a construction that is adverse to the debenture holders on the language of condition 12 of the debenture. I am not quite sure what the precise effect of that submission is. The words are quite simple words: "Appoint by writing"; and in construing them it is fair to note that the condition also empowers the debenture holders by writing to remove. I should have thought that those words would be satisfied if something was done—if the person acting for the debenture holders so conducted himself that one could say that he was appointing someone to be a receiver, and if he accompanied that by handing a writing which was the company's writing to the receivers. That would satisfy the condition. I am not by any means saying that that would be the only way to do it, but that is the relevant alleged course of events here.

But Mr. Muir Hunter says: No: This writing came into existence when it was made on February 25, and when the two directors, Brooks and Wheeler, then appended their signatures to the affixing of the seal, and thereby for present purposes identified it as the company's writing. He says that the subsequent putting in of the figure "28th" and of the word "February" again before the demand, does not affect that proposition, and that even if it did, it would mean that the writing was complete and (if at all) effective as such at that point of time.

The point is a short one, but in my judgment those propositions are not well founded. I agree with Cross J. when he accepted, as I understand that he did, that in the case of a writing it is perfectly competent that it should be made out, that it should come into existence on a day before it is intended to take effect, and does take effect. The contrary view would seem to have startling results, because assuming a power to appoint in writing, a man might make a document, lock it up in his desk with the idea that he was not wanting to use it at the moment, but there it was available if he did want to use it, and years might pass. According to Mr. Muir Hunter, when it was produced, it would have been effective from the date when he had made it and put it in his desk. That appears to me an absurd and unreal result of the argument which I do not think is the law.

Mr. Muir Hunter took a final point, namely, that notwithstanding the words which I have read in condition 12, the true construction of the condition is that "by writing" should be read "by deed." That argument, as I follow it, is based upon the view that, as appears from what follows in sub-condition (2), powers are given to the receiver so appointed which would involve the vesting in him of some estate; and if that is right, then a deed is necessary, and one should construe the words "by writing" as, therefore, meaning, in the light of what follows,

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"by deed." I am afraid I am quite unable to accept that argument. I do not accept the view that there was any vesting of an estate contemplated as the result of the appointment. But even if some such matter arose, that would be a question to be decided after the appointment, for example, whether the receiver, not having been appointed by deed, had in law the authority to do something which he thereafter purported to do. We are not at this stage concerned with that at all.

For the reasons that I have stated, I conclude that the answer to this case is that on the assumptions of fact which I have indicated—which can be determined only in the action—this instrument would be capable of being a writing as contemplated by the debenture taking effect on the date (February 28) when it was in fact, according to the defendants, passed over to Greenwood after a demand had been made by Inkin with the authority of the debenture holder.

I would, therefore, order accordingly, and set aside the judgment of Cross J., though, as I say, I do not express any view upon the matter with which he expressly dealt, namely, whether the document took effect in the circumstances (or was capable of taking effect) as a deed. I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom—save in very exceptional cases—of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.

HARMAN L.J. I concur, and find myself doing so with particular heartiness, with reference to the last observations my Lord has made. The number of conditions he has found it necessary to use to fence in the expression of this court's opinion shows at once the undesirability of this kind of procedure. It is highly undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say: "Well, "if this was thus, then that was so." In particular here one has no notion what authority (if any) Inkin, the servant of the bank, had so far as he was (if at all) the agent of the debenture holders. Had he authority to demand the mortgage money? Had he authority to make the appointment? One has no idea at all. But those are only two of the questions which are left unresolved by the case as it now stands.

As my Lord has observed, we have not had fully argued out the point about the delivery of this instrument as an escrow. But the judgment appears to show the judge to have held that document as an escrow, which is retractable at the will of the grantor pending the fulfilment of the conditions attached to it. That statement of the law seems to be consonant with a decision of this court in *Beesly* v. *Hallwood Estate Ltd.*[7]

[7] [1961] 2 W.L.R. 36.

I assume, therefore, that on this point the judge was right.

The other point, namely, whether the document was operative in law as an appointment in writing, was not really argued before Cross J. as it has been argued before us. He came to the conclusion that these two directors had authority only to execute, or to witness the execution of, a deed by the company, and that as that did not authorise them to execute or sign a document under hand, that was an end of the matter. But with all respect, the appointment need not be under hand. There was no need for any signature here. The two directors were authorised to do that which they did, and having done it, whether that instrument so brought into being operates as a writing is for the court, and is not a matter of their authority at all; and my Lord has expressed the view, in which I concur, that this document on the face of it could operate as an appointment in writing. Whether it did so depends on a number of facts as to which we do not know the answer. All we can say, therefore, is that it could so operate.

Mr. Muir Hunter's assumption that you must write it all out after the demand is made, and you are not entitled to carry a piece of paper in your pocket with the words written on it, and produce that piece of paper if and when you need it, seems to be an absolute novelty, and not convenient in practice, or right in law. I can see no reason why you should not write down certain words on a piece of paper and keep them in your bosom or your pocket book, and produce them at the right moment. Nor do I see why, if you so produce them, they should not have effect at the moment when you do produce them to the proper person, here to the receiver. Regarded as a document in writing, the document is not a conditional appointment at all. When the words were written on February 25, they were written without any intent that they should have any present effect and merely in preparation for a day which might, or might not, arrive. But when it did arrive it seems to me that (if Inkin had the necessary authority) the production of the document, and the handing of it to Greenwood with an intimation that this was his appointment as receiver, would constitute a good appointment by writing; and to that extent, therefore, we must differ, I suppose, from the judge, although over ground which he had never really traversed. Nevertheless, to that extent the appeal must, in my judgment, be allowed, and some kind of declaration made that, in various events which might have happened, this instrument could be effective for its apparent purpose.

DONOVAN L.J. In the way in which this case has come before the court, and has been argued here, it seems to me that two questions arise: First, whether the document purporting to appoint the receiver is such a "writing" as satisfies condition

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12 of the debenture; and secondly, whether, if so, the appointment was invalid as being premature.

As to the first question, I can see no answer to the defendants' contention that, if the document cannot properly operate as a deed, it certainly can do so as a writing; and I need say no more upon this point than my brothers have said already, with which I agree.

As to the second question, the argument is that the receiver was appointed the moment the document was signed, and so before the debt became payable. I agree that in a context where precision is not required, one might speak of the document loosely as appointing a receiver. But in this context precision is required. What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property, to carry on its business, to act in its name, and pay the debt; and the company has to submit to the exercise of these powers by the person having such authority.

This state of affairs is not achieved simply by the debenture holder signing a document in privacy, and keeping the contents to himself for as long as he wishes. Clearly the contents of that document must be communicated at least to the receiver before his appointment can be said to be effective. One may illustrate this by the converse case of removal, which may also be done under condition 12 by writing. The plaintiff here is driven to argue that the receiver might also be removed by a writing of which he need know nothing. So he would go on managing the company's business, acting in the company's name and receiving the company's property perhaps for weeks before he became aware of the fact that he had ceased to be receiver, and had been removed. This seems to me clearly to expose the fallacy of the argument.

On the assumptions that we are asked to make, that is, that the receiver was notified of his appointment on February 28, after demand for payment had been properly made, I think the appointment was not premature, and I agree that the appeal should be allowed.

December 7. The case was mentioned to the court and Lord Evershed M.R. expressed doubt whether the court ought to make any order on the appeal on the preliminary points. The judgment of Cross J. should be set aside and his order discharged. The judgment already delivered by the Court of Appeal could, His Lordship said, be used merely as a guide in further litigation. The Court of Appeal ought not to prejudge the issue whether the instrument operated as a "writing" for its effect depended on what was the intention of the parties at the material time. The preliminary points raised questions of fact and law and if, when the matter had come before the court, the court had

been sitting at first instance, they would have refused to answer the questions pending the trial.

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Judgment of Cross J. set aside. Costs in the Court of Appeal and the High Court to be the defendants' costs in the action.

Solicitors: *Wilde Sapte & Co., Matthew Trackman, Lifton & Cunnington.*

E. D.

[COURT OF CRIMINAL APPEAL.]

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Dec. 2, 21.
Lord Parker C.J., Streatfeild, Glyn-Jones, Ashworth and Elwes JJ.

Crime — Sentence — Probation order — Compensation order made by magistrates at same time as probation order—Breach of probation order—Offender committed to quarter sessions for sentence for original offence—Sentence of imprisonment—Probation order ceases to have effect—Whether compensation order also ceases to have effect—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 5 (4), 6, 11 (2).

The appellant was convicted by the Waltham Abbey magistrates on June 23, 1959, of four offences of obtaining money by false pretences. A probation order for three years was made and the appellant was ordered to pay £14 15s. compensation under section 11 (2) of the Criminal Justice Act, 1948.[1] After his conviction the appellant moved to Clacton and the Clacton magistrates' court

[1] Criminal Justice Act, 1948, s. 5 (4): "Where . . . a probationer "is sentenced for the offence for "which he was placed on probation, "the probation order shall cease to "have effect."

S. 6: "(1) If at any time during "the probation period it appears . . . "to a justice of the peace on whom "jurisdiction is . . . conferred [by "virtue of s. 6 (2)] that the proba- "tioner has failed to comply with any "of the requirements of the order, the "justice may issue a summons "requiring the probationer to appear ". . . or may . . . issue a warrant "for his arrest. . . . (3) If it is proved "to the satisfaction of the court be- "fore which a probationer appears ". . . that the probationer has failed "to comply with any of the require- "ments of the probation order, that "court may without prejudice to the "continuance of the probation order, "impose on him a fine not exceeding "ten pounds . . . or may—(*a*) if the "probation order was made by a "court of summary jurisdiction, deal "with the probationer, for the offence "in respect of which the probation "order was made, in any manner in "which the court could deal with "him if it had just convicted him of "that offence; . . . (4) (*b*) where "the probationer is brought or "appears before the court of assize "or quarter sessions . . . that court "may deal with him, for the offence "in respect of which the probation "order was made, in any manner in "which the court could deal with him "if he had just been convicted before "that court of that offence."

S. 11 (2): "A court, on making "a probation order or an order for "conditional discharge or on dis- "charging an offender absolutely "under this Part of this Act, may,

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

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became the supervising court. He subsequently committed a breach of the probation order in that he failed to notify the probation officer of a change of his address and was brought before the Clacton magistrates' court, as the supervising court, under section 6 of the Act of 1948. That court committed him for sentence to Essex Quarter Sessions under section 29 of the Magistrates' Courts Act, 1952, and he was there sentenced to terms of imprisonment amounting to two years. By virtue of section 5 (4) of the Act of 1948 the probation order ceased to have effect on the passing of that sentence but no reference was made at quarter sessions to the order for compensation. On appeal against sentence the question arose whether the compensation order continued in force:—

Held, (1), allowing the appeal in part, that in all the circumstances, the sentence of two years' imprisonment should be reduced to such a sentence as enabled the appellant to be discharged on the day after the hearing of the appeal (post, p. 216).

(2) That the compensation order continued in force because section 5 (4) of the Act of 1948 provided only that the probation order should cease to have effect, and there was no express provision in the Act that any other orders were to cease to have effect. Moreover, the court could not attribute to Parliament an intention to take away the right vested in the victims of the crime, in whose favour the compensation order was made, in the absence of clear words having that effect (post, pp. 219–220).

(3) That the fact that the offender was still liable to pay compensation might well be a factor to be taken into account by the sentencing court in assessing an appropriate punishment (post, p. 220).

Reg. v. *McCarthy*, The Times, October 26, 1960, disapproved.

APPEAL against sentence.

The appellant, Duncan Frederick Evans, appealed against four sentences, totalling two years' imprisonment, imposed on him at Essex Quarter Sessions on March 29, 1960. On June 23, 1959, he had been convicted by the Waltham Abbey magistrates' court of four offences of obtaining money by false pretences, and six other offences were taken into consideration. The Waltham Abbey magistrates had made a probation order for three years and had ordered him to pay the sum of £14 15s. as compensation. He then moved to Clacton and came under the supervision of the Clacton magistrates' court. Subsequently he committed a breach of the probation order and was brought before that court, which committed him for sentence to Essex Quarter Sessions. At sessions no mention was made of the order for compensation and under those circumstances a Full Court of Criminal Appeal was constituted to consider the effect of the sentence of imprisonment on the compensation order, and also to consider the decision of the court in *Reg.* v. *McCarthy*.[2]

E. D. R. Stone for the appellant.
J. H. Buzzard for the Crown.

"without prejudice to its power of "awarding costs against him, order "the offender to pay such damages "for injury or compensation for loss "as the court thinks reasonable; "..."

[2] The Times, October 26, 1960.

In addition to the case referred to in the judgment, the following were cited in argument: *Rex* v. *Parry*[3]; *Reg.* v. *Havant Justices, Ex parte Jacobs*[4]; *Reg.* v. *Devine.*[5]

Cur. adv. vult.

Dec. 21. LORD PARKER C.J. Glyn-Jones J. will give the judgment of the court.

GLYN-JONES J. On June 23, 1959, the appellant was convicted by a court of summary jurisdiction, sitting at Waltham Abbey, upon four charges of obtaining by false pretences sums of money amounting in all to £14 15s. Six other similar offences were taken into consideration. The court made a probation order for three years and ordered the appellant to pay £14 15s. as compensation. The appellant, after his conviction, went to live at Clacton, where he found work as a baker and there he came under the supervision of the probation officer for that district.

In September, 1959, at the end of the summer season, he lost his employment because, according to his employer, he was a bad time-keeper. He told the probation officer that he hoped to find a job with another baker in Clacton, but instead of doing so he left Clacton and committed a breach of the conditions of his probation in that he did not report his change of address to the probation officer, and his whereabouts were not discovered until, a warrant having been issued for his apprehension, he was found in Leytonstone where he had again obtained employment as a baker. In accordance with the provisions of section 6 of the Criminal Justice Act, 1948, he was brought before the Clacton magistrates as the supervising court, and they, having heard his record, committed him in custody to the Essex Quarter Sessions for sentence pursuant to section 29 of the Magistrates' Courts Act, 1952. He had been previously convicted on many occasions for offences of dishonesty, the first for larceny at the age of 16, when he was put on probation. Between the ages of 22 and 26 he was sentenced on five occasions for offences of larceny or false pretences to short sentences of imprisonment, and finally in 1951 to three years' corrective training, from which sentence he was released from prison in April, 1953.

Quarter sessions imposed sentences of 12 months' imprisonment on each of the four charges, of which three were concurrent and one consecutive, making two years in all, and it is against these sentences that the appellant appeals. Leave was given by the single judge on the ground that the magistrates by whom the appellant was originally convicted could not have been of opinion

[3] [1951] 1 K.B. 590; [1951] 1 T.L.R. 187; [1950] 2 All E.R. 1179, C.C.A.

[4] [1957] 1 W.L.R. 365; [1957] 1 All E.R. 475, D.C.

[5] [1956] 1 W.L.R. 236; [1956] 1 All E.R. 548, C.C.A.

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that his character and antecedents were such that greater punishment should be inflicted for his offences than the court had power to inflict (presumably on the ground that had they been of that opinion they would not have put him on probation); hence, in the view of the single judge, the Waltham Abbey magistrates had no jurisdiction to commit him to quarter sessions under section 29 of the Magistrates' Courts Act, for the supervising court, having the same character and antecedents to consider, must have based their opinion solely upon the conduct of the appellant subsequent to his conviction.

We do not find ourselves in agreement with the single judge. The Waltham Abbey magistrates were entitled to choose between punishment and probation. They doubtless had regard, as they properly might, to the fact that six years had gone by since the appellant served his sentence of corrective training, and during those six years the appellant had not been convicted of dishonesty. There had been a conviction at the Essex Assizes in November, 1956, for causing grievous bodily harm to the woman with whom he was living. This offence was committed by the appellant while in drink and there must have been extremely strong mitigation, for the learned judge imposed no punishment other than a probation order for 12 months. The appellant continued to live with the same woman and has maintained her and her children until sentenced by the Essex Quarter Sessions.

In these circumstances the magistrates doubtless thought that there was a chance that a probation order might save the appellant from reverting to a life of criminal dishonesty, and we have no reason to criticise their decision; but it does not follow that if they had decided that the appellant must be punished they would not have been of opinion that the appellant deserved greater punishment than they had power to inflict. Moreover, in our opinion, the supervising court is not fettered in the exercise of its discretion by a consideration of what might have been the opinion of the court in which the appellant was originally convicted. They have the advantage of knowing what the conduct of the probationer has been since the probation order was made and this may throw light on his character. Section 6 (3) (*a*) of the Criminal Justice Act, 1948, gives the court before whom a probationer is brought power to deal with him in any manner in which the court could deal with him if it had "just" convicted him; not in the manner in which it would have dealt with him if it had been the court which originally convicted him and was acting at the time of the original conviction.

In our opinion the Clacton magistrates were acting within their powers in committing him to Essex Quarter Sessions for sentence. We came, however, to the conclusion that the total sentence of two years makes insufficient allowance for the effort which the appellant must have made to avoid conviction for dishonesty for six years after his sentence of three years' corrective training, and we accordingly substituted such a sentence

of imprisonment as enabled the appellant to be discharged on the day after the hearing of the appeal on December 2, 1960.

At the original hearing of this appeal Mr. Stone, for the appellant, invited the court to restore the probation order on the ground that the sentence of imprisonment had the effect of nullifying the order for payment of compensation made by the Waltham Abbey magistrates and thus depriving the victims of the appellant's dishonesty of their opportunity to enforce the order. Incidentally, counsel stated that the appellant had been at all times ready and willing to pay, but gave no reason why he had not even begun to do so.

It would not be right to withhold punishment which a court thought to be appropriate and necessary to be inflicted merely to keep alive an order for compensation; but if the punishment of a probationer by a fine or imprisonment does put an end to the order for compensation that is a factor which might properly be taken into account by a court before whom the probationer is brought because he has committed another offence, or is otherwise in breach of a requirement of the probation order. That was the view taken by this court in *Reg.* v. *McCarthy.*[1] In that case, upon the making of a probation order, the probationer had been ordered to pay £100 in compensation. He subsequently committed another offence for which he was brought before London Sessions and was sentenced to 18 months' imprisonment, and a concurrent sentence of seven days' imprisonment was imposed for the offence in respect of which the probation order had been made. In that case the attention of this court was drawn to section 6 of the Criminal Justice Act, 1948, and in particular to the power given by subsection (3) to a court to impose a fine for a breach of probation, leaving the probation order in existence. Oddly enough, in that case counsel for the appellant argued that the order for compensation was still valid notwithstanding the sentence of seven days' imprisonment, while counsel for the Crown contended for the contrary view. In the end the court came to the conclusion that since an order for compensation could not be attached to a sentence of imprisonment the order for compensation had ceased to have effect, and with the object of restoring it the court set aside the sentence of imprisonment and substituted a fine of twenty shillings for the breach of probation, purporting to act under section 6 (3) of the Act of 1948.

As was stated by the Lord Chief Justice at the original hearing of the present appeal, the court has since had reason to think that the arguments in *McCarthy*[2] were founded upon the wrong section and this court of five judges has been constituted in order that that decision may be reviewed. Having reviewed that decision the court is of opinion that it was wrong. In the first

[1] The Times, October 26, 1960. [2] Ibid.

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place the court mentioned in section 6 (3) of the Criminal Justice Act, 1948, is the court of summary jurisdiction before which the probationer is brought upon a breach by him of a requirement of the probation order. Courts of assize or quarter sessions are not empowered by that subsection to impose a fine for breach of probation. Moreover, McCarthy was a probationer who had committed another offence during the period of his probation, and it was for that offence that he had received his sentence of 18 months' imprisonment. His case, therefore, fell to be considered under section 8 of the Act and not under section 6 at all. A probationer who commits a further offence during the period of his probation doubtless commits a breach of a requirement of his probation; but the proviso to section 6 (6) of the Act makes it clear that he must be dealt with under section 8 and not under section 6. The appellant in this appeal, however, has not committed another offence during the period of his probation, and the relevant section in this case is section 6.

The question which remains is this, namely, if a probationer in whose case an order for compensation has been made is subsequently dealt with and punished (whether by fine, detention, order for Borstal training or imprisonment) does the infliction of that punishment put an end to the order for compensation? For this purpose it seems immaterial whether the offender is dealt with under section 6 or under section 8 for the relevant provisions of both sections are similar. In section 6 it is provided that the court which deals with the probationer "may . . . deal with "[him] for the offence in respect of which the probation order "was made, in any manner in which the court could deal with "him if it had just convicted him of that offence" (section 6 (3) (*a*) relating to a court of summary jurisdiction) or " . . . in "any manner in which the court could deal with him if he had "just been convicted before that court of that offence" (section 6 (4) (*b*) relating to a court of assize or quarter sessions). Neither the court which originally convicted the offender nor that—whether or not it is the same court—which ultimately deals with him has power at the same time both to inflict punishment and to order payment of compensation; and it is said to be anomalous that the order for compensation should survive the infliction of punishment, for if it does, the two courts have brought about by their separate orders a result which neither has power to order at one time. Moreover, it is argued that if the second court had just convicted him it would follow that he would be in the position of a man between conviction and sentence with no order or judgment against him. In other words, it is said, the second court must have, as it were, a clean slate on which to write, and their order or judgment when made or given takes the place of any order or judgment of the original court, which thereupon ceases to have effect. If this be so, then at the moment when the order or judgment of the second court comes into operation,

not only the probation order and any order for compensation but also any other order, for example, for payment of costs or for restitution of money or property under section 45 of the Larceny Act is nullified.

In this case the court before which the appellant was brought in consequence of his breach of probation was the court of summary jurisdiction at Clacton. It is that court which dealt with him pursuant to section 6 (3) as if it had just convicted him. Instead of then inflicting punishment the court committed him to quarter sessions for sentence; but it was before the court of summary jurisdiction that the appellant stood in the position of a man between conviction and sentence; and if the argument set out above be well founded then all the orders made by the first court, including any order for costs, compensation or restitution, ceased to have effect when the appellant was committed for sentence. When he appeared before quarter sessions that court dealt with him pursuant to its powers under section 29 of the Criminal Justice Act, 1948, and not under section 6 (4) of that Act. But quarter sessions might have differed from the Clacton magistrates and, taking the view that the breach of probation was trivial, might have made no order, intending to leave the original probation order to stand. If so, does the original probation order revive, and with it the order for compensation, and any other order made by the original court? Or must quarter sessions make a fresh probation order and fresh orders for compensation, etc., to the extent to which the original orders had not been complied with?

This court is of opinion that the fallacy in the argument set out above is that it disregards the presence of the word "just" in the phrase "if it had just convicted him." The statute does not require the second court to put itself back in the position of the original court at the moment of conviction; and although the statute says that the second court may deal with the offender in any manner in which it would deal with him if it had "*just*" convicted him, that does not mean that the second court has in fact just convicted him; it has not. The second court is dealing with an offender who, since his conviction, may have reached an age when he qualifies for corrective training or preventive detention; he may have become too old for Borstal training; and the court has the advantage of hearing how he has behaved himself since the probation order was first made. The second court must deal with the offender in the light of all the circumstances and conditions which exist at the time when it deals with him, not those which existed when he was first convicted, and among them is the circumstance that a valid order or valid orders made against him by the first court is or are still in existence. This court does not think that by implication, and in the absence of express words, it can read into section 6 a provision that the orders of the first court are automatically nullified when the

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second court deals with the offender. The court's opinion is fortified by the fact that section 5 (4) of the Act of 1948 expressly provides that where a probationer is sentenced for the offence for which he was placed on probation, the probation order shall cease to have effect, and this would leave the original probation order in being in a case where the second court does not impose a sentence, and negatives the suggestion that when the offender is dealt with by the second court it must be on the footing that all the orders of the original court are of no effect. There is not in the Act any express provision that any orders made by the original court, other than a probation order, are to cease to have effect when the offender is subsequently dealt with, and in view of the fact that an order for payment of compensation or for costs or for restitution may accompany an order for conditional discharge as well as an order for probation, we think the omission is significant. Moreover, an order for payment of compensation vests in the victims of the crime in whose favour the order is made a right to enforce the order for their own benefit, and the court cannot attribute to Parliament an intention to take away that right in the absence of clear words having that effect.

The offender who is put upon probation and ordered to pay compensation is given a right, by behaving himself, to avoid punishment. If he chooses to throw away that chance and as a result is punished, the court sees nothing inequitable or unreasonable in his continuing to be under the liability to pay compensation, although as we have already said, the fact that he is still liable to pay compensation may well be a factor to be taken into account by the sentencing court in assessing an appropriate punishment.

This court is of opinion that the decision in *McCarthy* [3] was wrong, and holds that the appellant is still liable to pay compensation under the original order, notwithstanding that he has since been sent to prison following his own breach of the original probation order.

Appeal allowed in part. Sentence varied.
Order for compensation to stand.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

[3] The Times, October 26, 1960.

[PROBATE, ETC., DIVISION.]

ABATE *v.* ABATE (ORSE. CAUVIN).

1960 *Dec.* 14.

1961 *Jan.* 23.

Lloyd-Jones J.

Husband and Wife — Nullity — Foreign decree — Validity — Voidable marriage—Foreign decree of nullity—Recognised by law of husband's domicile.

The parties were married in 1952 in London. The husband was at all material times domiciled in Italy. The marriage was never consummated, owing to the husband's incapacity. In 1953, the parties finally ceased to cohabit. In September, 1959, when the wife was resident in the Canton of the Grisons, in the Swiss Confederation, and the husband was resident in Italy, the husband had his name removed from the population register of the Commune of San Remo and obtained his inscription in the civil population register of Castaneda, in the Grisons. Later in the same month, the husband instituted proceedings in the Grisons for an annulment of the marriage on the ground of his own impotence. The Swiss court held that since the husband had been struck off the population register of the Commune of San Remo and had obtained inscription in the civil population register of Castaneda, that proved that he resided at Castaneda with the intention of settling down there. It followed that he had proved that he had his "domicile" at Castaneda, and that, accordingly, the court had jurisdiction to adjudicate upon the petition, and it declared the marriage null and void. Less than three months after obtaining the Swiss decree, the husband, being then resident in England, sought a declaration that the Swiss decree was a valid and effective decree annulling the marriage. Expert evidence established that the courts of Italy would recognise the Swiss decree as valid:—

Held, that the principle that the English courts will recognise as valid a decree of divorce obtained in a State where the husband was not domiciled, if the courts of his domicile would recognise the validity of the decree, applies also to nullity decrees.

Armitage v. *Attorney-General* [1906] P. 135; 22 T.L.R. 306 applied.

UNDEFENDED PETITION FOR A DECLARATION.

On October 19, 1952, the husband, who was at all material times domiciled in Italy, married the wife at the Church of St. James, Spanish Place, in London. Before the marriage the wife was domiciled in England.

After the marriage, the parties never cohabited in England. The marriage was never consummated, but on June 23, 1953, the wife gave birth to a child, Michael, who was conceived by fecundatio ab extra.

Soon after the birth of the child, the marriage broke down completely and the parties, who had cohabited in Italy, thereafter lived apart.

In September, 1959, the husband had his name removed from the population register of the Commune of San Remo, where he

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

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had until then resided, and obtained his inscription in the civil population register of Castaneda, in the Canton of the Grisons, in the Swiss Confederation. The wife was at that time resident at Castaneda. Later in September, 1959, the husband initiated proceedings for the annulment of the marriage before the "Tribunale" for the District of Moesa, in the Canton of the Grisons, and on July 9, 1960, that court declared the marriage to be annulled. The judgment of the court contained the following recitals and findings. The husband's petition, dated October 15, 1959, was on the ground of his own impotence. At the hearing of the petition on July 9, 1960, both parties appeared and were legally represented. The wife admitted all the allegations set out by the husband in his petition, and supported the petition. The marriage had never been consummated owing to the husband's impotence, which impotence existed before the marriage and was permanent. Article 136 in conjunction with article 144 of the Swiss Civil Code prescribed that the court having jurisdiction to adjudicate upon petitions for divorce and annulment of marriage was the court of the "domicile" of the petitioner. By the Swiss Civil Code, the domicile of a person is the place where that person resides, if it is proved that he or she has given up his or her domicile abroad without having established another in Switzerland. By article 1 of the Convention of January 3, 1933, between Italy and Switzerland, judicial decisions in matters of civil law given by the courts of one of the contracting parties have binding force in the other country if the decision emanates from a court having jurisdiction in accordance with article 2 of the Convention, which prescribes, among other things, that such jurisdiction exists when the respondent has his or her domicile at the place where the decision is applied for, or when he or she has pleaded without reservation on the main issue of the dispute. In the present case, the husband petitioner had proved that he had his domicile at Castaneda, within the jurisdiction of the court, since it appeared that he had been struck off the population register of the Commune of San Remo, where he used to reside, and had obtained inscription in the civil population register of Castaneda. It had therefore been proved that the husband resided at Castaneda with the intention of settling down there, so that both the domestic and the international jurisdiction of the court appeared to be indisputable. The court declared the marriage null and void.

By his petition dated October 21, 1960, the husband, being then resident in England, sought a declaration that the Swiss decree pronounced on July 30, 1960, was a valid and effective decree annulling the marriage.

An expert in Italian law gave evidence that the Swiss decree would be recognised by the courts in Italy as validly annulling the marriage, since that decree complied with the requirements of the Convention of January 3, 1933, between Italy and Switzerland.

Joseph Jackson for the husband.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Mitford* v. *Mitford and von Kuhlmann* *; *Mountbatten* v. *Mountbatten*.†

Cur. adv. vult.

Jan. 23. LLOYD-JONES J. read the following judgment, in which he stated the facts and continued: In September, 1959, the husband initiated proceedings in Switzerland before the Tribunal of the District of Moesa in the Canton of the Grisons, for the annulment of his marriage. On July 9, 1960, that court declared the marriage to be annulled. The judgment of the Swiss court has been proved before me.

It is submitted in this court that there are three approaches to the recognition of the Swiss judgment. First, it is said there is a possibility that the husband was domiciled in the Canton of the Grisons at the time of the proceedings, as stated in the Swiss judgment; but, in fact, no reliance was based on this possibility, for from an English point of view it is patent on the evidence that no domicile of choice was acquired there.

Secondly, it is said that the husband was at all material times domiciled in Italy, that the courts of Italy recognise the Swiss decree, and that, on the analogy of the principle in *Armitage* v. *Attorney-General* [1] recognition should be accorded to that decree.

Thirdly, it is said that both the parties were resident in the Canton of the Grisons at the time of the decree, that residence of both parties gives an English court jurisdiction in nullity proceedings: *De Reneville* v. *De Reneville*,[2] and that an English court ought to accord jurisdiction to other courts, on a reciprocal basis, where it itself takes jurisdiction, as indicated in *Travers* v. *Holley*.[3]

I find that the husband, and therefore the wife, was domiciled in Italy at all material times.

Dr. Del Guidice, an expert in Italian law, and Dr. Speckert, an expert in Swiss law, have both given evidence before me, and I am satisfied that the courts of Italy will accord recognition to the Swiss decree. It is not necessary to repeat their reasons for stating this, since the judgment of the Swiss court sets out all the material facts and law.

The first question to be decided is whether the principle established in *Armitage* v. *Attorney-General* [4] should be applied to nullity suits. There appears to be no reported authority on the matter, but textbooks appear to warrant its application: see Dicey's Conflict of Laws, 7th ed., p. 383; Rayden on Divorce, 8th

* [1923] P. 130; 39 T.L.R. 350.
† [1959] P. 43; [1959] 2 W.L.R. 128; [1959] 1 All E.R. 99.
[1] [1906] P. 135; 22 T.L.R. 306.
[2] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.
[3] [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794.
[4] [1906] P. 135; 22 T.L.R. 306.

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ed., p. 824; Jackson on The Formation and Annulment of Marriage, p. 281.

In my judgment, if the court of the domicile of the parties recognises a nullity decree, this court will recognise it, and I so hold.

The question as to recognition of a decree founded on residence of both parties does not therefore fall to be decided in this case.

I declare, therefore, that the decree of the Tribunal of the District of Moesa in the Canton of the Grisons, made on July 30, 1960, is a valid and effective decree annulling the marriage.

Declaration accordingly.

Solicitor: *W. Timothy Donovan.*

[QUEEN'S BENCH DIVISION.]

O'NEILL *v.* BROWN.

1961
Jan. 26.

Lord Parker C.J., Salmon and Winn JJ.

Road Traffic—Maintenance of vehicle—Motor-lorry towing trailer—Connected by tow bar and ball and socket unit—Both parts of good construction and in good repair—Faulty coupling—Accident caused through trailer becoming disengaged from lorry—Whether a breach of obligation to maintain—"Maintenance"—Meaning—Motor-Vehicles (Construction and Use) Regulations, 1955 (*S.I.* 1955, *No.* 482), *reg.* 73 (1).

The appellant, a fair-ground showman, drove out of a fair-ground and along a road a motor-lorry connected to a trailer caravan by an automatic coupling device consisting of a tow bar attached to the trailer with a socket at the end which fitted over a ball-unit attached to the lorry. After travelling over the bumpy fair-ground and along two roads, one of which had a bumpy surface, the trailer became disengaged from the lorry, veered across the road, and collided with an oncoming motor-cycle, killing the motor-cyclist and injuring his passenger. Justices, before whom the appellant was charged with an offence under regulation 73 (1) of the Motor-Vehicles (Construction and Use) Regulations, 1955,[1] found, inter alia, that the tow bar and ball-unit which formed the connection between the two vehicles were of good construction and in good repair, but that the trailer had become disengaged owing to faulty coupling either by the appellant or his servant, and that there was a breach of regulation 73 (1):—

Held, (1) that the justices were justified on the evidence in finding that it was the faulty coupling which caused the trailer to become disengaged.

(2) That regulation 73, being in Part III of the regulations of 1955, was concerned with the maintenance of the vehicles and parts

[1] Motor-Vehicles (Construction and Use) Regulations, 1955, reg. 73 (1): "Every motor-vehicle, every trailer "drawn thereby and all parts and "accessories of such vehicle and "trailer shall at all times be in such "condition, . . . that no danger is "caused or is likely to be caused to "any person on the vehicle or trailer "or on a road."

and accessories thereof and, having regard to the mischief aimed at by the regulations, "maintenance" meant that the vehicles, parts and accessories thereof should not only be in good repair but in efficient working order. As the tow bar and ball and socket unit were improperly coupled they were not in efficient working order and, accordingly, there had been a breach of regulation 73 (1). Accordingly, the justices had come to a correct conclusion and the appeal must be dismissed.

Case stated by Portsmouth justices.

On January 11, 1960, an information was preferred by the respondent, Frank Aubrey Brown, against the appellant, Patrick John O'Neill, alleging that on November 18, 1959, at Portsmouth the appellant unlawfully used on a road, Northern Parade, a trailer towed by a motor-vehicle, a motor-lorry, a certain part of such vehicle, namely, the tow bar, not being in such condition that no danger was likely to be caused to any person on the vehicle or on the road, contrary to regulations 73 (1) and 104 of the Motor-Vehicles (Construction and Use) Regulations, 1955, made under section 30 of the Road Traffic Act, 1930.

The justices heard the information on March 11 and the following are among the facts they found: On November 18, 1959, the appellant, a showman, was the driver of the lorry and trailer. The two vehicles were coupled by means of a tow bar, consisting of a metal rod 18 inches in length and varying in diameter between approximately 1 and 2½ inches, the smaller end of which was attached to the trailer. At the larger end of the tow bar, on the underside, there was a socket, designed to receive a metal ball-unit which was attached to the rear of the motor-lorry. The interior of the tow bar contained a spring-loaded plunger, the concave end of which projected as a result of spring pressure into the socket. Incorporated in the socket-end of the tow bar was a spring-loaded locking device, operated by a lever with a handle which protruded from the upper surface of the tow bar. The locking lever passed through apertures in the upperside of the tow bar, plunger and underside of the tow bar. When the lever was maintained in that position by means of pressure from the spring, it locked the plunger in the forward position. The plunger ceased to be locked when the locking handle was pulled upward against its spring and when the handle was pulled horizontally backward the plunger moved back against its spring. When the locking handle was released, it automatically moved forward and down with a click, securing the plunger in the forward position when the ball-unit was completely in or out of the socket. The mechanism was designed to ensure that when the socket was pressed fully over the ball-unit and the locking handle released, the ball-unit and socket were unable to come apart. The end of the trailer to which the tow bar was attached was the heavier, giving to the tow bar a downward thrust. The strength of two or three men was required to lift the tow bar socket over the ball-unit.

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On November 18, 1959, while the appellant was in the driving seat of the motor-lorry at the Clarence Pier Amusement Park, two men coupled the trailer to the lorry by means of the tow bar mechanism. The appellant then uncoupled the vehicles and greased the ball-unit. When the vehicles had been recoupled by means of the tow bar mechanism the appellant drove out of the amusement park making a left-hand and a right-hand turn in so doing. The surface of the amusement park was bumpy in places. The appellant drove the lorry and trailer along two roads one of which had a bumpy surface and one a smooth surface. When near the junction with another road, the trailer became disconnected from the towing vehicle, swerved towards the nearside kerb and then across the road where it collided with an oncoming motor-cycle combination, resulting in the death of the motor-cyclist, injury to a pillion passenger and extensive damage to the machine. After the collision the motor-lorry was found stationary on the north-western side of the road, approximately 50 yards north-east of the caravan. There was no apparent defect in the tow bar and ball-unit. A police mechanic testified before the justices that when he examined the ball and socket mechanism he found them to be in excellent condition and was unable to express any opinion as to how it parted. When he examined the mechanism he found nothing wrong with it: why it parted was a complete mystery. It was possible that the coupling was defective but if that was the reason he had not been able to find what defect there was in it. Another possible reason was some unnatural force which would give a lift and twist—if the caravan ran over a deeply submerged manhole cover that could produce it or if there were half a brick in the road that might do it. The possibility of unnatural force could not be reasonably left out of the accident. Vibration would not undo the locking device, which had a fairly strong spring.

Counsel for the appellant made a submission of no case but the justices found that there was a case to answer.

Both the appellant and his servant gave evidence as to the coupling of the two vehicles at the amusement park.

It was contended by the appellant that the accident may have resulted from any one of the following causes: defective mechanism of the tow bar, due to lack of maintenance; incorrect coupling of the vehicles; some unnatural force due to the trailer passing over a brick or similar object which wrenched the tow bar from the ball-unit; defective manufacture or design of the tow bar; that because Part III of the regulations of 1955 related solely to the maintenance of parts and accessories of motor-vehicles and their construction was governed by Part II, it was essential that the court should find that the defective coupling of the vehicles was not due to the construction of the tow bar and such an inference could not be drawn from the evidence. In the event of the court drawing such an inference, the evidence did not support a finding that the defective coupling was due to

(1) lack of maintenance, or (2) incorrect coupling. In the event of the court drawing an inference that the vehicles were incorrectly coupled, regulation 73 did not relate to a matter of that kind but (save where the conditions of loading were specifically mentioned) solely to the maintenance of the vehicle and trailer in good and roadworthy condition. Regulation 73 did not impose absolute liability and where the evidence did not disclose the cause of the defect it was impossible for the court to find that danger was likely to arise from such unknown cause.

It was contended by the respondent that regulation 73 should not be construed as relating solely to mechanical maintenance by reason of the absence of the word "maintained" therein and in the heading to Part III of the regulations: that the heading to regulation 73 was not a part of the regulation and a distinction should be drawn between regulation 73 and the subsequent regulations in which the words "be maintained" appeared.

The justices were of opinion that an inference could reasonably be drawn from the evidence that there was a likelihood of danger arising to persons on the trailer or on the road by reason of the condition of the tow bar, causation being a matter which was not material to the proof of the charge; that demeanour and conflicting statements of the appellant and his witness, however (each maintained that he had personally performed the final act of coupling), viewed in the light of the evidence that the tow bar was of common and obviously efficient design, of a type in daily use throughout the country and apparently in excellent condition, led them to the conclusion that its dangerous condition arose from the failure of the person who manipulated the parts to ensure that they were properly engaged and locked. They directed their minds to the distinction to be drawn between the construction of vehicles as governed by Part II of the regulations and their use as governed by Part III when considering the contention of the appellant that because of that distinction it was essential for them to be satisfied that the defective coupling of the vehicles was not due to the construction of the tow bar. They would have accepted that contention had the tow bar been governed by Part II of the regulations. It was clear, however, that that Part did not exhaustively govern the construction of all parts and accessories of every motor-vehicle and trailer drawn thereby and did not deal with the construction of a tow bar. If that contention were correct, it would follow that no provision existed for preventing the use on roads of motor-vehicles and trailers when danger was likely to arise from the condition, due to their construction, of parts and accessories which were not within the limited scope of Part II of the regulations. They were unable to accept that contention and took the view that regulation 73 (1) applied to such use. The contention made on behalf of the appellant that in its application to the condition of motor-vehicles, trailers, their parts and accessories, regulation 73 (1) related solely to mechanical maintenance was based on the wording of the heading to

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regulation 73 and the headings and wording of regulations 74 to 78 which dealt with maintenance of parts. They were of opinion that those headings were equivalent to marginal notes in a statute and need not be regarded as they formed no part of the regulations. They took the view that the heading to Part III of the regulations was the heading which governed the general construction of regulations 59 to 105. The words "be maintained" appeared in regulations 74 to 78 and the omission of such words from regulation 73 confirmed them in the opinion that in its application to the condition of motor-vehicles, trailers, their parts and accessories, it should be read as applying only to mechanical maintenance. If they were to hold otherwise, it would follow that there was no provision dealing with circumstances where danger was caused or was likely to be caused by the incorrect or careless use of parts which were properly maintained. They were therefore of the opinion that to construe regulation 73 (1) so as to allow an avenue of escape to those responsible for dangerous situations arising from that source or from the construction of parts which were not included in Part II of the regulations, would be contrary to the intention of the legislature and the object of the regulations. It was not beyond the bounds of possibility that the accident was caused by the application upon the tow bar of some unnatural force, such as that which would result from the trailer passing over a deeply submerged manhole cover or half of a brick, of which the driver was unaware, but they took the view that the tow bar should be so designed, constructed and maintained as to resist the stress and strain arising from the force suggested, the application of which would not, in their opinion, be an unnatural event upon a road. If, however, through circumstances beyond the appellant's control, the part in question had been subject to a force which it could not reasonably be expected to withstand (an example of which would be suffering an impact with another vehicle travelling at speed) leading ultimately to the disconnection of the trailer, they would have felt that other considerations applied, involving the question whether, after the impact, there was a "use" within the meaning of the regulations. They had no evidence of the application of a force of that nature and it appeared to them to be unnecessary to consider the law applicable to such an eventuality. They were of opinion that regulation 73 (1) should be construed literally and that it was an absolute prohibition against the use on a road of a motor-vehicle or trailer, a part or accessory of which was in such condition whereby danger was caused or was likely to be caused to a person on the vehicle or trailer or on a road, regardless of whether the dangerous condition arose from construction which was not governed by Part II of the regulations, lack of proper maintenance, the incorrect or careless use of parts, or, in the present case, the application to

the tow bar of the force to which the appellant's counsel referred. They convicted the appellant, who appealed to the Divisional Court.

R. G. Rougier for the appellant.
Michael Lee for the respondent.

The following cases were cited in argument: *Cole* v. *Young* [2]; *Latimer* v. *A.E.C. Ltd.* [3]; *Andrews* v. *Kershaw Ltd.* [4]

Lord Parker C.J. stated the facts and continued: How the accident came to happen was in many respects rather a mystery. There was evidence that there was no apparent defect in the tow bar and the ball-unit. That was found by the justices to be so. Accordingly, therefore, so far as construction was concerned, the two units forming the connection were of good construction.

So far as maintenance was concerned, in the sense of being in good repair, again there was evidence that the two units were in good repair. The only other two theories were either that there had been some unnatural force or bump which had caused the coupling to disengage, or that the appellant or his servant in fixing the tow bar on to the ball-unit, had somehow not caused the ball-unit to get home into the socket but had merely caused a connection sufficient to enable the trailer to be towed for some distance along the road. The police evidence was that in effect it was a mystery.

The justices found, albeit in part of their opinion, that it was the fault of the person who had effected or tried to effect the coupling. They said this: "The demeanour and conflicting "statements of the appellant and his witness, however (each "maintained that he had personally performed the final act of "coupling), viewed in the light of the evidence that the tow bar "was of common and obviously efficient design, of a type in daily "use throughout the country and apparently in excellent condi-"tion, led us to the conclusion that its dangerous condition arose "from the failure of the person who manipulated the parts to "ensure that they were properly engaged and locked."

The first point taken in this appeal is that that was not a finding which justices properly directing themselves could on the evidence have arrived at. I find it unnecessary to go through that evidence. It is enough to say that in my judgment there was evidence upon which they could properly come to that conclusion of fact, and I see no ground on which the court could possibly interfere with that finding.

The next question is whether in those circumstances there has been a breach of regulation 73 of the Motor-Vehicles (Construction and Use) Regulations, 1955. Part II of those regulations,

[2] [1938] 4 All E.R. 39, D.C.
[3] [1952] 2 Q.B. 701; [1952] 1 T.L.R. 1349; [1952] 1 All E.R. 1302, C.A.
[4] [1952] 1 K.B. 70; [1951] 2 T.L.R. 867; [1951] 2 All E.R. 764, D.C.

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which covers regulations up to and including regulation 58, is headed: "Regulations governing the construction, weight, and "equipment of motor-vehicles and trailers," and I think it is clear that those are regulations which apply, at any rate primarily, to the manufacturer or, if the vehicle is altered or reconstructed, the adapter. But beginning with regulation 59, up to and including regulation 106, there comes Part III, which is headed: "Regulations governing the use on roads of motor-vehicles and "trailers," and regulation 73 up to and including regulation 79, being part of the regulations in that Part III, is dealing with what is called maintenance. [His Lordship read regulation 73 (1) and continued.] Pausing there, I think it is clear in this case and, indeed is so found, that if the condition of the motor-vehicle or the trailer or the parts or accessories thereof were at fault, there clearly was a condition of affairs where danger was likely to be caused to a person on the road. The sole question, therefore, is what is meant by saying: "Every motor-vehicle, every "trailer drawn thereby and all parts and accessories of such "vehicle and trailer shall at all times be in such condition . . . "that no danger is caused or is likely to be caused to any person. . . ."

Mr. Rougier, on behalf of the appellant, has submitted in this connection that the word "maintenance" there, and as used in this group of sections, is really dealing with repair, that it is merely providing that vehicles and their parts should be kept in good repair. On that basis, it is undoubtedly true that both the trailer and its parts and the motor-vehicle and its parts were at all times in good repair. On the other hand, the respondent's contention is that there is no reason in this connection to give "maintenance" that narrow meaning, and that it should be given a meaning, which is certainly not inapt in many connections, of providing that the vehicle should not merely be in good repair but in efficient working order or in an efficient state. That is the meaning given to "maintenance," albeit by definition, in the Factories Acts, and when one is considering the mischief aimed at by this regulation it is proper, so runs the argument, that it should be given this wide meaning. I see no reason why "maintenance" should be confined to keeping in good repair, and I would give it the wide meaning contended for.

Next, it is said that once one finds these two vehicles being used on the road, the motor-lorry pulling the trailer, there were parts of each forming the coupling which were not in an efficient state, as the result, as the justices find, of the person who coupled them not making a secure coupling. It seems to me that that is something which comes within this regulation. If I may read the opening words once again and somewhat elaborate them, they read: "Every motor-vehicle and every trailer drawn thereby and "all parts and accessories of such vehicle"—and I will interpose—"and trailer drawn thereby shall at all times be in such "condition." It seems to me that once this motor-lorry was

drawing this trailer a state of affairs arose when under this regulation both the tow bar of the trailer and the ball-unit on the motor-lorry should have been in an efficient state or working order. Quite clearly, if they were improperly joined together each part was not in efficient working order. Accordingly, I think on that ground and that ground alone the justices were right in their determination. They in fact decided this case on the basis that it did not in their view matter whether the dangers that then arose were the result of construction or undue force being exercised through the state of the road, or failure to make a secure coupling. For my part I think their decision was justified on the ground that their finding of carelessness or failure to make a secure coupling is within the regulation, and it is unnecessary to deal with the other grounds on which they sought to justify the conviction.

SALMON J. I agree. I have come to the clear conclusion, as expressed by my Lord, that the appeal should be dismissed.

WINN J. I also agree. In my view regulation 73 relates to the condition of the various articles referred to in it and has no relevance when considering whether or not injury has arisen by lack of proper maintenance. I am fortified in that view by the terms of subsection (3) because it is quite impossible to refer those terms to any system of maintenance. One would have to read the subsection as though there could be inserted such words as "through lack of proper maintenance."

I agree with both the judgments which have been delivered and would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *R. I. Lewis & Co.; J. R. Haslegrave, Town Clerk, Portsmouth.*

E. M. W.

[COURT OF CRIMINAL APPEAL.]

REGINA *v.* MADAN.

C. C. A.
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Jan. 30.
Lord Parker C.J., Winn and Nield JJ.

Conflict of Laws—Sovereign immunity—Diplomatic immunity—Waiver—Crime—Clerk employed by Indian High Commissioner—Purported waiver by defendant at committal proceedings—Fact of immunity not known to court of trial until after conviction—Waiver by High Commissioner three months after trial—Whether conviction valid—Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 18), s. 1 (5).

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Criminal proceedings brought against a person entitled to diplomatic immunity under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952,[1] whether the chief representative of a State or a member of his staff, in a case of mala prohibita, are proceedings without jurisdiction and null and void unless and until there is a valid waiver which must, under section 1 (5) of the Act, be made by the chief representative of the State in question or by his agent acting on his behalf.

Rex v. *A.B.* [1941] 1 K.B. 454; sub nom. *Rex* v. *Kent*, 57 T.L.R. 307, C.C.A. applied.

A clerk on the staff of the High Commissioner for India, who was entitled to diplomatic immunity under section 1 of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, was charged with obtaining a railway season ticket and attempting to obtain a sum of money by false pretences. He purported to waive his immunity at the committal proceedings and his position under the Act was not known to the court of trial until after the jury had convicted him, when it was said that he must have waived the immunity, and that it was too late to raise it then. Three months later the High Commissioner waived the immunity. On appeal against conviction:—

Held, that the appellant's purported waiver was ineffective, and that, as the waiver made by the High Commissioner did not purport to be retrospective, the appellant had been subjected to proceedings without jurisdiction and the convictions must be quashed.

APPEAL AGAINST CONVICTION.

The appellant, Kanya Lal Madan, aged 34, a native of India employed as a clerk in the Passport Division of the office of the High Commissioner for India, was convicted at County of London Sessions on August 9, 1960, of (1) obtaining from the London Transport Executive on March 3, 1960, with intent to defraud a duplicate three-monthly railway season ticket, falsely pretending that a ticket issued to him a few days previously was lost, and

[1] Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, s. 1: "(1) Subject to the provisions of this section— "(*a*) a person for the time being recognised by Her Majesty's Government in the United Kingdom as "the chief representative in the "United Kingdom of any country to "which this section applies, whether "he is known by the title of High "Commissioner for that country or "by any other title, (in this section "referred to as 'a chief representa- "'tive'), shall be entitled to the like "immunity from suit and legal pro- "cess, and the like inviolability of "residence, . . . as are accorded to "the envoy of a foreign sovereign "Power accredited to Her Majesty; "(*b*) such members of the official "staff of a chief representative as are "performing duties substantially "corresponding to those performed "by members of the official staff of "an envoy of a foreign sovereign "Power shall be entitled to the like "immunity from suit and legal pro- "cess as is accorded to members of "the official staff of such an envoy; ". . . (4) The Secretary of State "shall compile a list of the persons "appearing to him to be entitled to "immunity from suit and legal "process under subsection (1) of this "section, . . . (5) Notwithstanding "anything in the preceding provi- "sions of this section—(*a*) a chief "representative may waive any im- "munity conferred by or under this "section on himself or on a member "of his staff, . . . or on a person in "the service of the Government of "the country which he represents; "(*b*) a state representative may "waive any immunity conferred "under this section on himself or on "a member of his staff. (6) The "countries to which this section "applies are . . . India. . . ."

(2) with intent to defraud, attempting to obtain from the London Transport Executive the sum of 8s. 9d. He was sentenced by the deputy-chairman (F. H. Cassels, Esq.) to four months' imprisonment on each count, to run concurrently.

The case for the prosecution was that on March 3, 1960, the appellant, having purchased a three-monthly railway season ticket for a journey between Baker Street and Clapham South on February 28, 1960, applied for and later obtained a duplicate from the London Transport Executive on the ground that he had lost the previous one on February 29, when he had in fact given the original ticket to a friend who had been living in the same house as he was. The appellant continued to use the duplicate ticket himself. The 8s. 9d. he was alleged to have obtained by false pretences represented reimbursement of fares he had paid until the duplicate ticket was issued. Although unknown to the court which tried him, the appellant was at all times entitled to diplomatic immunity as a member of the staff of the High Commissioner for India, his name being on the list kept by the Secretary of State under section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. That matter came to light in the following circumstances: It appeared for the first time in the committal proceedings when one of the police witnesses in cross-examination stated that he had ascertained that the appellant was on the High Commissioner for India's staff. A solicitor then appearing for the appellant purported to waive the immunity. The appellant's position on the High Commissioner's staff again emerged when he gave evidence at the trial but nothing more was thought of the matter until after he had been convicted of the two offences with which he was charged, when the probation officer was called and questioned as to what steps the High Commissioner's Office was likely to take. After an adjournment, during which the probation officer got in touch with the High Commissioner's Office, the probation officer informed the deputy-chairman that a representative of the High Commissioner's Office was under the impression that the appellant was entitled to diplomatic immunity. The deputy-chairman then said that as far as that was concerned the defendant must at some time, if he ever thought of it, have waived it. He added: "It is a bit late to claim it now." Counsel for the prosecution told the deputy-chairman that he thought the appellant was entitled to diplomatic immunity but had expressly waived it before the magistrate either by himself or by his solicitor. On November 21, 1960, the Deputy High Commissioner for India wrote to the Commonwealth Relations Office in the following terms: "The High Commissioner desires me to say that Mr. "Madan is and was entitled to diplomatic immunity in accord-"ance with the Diplomatic Immunities (Commonwealth Coun-"tries and Republic of Ireland) Act, 1952. I am further directed "to say that in order not to impede the course of justice and as a "very special case, the High Commissioner is prepared to waive

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"the immunity in the present instance without any prejudice to "the interests of this High Commission and on the clear under-"standing that it will not be treated as a precedent in the "future."

The appellant appealed against his conviction by leave of the single judge, on the ground, inter alia, that the deputy-chairman was wrong in law in holding that he, by appearing before the court, had waived the diplomatic immunity to which he was entitled.

Christmas Humphreys Q.C. and *J. A. Kirpal* for the appellant.

Ian Kennedy for the Crown.

Sir Reginald Manningham-Buller Q.C., *A.-G.* and *J. R. Cumming-Bruce* as amici curiae.

The following cases (other than those referred to in the judgment) were cited in argument: *In re Republic of Bolivia Exploration Syndicate Ltd.*[2]; *Taylor* v. *Best*[3]; *Mighell* v. *Johore (Sultan of)*[4]; *Rex* v. *Gee*[5]; *In re Suarez*[6]; *Bacchus S.R.L.* v. *Servicio Nacional del Trigo*[7]; *High Commissioner for India* v. *Ghosh.*[8]

LORD PARKER C.J. stated the facts and continued: The appellant asserts that the waiver could only operate from November 21, 1960, in that it must be a waiver by the High Commissioner and not by himself or by his solicitor, and that, in those circumstances, both the committing magistrate and the court of trial had no jurisdiction to deal with him at all; in other words, that all the proceedings prior to November 21 last were a complete nullity, and it would follow that he has not been properly convicted.

Certain things are, we think, clear. In the first place, it is not for someone who is entitled to diplomatic immunity to claim it in the courts. It is unnecessary to refer to the authorities, but we think it is clear that proceedings brought against somebody, certainly civil proceedings brought against somebody entitled to diplomatic immunity, are, in fact, proceedings without jurisdiction and null and void, unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court. Moreover, it is clear that that waiver must be a waiver by a person with full knowledge of his rights, and a waiver by or on behalf of the chief representative of the

[2] [1914] 1 Ch. 139; 30 T.L.R. 78.
[3] (1854) 14 C.B. 487; 139 E.R. 201.
[4] [1894] 1 Q.B. 149; 10 T.L.R. 115, C.A.
[5] [1936] 2 K.B. 442; 52 T.L.R. 473; [1936] 2 All E.R. 89, C.C.A.
[6] [1918] 1 Ch. 176; 34 T.L.R. 127, C.A.
[7] [1957] 1 Q.B. 438; [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715, C.A.
[8] [1960] 1 Q.B. 134; [1959] 3 W.L.R. 811; [1959] 3 All E.R. 659, C.A.

State in question. In other words, it is not the person entitled to a privilege who may waive it, unless, of course, he does so as agent for or on behalf of the representative of the country concerned; it must be the waiver of the representative of the State. That that is clear can, we think, be seen from the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, itself. [His Lordship read section 1 (5) and continued:]

Quite apart from section 1 (5), the law, as we understand it, has always been that the privilege can only be waived by the accredited diplomatic agent. It is sufficient, perhaps, in this connection to refer to *Rex* v. *A.B.*,[1] where Lord Caldecote C.J. said[2]: "The first thing to be said is that the privilege claimed "by the appellant is a privilege which is derived from, and in "law is the privilege of, the ambassador and ultimately of the "State which sends the ambassador. It was a privilege which "was originally based on the comity of nations, before it was "declared by 7 Anne, c. 12, in 1708. Lord Buckmaster, in the "case of *Engelke* v. *Musmann*,[3] said: 'My Lords, the privilege "'affording ambassadors and other accredited representatives of "'foreign countries immunity from all writs and processes is an "'ancient doctrine of the common law declared in terms by the "'Statute 7 Anne, c. 12'; and the statement that I have made "that the privilege is the privilege of the ambassador was stated "by Lord Hewart C.J. in his judgment in *Dickinson* v. *Del "Solar*[4]: 'The privilege is the privilege of the Sovereign by "'whom the diplomatic agent is accredited, and it may be "'waived with the sanction of the Sovereign or of the official "'superior of the agent.'"

Lord Caldecote C.J. in his judgment in *Rex* v. *A.B.*[5] further referred to *Marshall* v. *Critico*,[6] where Lord Ellenborough said: "This is not a privilege of the person, but of the State which he "represents." Accordingly, in the judgment of this court, it matters not that the appellant may have expressly through his solicitor waived his diplomatic immunity. That is the general position as the court understands it in regard to civil proceedings.

So far as criminal proceedings are concerned, there is no express authority on the matter. Indeed, in *Rex* v. *A.B.*[7] Lord Caldecote C.J. expressly kept the question open in these terms: "I find it unnecessary to decide whether or not the "diplomatic privilege of the character discussed before us can "be claimed by a member of a diplomatic staff in connection with "a criminal charge."

[1] [1941] 1 K.B. 454; sub nom. *Rex* v. *Kent*, 57 T.L.R. 307, C.C.A.
[2] [1941] 1 K.B. 454, 457.
[3] [1928] A.C. 433, 440; 44 T.L.R. 731, H.L.
[4] [1930] 1 K.B. 376, 380; 45 T.L.R. 637.
[5] [1941] 1 K.B. 454, 458.
[6] (1808) 9 East 447.
[7] [1941] 1 K.B. 454, 457.

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The matter is dealt with in Halsbury's Laws of England, vol. 7, p. 269, where it is stated in these terms: "He [the representative of the State concerned] is exempt from the criminal jurisdiction of the State in which he resides, and is not subject to interference or arrest except, possibly, in the one instance of his engaging in acts contrary to its safety and welfare." In a long note (*q*) dealing with that passage the rival theories on the matter are set out, and the note ends in these terms: "There is no modern English authority on the subject, but judicial statements suggest that the courts do not regard the immunity to be complete in point of law, at any rate as regards persons other than the public minister himself, whatever may be the position in practice having regard to amity in foreign relations."

The Attorney-General, to whom the court is indebted for his argument in this case, informs the court that he has been through the various cases and passages dealt with in that note, and that he can find no passage whatsoever which supports the proposition that any distinction is to be drawn between the privilege of the representative of the State himself and the privilege of those on his staff. When one is dealing with something, as in this case, which is mala prohibita, this court takes the view that there is no distinction to be drawn between the principles of law applicable in the case of civil proceedings and criminal charges. It would follow, therefore, that in the present case the appellant was subject to proceedings carried on without jurisdiction in that all the time he was entitled to diplomatic immunity. The sole question is whether the effect of the letter of the Deputy High Commissioner of November 21 last waiving the immunity can be said to operate in any way retrospectively. It is enough for our decision in the present case to say that on its face it does not purport to do so. What the true position would be if it had purported to be retrospective it is unnecessary for us to say. It is sufficient that in the present case it does not on any view purport to be retrospective.

In these circumstances, this court has no option but to quash both convictions. It makes no further order.

Appeal allowed.

Solicitors: *Percy Short & Cuthbert; M. H. B. Gilmour, Solicitor, British Transport Commission; Treasury Solicitor.*

E. M. W.

[COURT OF APPEAL.]

In re COHEN, A BANKRUPT.

Ex parte THE BANKRUPT *v.* TRUSTEE OF THE PROPERTY OF THE BANKRUPT.

Ex parte TRUSTEE OF THE PROPERTY OF THE BANKRUPT *v.* THE BANKRUPT AND OTHERS.

C. A.

1961
Jan. 11, 12, 13.

Lord Evershed M.R., Upjohn and Pearson L.JJ.

[Leeds No. 22 of 1954.]

Bankruptcy — Salary or income — Life interest under settlement — Whether "income" of bankrupt—Vesting in trustee—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 51 (2).

Legal Aid—Costs—Security for costs—Appeal—Sum paid into court by solicitor of legally aided appellant—Appeal dismissed—Payment out to successful respondent—Principle applicable.

The bankrupt had been adjudicated bankrupt on November 4, 1954. At the date of his adjudication he was entitled under his father's will to a life interest in his father's residuary estate. Since the adjudication the whole of the income arising in respect of that life interest had been paid to his trustee in bankruptcy. The bankrupt applied by motion in the Leeds County Court for a declaration that his trustee was not entitled to receive the income from his father's residuary estate unless the trustee had obtained an order under section 51 of the Bankruptcy Act, 1914,[1] entitling him to receive it. The trustee by cross-motion sought a declaration that the income from such life interest was payable to the trustee and divisable amongst the creditors. The Divisional Court affirmed the order of the county court judge declaring that such life interest was vested in the trustee in bankruptcy and divisible among the creditors.

The bankrupt was a legally aided person. The Court of Appeal having made an order that the bankrupt should pay into court the sum of £20 as security, that sum was paid into court by the bankrupt's solicitor out of his own moneys to enable the appeal to proceed. The Legal Aid and Advice Act, 1949, makes no provision for the payment of security for costs:—

Held, (1) that in subsection (2) of section 51 of the Bankruptcy

[1] Bankruptcy Act, 1914, s. 51: "(1) Where a bankrupt is an officer "of the army or navy, or an officer "or clerk or otherwise employed or "engaged in the civil service of the "Crown, the trustee shall receive for "distribution amongst the creditors "so much of the bankrupt's pay or "salary as the court, on the applica-"tion of the trustee, with the con-"sent of the chief officer of the "department under which the pay or "salary is enjoyed, may direct. "Before making any order under this "subsection, the court shall communi-"cate with the chief officer of the "department as to the amount, time, "and manner of the payment to the "trustee, and shall obtain the written "consent of the chief officer to the "terms of such payment. (2) Where "a bankrupt is in receipt of a salary "or income other than as aforesaid, "or is entitled to any half-pay, or "pension, or to any compensation "granted by the Treasury, the court, "on the application of the trustee, "shall from time to time make such "order as it thinks just for the pay-"ment of the salary, income, half-"pay, pension, or compensation, or of "any part thereof, to the trustee, to "be applied by him in such manner "as the court may direct."

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Act, 1914, the word "income" in the phrase "salary or income" has a limited meaning, and that income from the life interest of the bankrupt under his father's will was not comprised in the term "income" in that subsection, and that the bankrupt's appeal from the declaration that the life interest had vested in his trustee in bankruptcy and divisible among his creditors should be dismissed.

Ex parte Huggins (1882) 21 Ch.D. 85, C.A. and *Ex parte Benwell* (1884) 14 Q.B.D. 301, C.A. considered.

In re Landau [1934] Ch. 549; 50 T.L.R. 403, C.A. and *In re Tennant's Application* [1956] 1 W.L.R. 128, 874, C.A.; [1956] 1 All E.R. 425; [1956] 2 All E.R. 753, C.A. distinguished.

(2) That as a matter of principle, where a solicitor has paid into court a sum as security for the costs of the appeal of his client, a legally aided appellant, and the appeal is dismissed, the sum should not be paid out to the solicitor but, having regard to the exceptional nature of the case and the state of the authorities, half of the sum paid in should be repaid to the bankrupt's solicitor.

Decision of the Divisional Court (Danckwerts and Russell JJ.) affirmed.

Appeal from the Divisional Court (Danckwerts and Russell JJ.).

The appellant, Louis Cohen, had been adjudicated bankrupt on November 4, 1954. At that date he was entitled under the will of his father, Barnet Cohen, who had died in 1935, to a life interest in his father's residuary estate. Ernest Freeman was appointed his trustee in bankruptcy. At the time of the adjudication the bankrupt's life interest was subject to a mortgage. On June 22, 1956, on the application of the trustee, the mortgage was set aside as a fraudulent preference and the income of the life interest, which had been accumulated after the adjudication, was paid to the trustee, and all the subsequent income had been paid to him.

The bankrupt applied in the Leeds County Court by motion for a declaration that his trustee had not any title to or right to receive the income of the residuary estate of the bankrupt's father, and that the bankrupt at all material times had been solely entitled to such income, an account of all moneys received by the trustee and an order that the trustee should repay all such moneys received by him to the bankrupt.

The trustee in bankruptcy by cross-motion applied for a declaration that the life interest of the bankrupt in the residuary estate of his father had vested in the trustee, and that all income which had accrued since June 22, 1956, or should arise during the life of the bankrupt or until sale of the life interest was payable to the trustee and divisible amongst the creditors of the bankrupt, alternatively, an order under section 51 (2) of the Bankruptcy Act, 1914, for the payment of the whole or such part as might be just of such income for the benefit of the bankrupt's creditors. The trustees of the father's will were respondents to the trustee's motion. They took no part in the proceedings and submitted to whatsoever order the court might make.

The two motions were heard together. The county court judge

dismissed the bankrupt's motion. He allowed the cross-motion of the trustee in bankruptcy and declared that the life interest of the bankrupt had vested in his trustee, and that all the income which had arisen since the adjudication and the order of June 22, 1956, or which should arise during the life of the bankrupt or until sale of his life interest was payable to his trustee and divisible amongst the bankrupt's creditors.

The bankrupt appealed. His appeal was dismissed by the Divisional Court.

From that decision he appealed to the Court of Appeal. He was a legally aided litigant and he applied to the Court of Appeal to dispense with security. The Court of Appeal ordered security in the sum of £20. That sum was paid into court by the bankrupt's solicitor out of his own moneys.

Muir Hunter for the bankrupt, the appellant.

Douglas S. Forrester-Paton for the trustee in bankruptcy, the respondent.

The following cases were referred to in argument which are not mentioned in the judgments: *In re Rogers* [2]; *In re Graydon* [3]; *In re Ward* [4]; *In re Garrett.* [5]

LORD EVERSHED M.R. Like the judges in the court below we feel that we should not render any assistance in this case, or in other cases, by reserving judgment. As Danckwerts J. observed, he thought that the route through the jungle would not be further illuminated by consideration, and I venture to share that view, though I would say at once that the case is a difficult one, and rendered more difficult by decisions extending over nearly a century; and we have been much indebted to Mr. Muir Hunter for putting the point before us clearly, and referring us to many of these decisions on a point which has never in fact come in this form for decision before the court before.

The appellant, the bankrupt, for whom Mr. Muir Hunter appears, enjoys under his father's will a life interest in his father's residuary estate. The estate is at the moment invested partly in real property, which has been let, and partly in shares in a building society, so that the income to which the bankrupt was entitled (subject to the bankruptcy) consists in part of the rent, less proper deductions, including presumably Schedule A tax, and in part of dividends on the shares.

It has been the contention of the bankrupt that that income is income vested, it may be, in the trustee, but which nonetheless the trustee cannot deal with in any way save by application

[2] [1894] 1 Q.B. 425; 10 T.L.R. 24.

[3] [1896] 1 Q.B. 417; 12 T.L.R. 208.

[4] [1897] 1 Q.B. 266; 13 T.L.R. 166, C.A.

[5] [1930] 2 Ch. 137.

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under the terms of what is now section 51 (2) of the Bankruptcy Act, 1914.

It will be desirable that I should read the substance of both that subsection and its predecessor. [His Lordship read section 51 (1) and (2) and continued:] It may be taken (and it has certainly been conceded in argument before us) that if a subject-matter is within the scope of subsection (2)—that is to say, if it is a salary or pension, by way of example—then albeit that the subject-matter vests in the trustee, the trustee's right or power to deal with the subject-matter is qualified or limited by the terms of subsection (2). It follows in the present case, if Mr. Muir Hunter is right, that the trustee in bankruptcy could not dispose of the life interest of the bankrupt; his only right and only power would be to make application to the court that the whole, or such part as the court might think fit, of this revenue or source of income should be applied by the trustee towards meeting the bankrupt's debts.

The problem resolves itself, for a reason which I hope to justify, to this short point: is this income, are these dividends and rents, income in the nature of salary—that is, income possessing the same or similar characteristics as salary? I fully accept, of course, that in posing the question thus I am assuming a premise, namely, that the word income has a limited significance in this subsection. That premise I hope to justify; but assuming it for the moment, then for my part I answer the question (and I answer it without hesitation, as did the judges in the court below) negatively: that is to say, in my view, the income here the subject of debate is not income of the kind I have mentioned, and therefore is not within the scope of section 51 (2).

I arrive at that conclusion as a matter of common sense and common use of language. Mr. Muir Hunter in his reply suggested that this income, these dividends and rents, could be regarded as truly analogous to a pension. I cannot accept that argument. As a matter of sense and of language, I do not think the income is so analogous. If that view is right, it is, of course, the conclusion of the case, and for my part I attempt no further definition of this phrase "income other than as aforesaid." I rest my conclusion on the significance of the word "income" which I derive from the cases.

The result (and particularly my unwillingness further to expand the meaning of this subsection) may perhaps be unfortunate; but I think it is, as the law has developed over the past century, inevitable. Certainly so far as this case is concerned I am, I confess, satisfied in my own mind that the answer which I have given is in accordance with the intention of Parliament in the legislation now before us.

There has been some discussion of the matter of public policy, the unruly horse referred to in Lord Parker's speech in one of the

cases to which I shall later allude. I certainly prefer not to attempt any riding of that horse in this case; but if I look back over the history of this legislation, as we were invited and assisted to do by Mr. Forrester-Paton, I am much confirmed in the view I have formed that to hold otherwise than I do in this case would be to defeat the intention of Parliament; and, as I have mentioned public policy, to defeat also that element of public policy referred to by Lord Atkinson in the same House of Lords case, namely, that prima facie, if a man become bankrupt, his assets should be available for the discharge of his debts.

If you go back to the Bankruptcy and Insolvency Act of 1861 (the first Bankruptcy Act, we were told, to affect non-traders), you find there, as the clearest possible and inevitable conclusion, that a life interest actually enjoyed by a bankrupt is something which it would be the duty of the trustee in bankruptcy to realise for the benefit of the creditors. I need not take time in lengthy citation, but that view seems to me to flow beyond a peradventure from the terms of sections 115 and 127 of that Act. To illuminate it a little further, it was by section 115 that provision was made preventing a trustee from disposing of a life interest until it had fallen into possession. Section 127 laid down the duty of the trustee to realise the assets for the benefit of the creditors, and the Act itself makes it quite clear that the property of the debtor included property of every nature and kind. That Act contained in section 134 the ancestor of what is now section 51 (1). Though the language was not the same, it was directed to deal with the pay, half-pay, salary, etc., of persons in the service of the State; and it may well be that the subject-matters that section 134 dealt with were subject-matters which by common law were not assignable.

In 1869 the bankruptcy legislation was further amended and consolidated by the Bankruptcy Act, 1869, and there was then added to the successor of section 134, namely, section 89, what is the ancestor of section 51 (2), namely, section 90 providing for the case where the bankrupt is in receipt of a salary or income "other than as aforesaid," the language corresponding in other respects with what is now section 51 (2). But I note that in section 90 there is no such catalogue as is now in section 51 (2), that is to say, no reference to items such as half-pay, pension or compensation. The matter stood with the more general language, "salary or income other than as aforesaid." In the Bankruptcy Act, 1883, there is in section 53 language substantially corresponding to the present two subsections of section 51.

That is a brief sketch of the legislation, and I only add this, that the present sections of the Bankruptcy Act, 1914, relative to property vesting in the trustee, and so on, are in the widest possible terms, as were the corresponding terms in the earlier legislation; and it has been inherent in Mr. Muir Hunter's argument (and accepted, of course, by Mr. Forrester-Paton) that section 51

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is not to be limited to cases in which the subject-matter—the salary or income—is a subject-matter not so vesting in the trustee.

Looking back over the history of the decided cases, it seems to me, if I may say so, that there has been some confusion on this head. When I come to the case of *In re Landau*,[1] which is of some importance, this court appears to have assumed that the subject-matter there before the court, namely, a maintenance award under an order of the Divorce Court, was not a subject-matter vesting in the trustee. It may be that (as a matter of historical interest) the special provision in section 134 of the Act of 1861 was intended to be and was effectively limited to the sort of subject-matter which, by common law, is inalienable. The addition in section 90 of the Bankruptcy Act, 1869, of the words "salary or income other than as aforesaid" clearly, I think, introduced by way of complement to what had gone before a subject-matter which was unlike the preceding subject-matter, in the sense that it covered subject-matter which would be alienable, and therefore prima facie would vest in the trustee.

I do not pursue that aspect of it, but I mention it because it may well be that the confusion, if such it be, which has arisen in this matter may in part arise from the consideration whether section 51 (2) and its predecessors was or was not originally intended to deal with something which, apart from the impact of that section, would not have vested in the trustee at all. I say, however, no more about the legislation. My reference to it, I hope, justifies what I have said, namely, that the conclusion I reach in this case appears to me plainly in accord with the intention of Parliament, so far as you can derive it from a consideration of the legislation during the past century.

I must, however, now come to justify that which I have described as the premise of my conclusion, namely, the view which I have taken of the meaning of the word "income" as we find it now in section 51 (2). I would add this in further support of my general view of the case—that I think a conclusion different from that which I reach would produce anomalies which might fairly be described as extravagant. There can be no doubt that if one, who owns income-producing property in the form of shares, real property, etc., went bankrupt, the trustee would be entitled and bound to realise the asset for the benefit of the creditors, and thereby, of course, to take from the bankrupt not only his right to the corpus, but his enjoyment of the income. It would seem strange that there should be so marked a distinction, from the point of view of the interest of creditors, between the case where a man owns the income-producing asset, and the case where, though he does not own that asset, he is entitled to a life interest therein. What on this view would be the situation if a man owned the asset subject to the possibility of it being divested, I know not.

[1] [1934] Ch. 549; 50 T.L.R. 403, C.A.

Mr. Forrester-Paton referred in the course of his argument to *In re Forder*[2] mentioned in the judgment of Russell J. I do not derive great assistance from consideration of that case; but this can, I think, be asserted: if the argument for the bankrupt is correct, then it would appear inevitably to follow that upon the bankruptcy of one who had an interest in property liable to forfeiture, the result would be likely to be quite different if the trusts on the one hand were expressed by reference to section 33 of the Trustee Act, 1925,—that is to say, if the will or settlement provided that the beneficiary should enjoy the income upon "protective trusts"—and on the other where the beneficiary took under a will or settlement, which set out at length the conditions upon which a forfeiture should arise, in language such as was in fact employed in the case of *Forder*.[2] Again I need not pursue it, but it would seem a strange result that there would be liable to be such fine distinctions producing such great differences.

But I must now turn to the cases. Very properly, Mr. Muir Hunter, in opening, referred to the considerable line of authorities which touches upon this matter, and I shall refer not to all, but to some of them. The proper starting-point inevitably is the case of *Ex parte Huggins*.[3] That was decided by this court in the year 1882, the relevant Bankruptcy Act, therefore, being that of 1869. It will be recalled from my earlier references, that section 90 of that Act was the counterpart of section 51 (2), but it did not contain the references to pension and the like now found in the present subsection. Mr. Huggins was a man who had been Chief Justice of the colony of Sierra Leone, from which office he had retired on receiving a pension from or through the Colonial Office. He had then proceeded to engage in a bottle-washing business which, as a commercial venture, was disastrous; and the question was whether the pension which he was receiving (and I emphasise that the word "pension" did not then appear in section 90 of the Act of 1869) was one to which the trustee in bankruptcy could resort to any extent for the purpose of payment of creditors. The argument on the bankrupt's behalf was that the pension was not assignable, and therefore was outside the scope of bankruptcy altogether. Sir George Jessel M.R. expressed some sympathy with the unfortunate ex-Chief Justice, who had not chosen, like the cobbler, to stick to his last. But he arrived at the conclusion that the pension did vest in the trustee, but that none the less it was within the ordinary sense of the formula "salary or income" in section 90. He used this language[4]: "The present appellant's income is not a 'salary,' "but it is 'income.' The word 'income' is as large a word as "can be used. It is not the less 'income,' because it has to be "voted every year by the Colonial Legislature."

[2] [1927] 2 Ch. 291, C.A.
[3] (1882) 21 Ch.D. 85, C.A.
[4] Ibid. 92.

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The second member of the court was Lindley L.J. and he said this[5]: "Is this bankrupt 'in receipt of a salary or income other "'than as aforesaid?'"—quoting the language of section 90. "His pension is not a 'salary,' inasmuch as he is not bound to "render any services in respect of it. But why is it not "'income'? Surely it is income in every sense of the word," and the Lord Justice proceeded to point out that it was not a mere voluntary allowance. That decision in 1882 upon its face, and in the light of the short citations I have made from the judgments, might quite fairly lead to the view that "income" meant income; that it was, as Sir George Jessel M.R. said, as large a word as could be used, with the result that "income" would include income of every kind, and so, inter alia, would cover the income with which the court is concerned in this case.

That it does not have so wide an effect became apparent two years later in 1884; but before I refer to the case of 1884 I shall go straight to another decision of this court rather more than 50 years later, the case of *In re Landau.*[6] It will have to be borne in mind that for the moment I have passed over the intervening cases which followed *Ex parte Huggins*[7] very closely, but the full significance which the passages I have read from *Ex parte Huggins*[7] might have was, I think, first brought into play in this case of *Landau.*[8]

Landau[8] was a case in which a lady had divorced her husband, and had obtained from the Divorce Court an order (albeit by consent) for the payment of £1,800 tax free per annum by way of maintenance. She had then gone bankrupt. It was her contention—which had succeeded before the Registrar in Bankruptcy—that this maintenance was not available at all to the trustee in bankruptcy of the lady's creditors. Against that ruling the trustee in bankruptcy appealed. There is no note in the report of the arguments of counsel, but it seems to me quite plain from the judgments (and I hope I have not misapprehended them) that the court reached its conclusion upon the assumed basis that the subject-matter of this Divorce Court order was unassignable, and did not therefore vest in the trustee in bankruptcy.

Lord Hanworth M.R. referred to *Ex parte Huggins,*[9] and he referred particularly to the observations of Sir George Jessel M.R. All the members of the court came to the conclusion that although the maintenance income was not vested in the trustee, nevertheless the trustee was entitled under section 51 to apply for an order that part of it should be available to the trustee for the discharge of the lady's debts. Slesser L.J. referred also to *Ex parte Huggins,*[9] and in particular to what Lindley L.J. had said.

Romer L.J.—having affirmed the view, previously taken by Farwell J., that section 51 applied whether the property was or was not vested in the trustee—then proceeded to consider the

[5] 21 Ch.D. 85, 93, 94.
[6] [1934] Ch. 549, C.A.
[7] 21 Ch.D. 85, C.A.
[8] [1934] Ch. 549, C.A.
[9] 21 Ch.D. 85.

argument, which had been put forward on the bankrupt's behalf by Mr. Tindale-Davis, that this payment was not income. After referring to what Lord Esher M.R. had said in *Ex parte Benwell* [10]—a case to which I have obliquely alluded, having followed *Ex parte Huggins* [11] by two years—Romer L.J. said [12]: "It "is true that Lord Esher in *Ex parte Benwell* [13] said that income "in the old section corresponding to section 51 (2), was income "ejusdem generis with salary; but, with all respect to that "learned judge, I do not think such a statement assists us very "much unless the statement goes on to tell us to what genus "the salary payment belongs. He did not do so, but in the same "case Cotton L.J. did, and in the passage read by the Master of "the Rolls the learned Lord Justice said: 'In my opinion section "'90 points to some definite annual amount which is coming to "'the bankrupt.'" The Lord Justice then said: "This £1,800 "a year, free of tax, without any question whatsoever is a definite "annual amount coming to the bankrupt." Adverting to what he had said a little earlier, Romer L.J. further said that he had not the least idea why this annual payment was not income within the meaning of the section.

The decision in that case has stood now for a quarter of a century. I am fully alive to the fact that it must bind this court, and indeed in the latest of the cases to which I desire to refer, *Tennant's Application*,[14] this court held itself so bound. Both my brother Upjohn at first instance and this court shared the view that if the matter were res integra, the case of *Tennant* [14] might well have been properly decided in the opposite way from the way in which it was in fact decided. But Upjohn J. and this court felt themselves bound by the decision in *Landau*,[15] and found it impossible to draw any sensible distinction between *Tennant's* case [16] and *Landau's* case.[17]

In *Tennant's* case [18] the bankrupt was again a lady who had divorced her husband, the only difference between that case and *Landau* [19] being that there had not been an order of the Divorce Court, the husband having by covenant agreed to pay an appropriate sum for maintenance. To have distinguished the two cases would have involved saying that there was some distinction between the income derived by an ex-wife under a deed of covenant and the income derived under a Divorce Court order made by consent. But I observe that, in delivering the leading judgment in that case, I did say this [20]: "I desire to emphasise that "I am confining my decision in this appeal to the facts of this "case and the questions raised in it. It was said by Mr. Jennings

[10] (1884) 14 Q.B.D. 301.
[11] 21 Ch.D. 85.
[12] [1934] Ch. 549, 560, C.A.
[13] 14 Q.B.D. 301.
[14] [1956] 1 W.L.R. 128, 874, C.A.; [1956] 3 W.L.R. 874; [1956] 1 All E.R. 425; [1956] 2 All E.R. 753, C.A.
[15] [1934] Ch. 549.
[16] [1956] 1 W.L.R. 874, C.A.
[17] [1934] Ch. 549.
[18] [1956] 1 W.L.R. 874, C.A.
[19] [1934] Ch. 549.
[20] [1956] 1 W.L.R. 874, 882.

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"that, if Upjohn J. was right, then the same result would follow "in the case, for example, of a person who is absolutely entitled "to income as life tenant under a settlement of some fund or to "an annuity under a testator's will. Those cases are not before "us, and I express no view upon them. Income of those kinds "may or may not be within section 51 (2)."

That case is now before us, and as I have indicated I think that the income with which we are now concerned is in quality different from the income which the ladies in *Landau's* case [21] and *Tennant's* case [22] were receiving. The latter was income of the special kind that it was by way of maintenance following the dissolution of marriages. It follows from what I am saying that such maintenance can fairly as a matter of language be treated as having at any rate some of the essential characteristics of a salary but that the income with which we are now concerned cannot. The distinction may be thought to be fine, but it appears to me from the cases to which I am now coming that the line has to be drawn somewhere; and I prefer not to attempt any further definition, as I have already said, but to repeat that if *Tennant* [22] and *Landau* [23] are on one side of the line, then in my view without any doubt this case is on the other.

I have already said that I will avoid any attempt at equitation on the unruly horse of public policy; but there is at any rate something to be said on the line of public policy for dealing differently with a maintenance award or maintenance income of the kind involved in those two cases, and this kind of income. I make just one point here which appears from *Tennant's* case [24]: If the case of Mrs. Tennant (as she had been) was to be treated as outside section 51 (2) on the ground that the trustee could proceed to dispose of the covenanted income for the whole of her life, or whatever period may be appropriate, then, of course, there would appear to have been nothing to prevent her making an application in the Divorce Court for some further maintenance, and so the thing presumably would go on indefinitely. No considerations of that kind enter into this case.

It is now time that I retrace my steps to 1884, and refer to the case already mentioned by Romer L.J. in *Landau*,[25] namely, *Benwell*.[26] It was decided in 1884 after the passing of the Bankruptcy Act, 1883, but the Act which applied to the facts in that case was still the Act of 1869, the same Act which had been considered in *Ex parte Huggins*.[27]

Benwell [28] was a case of one whose professional life was described in the case as that of a "bone-setter," one who might today be called an osteopath, but "bone-setter" was the term used in *Benwell*.[28] On the facts his income appeared to be somewhat precarious, and its amount very much in dispute. The

[21] [1934] Ch. 549.
[22] [1956] 1 W.L.R. 874.
[23] [1934] Ch. 549, C.A.
[24] [1956] 1 W.L.R. 874, C.A.
[25] [1934] Ch. 549, 560, C.A.
[26] 14 Q.B.D. 301.
[27] 21 Ch.D. 85.
[28] 14 Q.B.D. 301.

question was whether what he earned from his professional activities was income within the meaning of section 90 of the Act of 1869. In so far as he earned it and received it, it would no doubt be income in his hands. Any professional man who earns fees pays tax upon what he earns on the footing that it is taxable income. This court, however, held that the future fees in question were not income within this broad formula by giving in its context to the words "income other than as aforesaid" the qualification I have already mentioned, that is, by limiting the word in section 90 to income in the nature of salary. That is made quite clear by Brett M.R., who had succeeded Sir George Jessel M.R. as Master of the Rolls. He said[29]: "What is the meaning of "the word 'salary' in the section? It must be a salary of the "same kind as those things which have been already mentioned" —that is, of course, a reference to section 89—"though it is not "paid in respect of similar services. Then there is the general "word 'income.' The rule is that general words added to particular words do not include everything which would come within "them according to the literal meaning of the English language, "but are to be limited to things ejusdem generis with those things "which have been previously mentioned. 'Income,' therefore, "must mean 'income' in the nature of a 'salary.'"

Cotton L.J. similarly so limits it. He says this[30]: "In the "cases provided for by section 88 the bankrupt has a right, if "things go on as they are, to receive a specific sum every year, "and then a part of that sum can be set aside and paid to the "trustee for distribution among the creditors." Section 88 was the section then relating to beneficed clergymen now replaced by section 50. "Is not section 90 intended to deal with something "of the same nature? In my opinion it is. It speaks of an order "for the payment to the trustee 'of such salary or income, or "'any part thereof.' In my opinion the court cannot under "section 90 deal with the capacity which a man has to earn "money by the exercise of his personal skill." Later the Lord Justice said[31]: "In my opinion section 90 points to some definite "annual amount which is coming to the bankrupt, and in such a "case a part of it can be set aside for the benefit of his creditors."

The third member of the court was Lindley L.J.—who it will be recalled had participated in the decision in *Ex parte Huggins*[32] and from whose judgment in that case I have already cited. It may be that his language, apparently broad in *Ex parte Huggins*,[32] was not then intended to be as wide as first reading might suggest, because in *Benwell*[33] Lindley L.J. said: "The question "is whether the professional earnings of the present bankrupt "are an 'income' of such a nature as is pointed at by section 90,

[29] 14 Q.B.D. 301, 307.
[30] Ibid. 308.
[31] Ibid. 308.
[32] 21 Ch.D. 85.
[33] 14 Q.B.D. 301, 309.

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"and, for the reasons which have been already given, I think that "they are not." That was *Ex parte Benwell*[33] in 1884.

The next case is that of *In re Shine*,[34] which came before this court in 1892. Mr. Shine was an actor, and the question arose in that case because he had a contract with a manager whereby in return for his undertaking to act at a particular theatre or theatres for a term of two years, he should receive a salary of £30 a week. His affairs having got involved, and a receiving order having been made against him, he then made an arrangement with the manager that the manager should retain £20 out of the £30, and apply that amount towards payment of his debts. Unfortunately all his creditors would not agree with this course, and so the question arose what the rights of the trustee were in relation to this £30 a week. It was held by this court that the payment was salary or income within what was then section 53 of the Act of 1883, but that nonetheless the arrangement that had been made with the manager was valid. I need not take time to deal with the second point save to point out that if the rights and powers of the trustee were limited to the powers under section 53, then the bankrupt presumably could deal with the income as he had done until the powers were exercised. But the argument also was that this weekly payment received by the actor was neither salary nor income within the meaning of section 53. I note in passing that by this time the Act of 1883 had come into effect, and that section 53 (2), like the subsection in the present Act, but unlike section 90 of the Act of 1869, referred also (and in addition to salary or income) to half-pay, pension, etc. In other words, there is now more of a catalogue in the subsection than there had been in the Act of 1869.

Lord Esher M.R. referred to this earlier case of *Benwell*.[35] He said[36]: "We have held that the word 'income,' as used in "this section, does not mean all income, or all that property "of a man which is generally called his income; for, in most "cases, income of that kind would vest in the trustee on his "bankruptcy, and thus go to the creditors. But the Act assumes "that there is some income of a bankrupt which is not part of "his property so as to vest in the trustee in his bankruptcy. It "follows, to my mind, that the income to which section 53 refers "must be income in the nature of a salary."

To the same effect was the language of Bowen L.J.[37]: "It "was said by this court in *Ex parte Benwell*,[38] that the word "'income' in section 53 (2), must be construed by the light of "the word 'salary'—that it is ejusdem generis with it. What is "meant by ejusdem generis? Not that 'income' is identical "with 'salary,' but that there is a genus under which, in common

[33] 14 Q.B.D. 301, 309.
[34] [1892] 1 Q.B. 522: 8 T.L.R. 279, C.A.
[35] 14 Q.B.D. 301, C.A.
[36] [1892] 1 Q.B. 522, 527, C.A.
[37] Ibid. 529.
[38] 14 Q.B.D. 301, C.A.

"with 'salary,' it might be classified. In other words, it "possesses some of the same qualities which 'salary' does."

Fry L.J. was of the same opinion, and opened his judgment with these words[39]: With regard to the question whether this "payment is 'salary or income' within the meaning of section 53, "I am of opinion that it is 'salary,' and, if it is not, it is clearly "'income' in the nature of salary."

What I have read from Lord Esher M.R.'s judgment indicates that the court was apparently proceeding upon the view—as I venture to think, a view which may have led to some confusion—that what this actor was receiving was something which did not vest in the trustee, and that section 53 was limited to that class of case, the same confusion (if I may so put it) which I pointed out in *In re Landau.*[40] But I do not think that that element can in any way disable the clear statement in this case, following the previous case of *Benwell,*[41] that the income, in Lord Esher M.R.'s language, "does not mean all income, or all that property of a "man which is generally called income," but is limited to income of the genus which Bowen L.J. defined as having some, at any rate, of the same qualities as a salary.

Those cases have stood unchallenged ever since they were decided. And there is one other—the only case in which this matter has come before the House of Lords—the case of *Hollinshead* v. *Hazleton.*[42] That case concerned a member of the House of Commons representing a constituency in Ireland; and it may well be that only a case from Ireland could now find its way to the House of Lords on this subject. This gentleman had become bankrupt, and the question arose as to the availability for his creditors of his remuneration of £400 a year as a Member of Parliament. It therefore became necessary for the House to say whether that £400 a year was salary or income within the corresponding section of the Bankruptcy Act for Ireland which may be taken to be in terms entirely corresponding to that of the present section 51 (2) of the Act of 1914.

Various other points were raised and dealt with at some length, including questions of public policy; but it is I think quite plain that Lord Atkinson approved the limitation which had been put on the word "income" in *Shine's* case.[43] After referring to the possible grounds of public policy applicable in the case of a Member of Parliament and his remuneration as such, Lord Atkinson said[44]: "I should be inclined to hold that the sum paid "was a salary." If any one of the other three,"—that was the other three grounds for saying as a matter of public policy that this remuneration should be paid—"I should be inclined to hold "it was 'income' in the nature of a salary, but I think, as the

[39] [1892] 1 Q.B. 522, 531.
[40] [1934] Ch. 549, C.A.
[41] 14 Q.B.D. 301, C.A
[42] [1916] A.C. 428; 32 T.L.R. 177, H.L.
[43] [1892] 1 Q.B. 522, C.A.
[44] [1916] A.C. 428, 449, H.L.

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"judges thought in *Shine's* case,[45] it must be either the one or "the other."

We have been through all the speeches in that case, and I do not myself think that it will assist if I make further citation from them. I find in none of them anything which qualified the conclusion laid down in *Benwell*[46] and *Shine*.[47] Indeed the passage which I have read from Lord Atkinson's speech seems to me to approve it. As I pointed out in my judgment in *Tennant's* case,[48] if certain language of Lord Parker's had been accepted as defining the scope of these subsections, it might have very much assisted the result in this and other cases, namely, the suggestion that section 51 (as it now is) of the Act of 1914 should be confined in all cases to salaries or other income which was by its nature at common law inalienable. But as I observed, that suggestion was not necessary in the decision in *Hollinshead* v. *Hazelton*[49] and was not reflected in anything said by the other noble Lords.

The citations I have made, as I think, justify the conclusion that the word "income" in this subsection is limited, and is limited in the way that I have already more than once defined. If that is so, then, as I said at the beginning of my judgment, the result adverse to the appellant seems to me inevitably to follow, and I repeat also that that result appears to me to be in accordance with common sense, and what I believe to be the intention underlying this legislation.

I think that the general effect is not entirely satisfactory. The intrusion of *Landau's* case[50] and what followed it has perhaps added some confusion to this branch of the law; and it may be that it is a matter which on some future occasion Parliament will reconsider. It seems unlikely that, except possibly from Northern Ireland, the matter can again come before the House of Lords; but if in any circumstances it did, I hope that the House would consider carefully the reasoning in the case of *Landau*[50] and its correctness, and also the correctness of the decision in *Tennant's* case[51] which this court felt itself bound to decide as it did (as did Upjohn J.) because of the earlier decision in *Landau*,[52] But without saying more I do in this case emerge from the jungle on the side of Mr. Forrester-Paton, and therefore would dismiss the appeal.

Upjohn L.J. I agree, and I desire to add only a very few words. My Lord has reviewed the authorities, and has shown clearly the conflicting views that have been taken in this court as to the precise ambit of the word "income" used in section 51 (2). No doubt, "income" shorn of all context is as wide a word as one could desire to use; and, broadly speaking, that seems to have been the construction adopted in the cases of *Huggins*[53]

[45] [1892] 1 Q.B. 522, C.A.
[46] 14 Q.B.D. 301, C.A.
[47] [1892] 1 Q.B. 522, C.A.
[48] [1956] 1 W.L.R. 874, C.A.
[49] [1916] 1 A.C. 428, H.L.
[50] [1934] Ch. 549, C.A.
[51] [1956] 1 W.L.R. 874, C.A.
[52] [1934] Ch. 549, C.A.
[53] 21 Ch.D. 85, C.A.

and *Landau*,[54] but, as my Lord has pointed out, in the intermediate cases of *Benwell*[55] and *Shine*[56] a much more limited view of the ambit of the word "income" has been adopted in this court.

In those circumstances a critical appreciation of the actual section itself cannot be out of place. I desire to draw attention only to the fact that the section is in that part of the Bankruptcy Act which is dealing with the realisation of property. It follows section 50. Section 50 is dealing with the sequestration of the profits of a benefice upon bankruptcy, and it provides that the bishop may nevertheless appoint to the bankrupt a stipend for carrying out his duties.

It is then, I think, material to read the marginal note to section 51, although I appreciate that it cannot control the language used in the section itself. The note is in these terms: "Appropriation of portion of pay or salary to creditors." Section 51 (2) then starts in this way: "Where a bankrupt is in receipt of "a salary or income other than as aforesaid," that is, other than pay or salary of those in the service of the Crown which is dealt with by subsection (1). I should have thought that in that context the word "income" would plainly have a somewhat limited meaning; and that the draftsman of the Act was not dealing with income generally, such as income arising under a settlement. But if there were any doubts at that stage, it would seem to me that they are removed by the additional description as to the ambit of the section indicated by the words immediately following, "or is entitled to "any half-pay or pension or to any compensation granted by the "Treasury." That appears to me to indicate quite clearly that there is some limit to be put upon the word "income" where it occurs in the section. Of course, I appreciate that the compensation granted by the Treasury may be income or capital, but I do not think that affects the present matter.

The matter is then summarised at the end of the section by a comprehensive description of the matters upon which the court is empowered to "make such order as it thinks just for "the payment of the salary, income, half-pay, pension or "compensation," and so on. I cannot think for one moment that in using that description, and in sandwiching the word "income" in between "salary" and "half-pay," the draftsman of the Act intended the word "income" to have the wide ambit which Mr. Muir Hunter has tried to persuade us that it bears; and I agree with my Lord in thinking that the proper limit is to describe it as income in the nature of salary, but without attempting any further definition.

I share my Lord's doubts as to whether *In re Landau*[57] was correctly decided, though, of course, it and *In re Tennant*[58] bind this court in cases to which they are properly applicable. Like

[54] [1934] Ch. 549, C.A.
[55] 14 Q.B.D. 301, C.A.
[56] [1892] 1 Q.B. 522.
[57] [1934] Ch. 549.
[58] [1956] 1 W.L.R. 874.

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him, I hope that it may be possible (although it would seem unlikely) that the matter may be reviewed in a higher court. I agree that this appeal should be dismissed.

Pearson L.J. I agree with both the judgments which have been delivered, and I have nothing to add to them.

Forrester-Paton. May I ask your Lordships to deal with the question of costs? The appellant is an assisted person. He deposited the security of £20. There was an application that it should be dispensed with, but it was not dispensed with, and I think the court intimated that that question should be dealt with, if it arose, at the conclusion of the hearing of the appeal.

Lord Evershed M.R. Prima facie you would say, I suppose, that the order should be that the £20 be paid out to the trustee? Did that come from the legal aid fund?

Muir Hunter. No, my Lord; it is one of the lacunae in the provisions relating to the legal fund that they have not dealt with the question of security. The court under the rules has express power to dispense with security, application for which was made by one of my learned friends in March of last year. That sum was in fact paid in by my instructing solicitor for the purpose of lodging the appeal; it was not the bankrupt's money, and never has been. There is no escape from the payment in of the £20, because you cannot set down the appeal without it. On the occasion when application was made on March 21, 1960, in dismissing the application, as I am instructed, your Lordships' court (the Master of the Rolls, Pearce and Harman L.JJ.) indiccated that the court might adopt the same attitude to the £20 as had been adopted in the Divisional Court below. The Divisional Court had ordered the £20 to be paid out to the bankrupt's solicitor, and made no other order as to costs except, of course, the order for legal aid taxation. The legal aid fund, however, does not recognise any liability for the reimbursement as a disbursement of a deposited security.

Upjohn L.J. It is all very well; but if it became the common practice that solicitors in legal aid cases would deposit £20 expecting to be reimbursed, the whole object of the regulations, which aim at preventing the making of frivolous applications, might well be destroyed. A solicitor might well adopt this course in a non-legal aid case, and expect to have it paid out, but so far as my experience goes in the Bankruptcy Court I do not think that would be right.

Muir Hunter. The Divisional Court, of course, took the view that this was a difficult case, and gave leave to appeal with great alacrity.

UPJOHN L.J. Speaking for myself, in the ordinary case I should be entirely against ordering any repayment, even if made by a solicitor, but this is a very exceptional case. No doubt the debtor, fortified by certain decisions of this court, thought that perhaps the law was not quite what we have held it to be, and he has come to this court with that in mind in what is from some points of view a difficult case.

PEARSON L.J. This is the difficulty which troubles me. If there is a case which ought to be argued, and it cannot under the rules be brought to appeal unless the solicitor for the appellant deposits £20, it seems a little hard that the solicitor should have to forfeit his £20 because, after much argument and consideration of the authorities, on which it might be said that in some respects previous decisions of this court were open to question, the case goes against him and he has to suffer in that way personally. That is what troubles me.

LORD EVERSHED M.R. One comment on that is that it might be thought that the legal aid fund in a case of this sort ought to find the deposit.

There is a matter of principle involved here. What we will do is to direct that half of this sum be paid back to the solicitor for the appellant, and half to the trustee. I am sorry if the solicitor is £10 out of pocket, but he may get it somewhere else. Perhaps, as Mr. Forrester-Paton said, he might be said to have taken a risk, and we will relieve him of it to the extent of 50 per cent.

Appeal dismissed with costs.

Solicitors: *Christian & Co. for Joseph Lester & Co., Leeds; Paisner & Co. for J. S. & P. Walsh & Co., Leeds.*

B. A. B.

[CHANCERY DIVISION.]

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1961
Jan. 19;
Feb. 2.

Buckley J.

[1960 D. No. 1460.]

Company—Winding up—Contributories—Rights to surplus assets—Rights of preference shareholders to participate in "further surplus "assets"—Whether right of participation remains after paying creditors, costs, arrears of preference dividend and all paid-up capital.

Company—Capital—Reduction—Capitalisation of reserves resulting from revaluation of capital assets—Article permitting company to capitalise reserves not required for payment of preferential dividend—Whether variation of rights of preference shareholders—Whether legal.

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A company was incorporated in 1896 with an authorised capital of £200,000, divided into 10,000 preference shares, 20,000 ordinary shares and 10,000 unclassified shares all of £5 each. Article 5 (a) of the company's articles of association, incorporated by reference into its memorandum of association, gave the preference shareholders the right to receive a cumulative preferential dividend of 6 per cent. per annum on the amount paid up on their shares and article 5 (b) gave them the right in the event of a winding up "to "be paid out of the surplus assets of the company the amount paid "up in respect of such preference shares and all arrears (if any) "of dividend thereon up to the date of the commencement of the "winding up in priority to the other shareholders, and to partici-"pate in any further surplus assets of the company after payment "of the amount paid up in respect of the other shares rateably with "the other shareholders in proportion to the amount paid up" on the preference and other shares. The memorandum provided that the unclassified shares might be issued as preference, ordinary or deferred shares and article 6 of the articles of association that the company might issue the 10,000 unclassified shares or any new shares created on an increase of capital as preference shares to rank pari passu with the original 10,000 preference shares, but so that the total number of preference shares issued should not exceed one-third of the issued share capital. Article 54 provided that each member should have one vote for every 10 shares held; article 85 provided that after setting aside such sum as a reserve as the directors decided, the profits should be divisible among the members in proportion to the amount paid up on their shares and article 90 that the directors might set aside such profits as they thought fit as a reserve, and subject to article 5, might invest the reserve, divide it into funds and employ it in the business without keeping it separate from the other assets.

In 1910, pursuant to a new article, the company subdivided the 22,933 existing ordinary £5 shares into 114,655 ordinary £1 shares and in 1911 substituted for article 54 a new article giving the ordinary shareholders one vote for every five ordinary shares held and the preference shareholders one vote for each preference share held. The original articles of association contained no capitalisation clause but in 1920 the company adopted a new article authorising capitalisation of undivided profits, increased the share capital by the creation of 50,000 ordinary £1 shares and capitalised a sum of £42,044 in the form of ordinary £1 shares distributed among the ordinary shareholders credited as fully paid, which then stood to the credit of the general reserve of the company and represented accumulated revenue. In 1946 the company adopted a new set of articles, article 140 of which provided that the company might resolve that any sum not required for the payment of the preferential dividend and (a) for the time being standing to the credit of any reserve account including premiums received on the issue of shares, or any sum arising from any operation creating an excess of assets on capital account, or (b) being undivided net profits in the hands of the company be capitalised and such sum to be "appro-"priated as capital to and amongst the shareholders who would "have been entitled thereto if the same had been distributed by way "of dividend. . . ."

The company took out a summons to determine, inter alia, the following questions: (1) whether the "further surplus assets" in which under article 5 (b) the preference shares participated in a winding up rateably with the other shareholders meant the assets of the company available after payment of the debts and liabilities and the return to the members of the amounts paid up or credited

as paid up on all shares and the payment to the preference shareholders of any arrear of their dividend up to the date of winding up; and (2) whether the company had power pursuant to article 140 to allot to the ordinary shareholders credited as fully paid-up shares or securities by way of capitalisation assets resulting from the revaluation of the capital assets. It was conceded that the company had power to capitalise credit balance on profit and loss account and other revenue reserves, reserves resulting from the realisation of capital profits and share premium account:—

Held, (1) that, on the true construction of the memorandum and articles of association, the preference shareholders would be entitled to participate on winding up rateably with the other shareholders in all the assets of the company which remained after paying creditors, costs and arrears of the preference dividend and after repaying all paid-up capital: the rights of the ordinary shareholders to the exclusive enjoyment of accumulated profits not required to pay the preference dividend depended on appropriate resolutions being passed before liquidation began, and in default of such resolutions, such accumulated profits would form part of the fund of assets distributable under article 5 (b) (*post*, pp. 264–265).

In re Bridgewater Navigation Co. [1891] 2 Ch. 317; 7 T.L.R. 360, C.A. and *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.* [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068, H.L. applied.

(2) That, on its true construction, article 140 authorised the capitalisation of a reserve resulting from the revaluation of capital assets, for such capitalisation was in essence a declaration of a dividend combined with the application of that dividend on behalf of the shareholders entitled to participate in it in paying up the shares to be allotted and issued to them in satisfaction of their rights of participation, and that, as the reserves were distributable among the ordinary shareholders, they might also be legally capitalised without encroaching upon the rights of the preference shareholders (post, pp. 267–268).

Hill v. *Permanent Trustee Co. of New South Wales* [1930] A.C. 720, P.C.; *Inland Revenue Commissioners* v. *Thornton, Kelley & Co. Ltd.* [1957] 1 W.L.R. 482; [1957] 1 All E.R. 650, applied.

Westburn Sugar Refineries Ltd. v. *Inland Revenue Commissioners* [1960] T.R. 105, not followed.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment of Buckley J.:

The plaintiff, the Dimbula Valley (Ceylon) Tea Co. Ltd., was incorporated in 1896 under the Companies Acts, 1862 to 1890, with an original authorised capital of £200,000, divided into 10,000 preference shares, 20,000 ordinary shares and 10,000 unclassified shares, all of £5 each. The memorandum of association provided that the preference shares should carry such rights as were defined "In the articles of association registered here-"with." Article 5 of those articles was in the following terms: "The 10,000 preference shares in the original capital shall confer "on the holders the following rights: (a) The right to receive "out of the profits of the company a cumulative preferential "dividend at the rate of 6 per cent. per annum on the amount "for the time being paid up thereon, such dividend to commence

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"as from March 31, 1896. (b) The right in the event of the "company being wound up to be paid out of the surplus assets "of the company the amount paid up in respect of such prefer- "ence shares and all arrears (if any) of dividend thereon up to "the date of the commencement of the winding up in priority "to the other shareholders, and to participate in any further "surplus assets of the company after payment of the amount "paid up in respect of the other shares rateably with the other "shareholders in proportion to the amount paid up on the said "preference shares and the other shares respectively."

The memorandum provided that the unclassified shares might be issued as ordinary, preference or deferred shares, or partly in one such manner and partly in another, and the articles authorised the issue of any of these shares or any new shares created on an increase of capital as preference shares ranking pari passu with the original preference shares, but so that the number of preference shares at any time issued should not exceed one-third of the issued share capital of the company.

Voting was regulated by article 54 as follows: "Every "member shall have one vote for every ten shares held by him. "A member shall not be entitled to vote in respect of a less "number of shares than ten, or an excess of shares less than ten "over ten, or any multiple of ten."

Under the heading "Dividends and reserve" the following articles were included: "85. Subject to the rights of members "entitled to shares issued upon special conditions, the profits of "the company, after setting aside such sum to a reserve as the "directors may decide, shall be divisible among the members in "proportion to the amount paid up on the shares held by them "respectively. Provided, nevertheless, that where capital is paid "up in advance of calls, upon the footing that the same shall "carry interest, such capital shall not, whilst carrying interest, "confer a right to participate in profits."

Article 90: "The directors may from time to time set aside "such of the profits of the company as they think proper as a "reserve to meet contingencies, or for equalising dividends or "for repairing, improving, and maintaining any of the property "of the company, and for such other purposes as the directors "shall in their absolute discretion think conducive to the "interests of the company, and may, subject to clause 5 hereof, "invest the several sums so set aside upon such investments as "they may think fit, and from time to time may deal with and "vary such assets and investments and dispose of all or any part "thereof for the benefit of the company, and divide the reserve "into such special funds as they think fit, with full power to "employ the whole or any of the assets constituting the reserve "in the business of the company, and that without being under "any obligation to keep the same separate from the other assets."

There was no article similar to article 114 of Table A of the

Companies Act, 1948, in terms authorising the declaration of dividends or providing that no dividend should exceed the amount recommended by the directors, but the declaration of dividends was included amongst the business to be transacted at ordinary general meetings of the company, and there were references to dividends "declared" on shares in articles dealing with the transfer and transmission of shares. There was an article authorising the payment of interim dividends by the directors. The original articles of association contained no capitalisation clause. They contained a common form article authorising increases of capital but no provision for the subdivision of shares. They contained a variation of rights clause but no use was made of this in respect of any of the matters in question.

In May, 1910, the company by special resolution adopted an article authorising the subdivision of shares, and thereupon subdivided the ordinary shares of £5 each, which were then 22,933 in number, into 114,665 ordinary shares of £1 each, and further resolved that any further shares to be thereafter issued as ordinary shares should be divided into and issued as £1 shares. The result of this was to multiply the votes of the ordinary shareholders greatly. In 1911, however, this position was rectified or altered by another special resolution substituting for article 54 a new article which gave ordinary shareholders one vote for every five ordinary shares held, and to preference shareholders one vote for every preference share held. In 1920 the company by special resolution adopted a new article authorising capitalisation of undivided profits.

On April 14, 1920, the company increased its share capital to £250,000 by the creation of 50,000 ordinary shares of £1 each. On the same day the company capitalised a sum of £42,044 in the form of ordinary shares distributed amongst the ordinary shareholders credited as fully paid. The amount so capitalised then stood to the credit of the general reserve of the company and represented accumulated revenue.

In 1946 the company adopted in place of the original articles of association a new set of articles of association, which included a capitalisation article which read: "140. The company in general "meeting may at any time and from time to time on the recom-"mendation of the board pass a resolution that any sum not "required for the payment or provision of any fixed preferential "dividend and (A) for the time being standing to the credit of "any reserve fund or reserve account of the company, including "premiums received on the issue of any shares or debentures of "the company, or any sum arising from any operation creating "an excess of assets on capital account, or (B) being undivided "net profits in the hands of the company, be capitalised, and "that such sum be appropriated as capital to and amongst the "shareholders who would have been entitled thereto if the same "had been distributed by way of dividend in the shares and

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"proportions in which they would have been so entitled, and in "such manner as the resolution may direct . . ." The article then provided in the usual way for the sum so appropriated being applied in paying up shares or debentures to be issued to the shareholders in accordance with their rights.

The company took out a summons for the determination of the following questions: (1) Whether on the true construction of the memorandum and articles and in the events which had happened the allotment in 1920 of the 42,044 ordinary shares was in accordance with the rights of the members; (2) if not, whether it must by lapse of time be regarded as valid; (3) whether the further surplus assets in which the preference shares participated in a winding up rateably with the other shareholders meant (a) the assets of the company available after payment of the debts and liabilities of the company, and the return to the members of the amounts paid up or credited as paid up on all shares, and the payment to the preference shareholders of any arrear of their dividend up to the date of the winding up, or (b) some other assets; (4) whether the company had power pursuant to article 140 of the present articles or otherwise to allot to the ordinary shareholders credited as fully paid-up shares or securities by way of capitalisation of (i) credit balance on profit and loss account and other revenue reserves, (ii) reserves resulting from the realisation of capital profits, (iii) reserves resulting from the revaluation of capital assets, or (iv) share premium account, and (5) whether on a poll (a) every member holding ordinary shares had one vote for every five ordinary shares held by him, and every member holding preference shares had one vote for every preference share held by him, or (b) the members were entitled to some other voting rights.

J. G. Monroe for the company.

P. J. Sykes for the first defendant, a representative preference shareholder.

T. D. D. Divine for the second defendant, a representative ordinary shareholder.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Crichton Oil Co. Ltd.*[1]; *In re Odessa Waterworks Co. Ltd.*[2]; *Bishop* v. *Smyrna and Cassaba Railway Co.*[3]

Cur. adv. vult.

Feb. 2. BUCKLEY J. read the following judgment, in which he stated the facts and continued: Questions 3 and 4 are hypothetical questions, in this sense, that there is, so far as I know,

[1] [1901] 2 Ch. 184; 18 T.L.R. 556, C.A.

[2] [1901] 2 Ch. 190n.

[3] [1895] 2 Ch. 265; 11 T.L.R. 393.

no present intention of the company being wound up or capitalising any of its undistributed profits, but they are questions which affect the valuing of the company's shares to some extent and which would have to be clarified before any reorganisation of the company's capital structure was undertaken, and I think that it is desirable I should answer them.

Mr. Sykes, who appears for a representative preference shareholder, concedes that, at any rate after so long an interval of time, he could not successfully contend that the capitalisation which was effected in 1920 ought not to be regarded as regular and valid. Indeed, he could suggest no ground on which that capitalisation could be said to have been irregular, and I shall accordingly declare that it was in accordance with the rights of the members.

As regards the powers of the company to capitalise reserves and undistributed profits in the future, however, he has contended that the company has no power to capitalise any reserve resulting from the revaluation of capital assets, although he concedes that it can properly capitalise any credit balance on profit and loss account or other revenue reserve, any reserve resulting from the realisation of capital profits or any amount standing to the credit of a share premium account. As regards a winding up, he contends that the surplus assets in which the preference shareholders are entitled to participate are those assets of the company which remain after all the claims of creditors and the costs of the winding up have been paid.

It will be convenient to consider the rights in a winding up first. The rights attached to the preference shares as set out in the original articles of association were imported into the memorandum of association by reference and consequently remain unaffected by any alterations of the company's articles So far as participation in profits and in the assets of the company on a winding up is concerned, they are laid down in the original article 5 which I have read. Mr. Sykes concedes that paragraph (a) of that article contains a comprehensive statement of the preferential shareholders' rights to participate in profits until a winding up occurs. As to paragraph (b), he says that "surplus assets" here cannot mean such assets as remain after not only paying creditors and costs but also extracting distributable profits to which any class of shareholders may have become entitled before the winding up began because of the reference to payment out of the surplus assets of arrears of the preference dividend. Moreover, if by virtue of the original article 85 the ordinary shareholders become entitled, as they accrue, to all profits of the company not required for payment of the preference dividend, notwithstanding that such profits remain undistributed, Mr. Sykes says that it is hard to see what surplus assets could be left over in a winding up after paying creditors, costs and arrears of preference dividend, repaying paid-up capital and distributing to the ordinary shareholders

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the undistributed profits to which they would have so become entitled.

On the other hand, Mr. Divine, on behalf of a representative ordinary shareholder, contends that the present case is governed by the decision in *In re Bridgewater Navigation Co.*,[1] that the undistributed profits of the company not required for payment of the preference dividend become appropriated to and belong to the ordinary shareholders and that they ought accordingly to be excluded from the assets in which the preference shareholders are entitled to participate in a winding up. According to Mr. Divine, the surplus assets in which the preference shareholders may participate after creditors, costs and arrears of preference dividend have been paid and paid-up capital has been repaid will not include any such undistributed profits. The reference in paragraph (b) of article 5 to "further surplus assets" relates, according to him, to such matters as appreciation of capital assets realised in the winding up or profits obtained by the liquidator carrying on the company's business for the purposes of the winding up.

Before I consider the relevant authorities I will make the following observations. First, it is clear that at any time before liquidation the ordinary shareholders, who control the voting at general meetings, could quite legitimately extract by way of dividends on their ordinary shares the whole of the distributable but undistributed profits except to the extent that they might be required to pay accrued preference dividends. Secondly, assuming that article 140 of the new articles of association adopted in 1946 was validly adopted, it is clear that at any time before liquidation the ordinary shareholders could, under that article, capitalise for their own exclusive benefit the whole of such undistributed profits with the like exception. Even if, therefore, the preference shareholders were entitled to participate pari passu with the ordinary shareholders in any assets of the company remaining after paying creditors, costs and arrears of preference dividend and repaying paid-up capital, their expectations in this respect could not be said to be very great.

Considerations of this kind assisted the majority of the House of Lords in *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.*[2] to reach the conclusion on the construction of the relevant regulations in that case that the preference shareholders in the respondent company had no such right of participation.

But whether in the present case the preference shareholders have such a right depends upon the bargain between the members constituted by the company's memorandum and articles and depends upon the true interpretation of the original article 5 read in the context of the rest of the original articles of the company. The fact that the ordinary shareholders might be able to

[1] [1891] 2 Ch. 317; 7 T.L.R. 360, C.A.; [1891] 1 Ch. 155.

[2] [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068, H.L.

defeat the expectations of the preference shareholders to participate in a winding up in undistributed profits is not necessarily inconsistent with the preference shareholders having such a right.

In article 5 (b) the expression "surplus assets" is used twice. Where it first appears it must clearly mean property of the company remaining after the external liabilities of the company have been discharged and provision has been made for the costs of the winding up, but before any capital has been repaid to the preference shareholders or any arrears of preference dividend have been satisfied, and a priori before any capital has been repaid to the ordinary shareholders or any profits have been distributed to them. In other words, "surplus assets" here means all the assets of the company remaining after creditors have been paid and the costs of winding up have been paid or provided for, but before any payment to members as such has been made or provided for. The article confers on the preference shareholders a right to certain preferential payments out of this fund; it then directs repayment thereout of the capital paid up on the other shares of the company, that is to say, the ordinary shares; finally it confers on the preference shareholders a right to "participate "in any further surplus assets of the company" rateably with the other shareholders. In this context I think that "any "further surplus assets" must mean that part of the fund of "surplus assets" referred to earlier in the paragraph which remains after making thereout the specific payments referred to in the paragraph.

In *In re Bridgewater Navigation Co.*[3] the question arose whether undistributed profits of the company were distributable in a winding up amongst the ordinary shareholders of the company only or amongst the preference and ordinary shareholders rateably. The company as originally constituted had only one class of shareholders and its articles provided, inter alia, as follows: Article 85: "Subject to the last preceding article, and "subject to any arrangement which may from time to time have "been entered into relative to the remuneration of any manager "or other officer of the company by way of commission or a per-"centage on the net profits of the company or any part thereof, "the entire net profits of each year shall belong to the holders "of the shares of the company and be divided pro rata upon the "whole paid-up share capital of the company, and the directors "may, with the sanction of the company in general meeting, "declare a dividend to be payable thereout on the shares in "proportion to the amounts paid up thereon."

The preceding article authorised the directors of the company to set aside sums out of profits to reserves. Subsequently the company created a class of preference shares whose right to participate in profits was limited to a preferential dividend at the rate of 5 per cent. per annum.

[3] [1891] 2 Ch. 317; [1891] 1 Ch. 155.

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In *Birch* v. *Cropper*,[4] the House of Lords had earlier decided that after adjusting the rights of the shareholders inter se the surplus assets of the company ought to be divided between the shareholders of both classes in proportion to their shares. In *In re Bridgewater Navigation Co.* both North J.[5] and the Court of Appeal[6] took the view that that decision of the House of Lords had not decided the proper destination of the undistributed profits in question before them: presumably this would properly be described as relating to the adjustment of the rights of the shareholders inter se. The decisions of North J. and the Court of Appeal turned mainly upon the terms of article 85 of the company's articles of association, which I have read. Having regard to the creation of the preference shares with a limited right to participate in profits North J. held[7] that that article should be treated as though it read "shall after payment of the dividend "to the preference shareholders belong to and be divided pro "rata among the ordinary shareholders of the company." He consequently held that the ordinary shareholders were exclusively entitled to the net profits of the year current at the date of liquidation, subject to paying an apportioned preference dividend to the preference shareholders, and to a sum reserved but not required for canal improvements, but not to certain other reserves. The Court of Appeal[8] varied the order of North J., holding that the last-mentioned reserves also represented undistributed profits, which had not lost that character as a result of having been reserved for purposes for which in the event they were not required. The significant circumstance in the case was, in my judgment, that article 85 provided that the whole of the company's net profits of each year remaining after payment of the preference dividend should "belong to and be divided among" the ordinary shareholders. The right of the preference shareholders to participate in the company's assets in a winding up necessarily took effect subject to this right of the ordinary shareholders.

By the articles of association which came under consideration in *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.*[9] the right of the preference shareholders of the respondent company to participate in profits while the company was a going concern was limited to a cumulative preferential dividend at a stated rate, subject to which the residue of the profits was declared by article 128 to be "divisible" amongst the ordinary shareholders. In a winding up the preference shareholders were given a preferential right to repayment of capital paid up on their shares but the articles were silent about what should happen to any assets remaining after that preferential right was satisfied. The majority of the House of Lords held as a matter of construction

[4] (1889) 14 App.Cas. 525; 5 T.L.R. 722, H.L.
[5] [1891] 1 Ch. 155.
[6] [1891] 2 Ch. 317.
[7] [1891] 1 Ch. 155, 168.
[8] [1891] 2 Ch. 317.
[9] [1949] A.C. 462.

that the articles dealing with the preferential rights of the preference shareholders in a winding up contained an exhaustive statement of their rights to participate in the company's assets in a winding up. From the fact that their right to participate in profits while the company was a going concern was limited to their preferential dividend and that their right to participate in a winding up was restricted to repayment of the capital paid up on their shares, it would naturally follow that the profits of the company which were not required for payment of the preference dividend belonged at all times to the ordinary shareholders. Lord Maugham, Lord Simonds and Lord Normand, however, all seem to have reached the conclusion that the rights of the preference shareholders in a winding up were restricted to repayment of capital by the road of first holding that the profits so far as not required for payment of the preference dividend became appropriated to the ordinary shareholders and belonged to them while the company was still a going concern. In reaching this conclusion they were largely influenced by the circumstance that the articles gave the ordinary shareholders complete control of these profits until liquidation.

I think that the decision may be summarised as follows: (1) the article regulating the distribution of profits did not in terms state that profits remaining after paying the preference dividends should belong in any event to the ordinary shareholders; (2) the article dealing with rights in a winding up was silent about whether the preference shareholders should or should not participate in surplus assets available for distribution after repayment of all paid-up capital; (3) it was clear that until liquidation began the ordinary shareholders could, by means of dividends and capitalisation, appropriate to themselves all the undistributed profits not required to pay preference dividends. The majority of the House of Lords considered the last-mentioned circumstance to afford the clue to the proper construction to be adopted as regards (1) and (2)—see *per* Lord Maugham,[10] Lord Simonds [11] and Lord Normand.[12]

As regards (1), the *Wilsons & Clyde* case [13] differed from the *Bridgewater* case [14] but was similar to the present case. As regards (2), the *Bridgewater* case [13] was similar to the *Wilsons & Clyde* case [14] and the present case differs from them both by reason of the terms of article 5 (b). As regards (3), the present case resembles the *Wilsons & Clyde* case.[13]

The significant distinction between the present case and the *Wilsons & Clyde* case [13] is that paragraph (b) of the original article 5 in the present case makes it clear that the preference shareholders are entitled to participate to some extent in a winding up beyond repayment of their paid-up capital and payment of arrears of their preference dividend. The question is to what extent they are so entitled.

[10] [1949] A.C. 462, 479–480.
[11] Ibid. 488.
[12] Ibid. 494.
[13] Ibid.

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The distinction between this case and the *Bridgewater* case [14] is that the original article 85 in the present case said, not that the profits there referred to should "belong" to the ordinary shareholders, but that they should be "divisible" among (in effect) the ordinary shareholders. In such a passage "divisible" might, as a matter of interpretation, mean "that which is to be divided" or "that which is capable of being divided." In the *Wilsons & Clyde* case [15] the former of these alternatives was adopted for reasons which I have already indicated. Mr. Divine says that similar reasons apply here because there was nothing in the original articles to prevent the ordinary shareholders at any time before liquidation from taking for themselves all the undistributed profits not required to satisfy the preference dividend. This is true, but I must also keep in mind the terms of article 5 (b). As I have endeavoured to show, in the *Wilsons & Clyde* case [15] the appropriation to the ordinary shareholders of profits not required to pay preference dividends and the exclusion of the preference shareholders from participation in any surplus assets were complementary provisions. In the present case a parallel position does not exist because of the reference in article 5 (b) to participation by the preference shareholders in surplus assets. The circumstance that the ordinary shareholders have complete dominion over profits while the company is a going concern is not necessarily inconsistent with another class of shareholders having a right to participate in profits which the ordinary shareholders choose to leave undistributed until after the commencement of a winding up.

Having regard to the analysis which I have made of the language of paragraph (b) of article 5 I feel compelled to the view that in the present case the preference shareholders would be entitled to participate in a winding up rateably with the other shareholders in all the assets of the company which remain after paying creditors, costs and arrears of the preference dividend and after repaying all paid-up capital. I do not think that either the *Bridgewater* case [16] or the *Wilsons & Clyde* case [15] requires or enables me to reach another view. Indeed, I think that part of Lord Simonds' reasoning in the latter case strongly supports my view. He said [17]: "There is another somewhat general considera-
"tion which also, I think, deserves attention. If the contrary
"view of articles 159 and 160 is the right one and the preference
"stockholders are entitled to a share in surplus assets, the
"question will still arise what those surplus assets are. For the
"profits, though undrawn, belong, subject to the payment of
"the preference dividend, to the ordinary stockholders and, in so
"far as surplus assets are attributable to undrawn profts, the
"preference stockholders have no right to them. This appears
"to follow from the decision of the Court of Appeal in *In re*

[14] [1891] 2 Ch. 317.
[15] [1949] A.C. 462.
[16] [1891] 2 Ch. 317.
[17] [1949] A.C. 462, 488.

"*Bridgewater Navigation Company*,[18] in which the judgment of "the House of Lords in *Birch* v. *Cropper*[19] is worked out. This "again is not decisive of the construction of particular articles, "but I am unwilling to suppose that the parties intended a "bargain which would involve an investigation of an artificial and "elaborate character into the nature and origin of surplus assets."

In a case like the present, in which it is clear that the preference shareholders are to participate to some extent in surplus assets, an investigation of the kind envisaged by Lord Simonds would be involved if the surplus assets had to be divided into two categories, namely, undistributed profits belonging to the ordinary shareholders, and other surplus assets.

I consequently reach the conclusion that in the present case the right of the ordinary shareholders to the exclusive enjoyment of accumulated profits which are not required to pay the preference dividend depends upon appropriate resolutions being passed before liquidation begins, and that in default of such resolutions such accumulated profits will form part of the fund of assets distributable under article 5 (b).

I have reached this conclusion without reference to the company's new articles of association, but I should point out that under article 130 of those articles no dividend can be declared in excess of the recommendation of the directors. The ordinary shareholders consequently no longer enjoy the dominion over profits which they enjoyed under the original articles and upon which Mr. Divine relies.

Accordingly I will declare, in answer to question 3 of the originating summons, that according to the true construction of the memorandum and articles of association of the company the preference shareholders will be entitled in a winding up to participate rateably with the other shareholders of the company in the assets of the company available after payment of the debts and liabilities of the company and the return to the members of the amounts paid up or credited as paid up on all shares in the company and the payment to the preference shareholders of any arrears of their dividend up to the date of the commencement of the winding up, and after providing for costs.

I come now to the question of the effect of the capitalisation article, article 140 in the company's new articles of association. Mr. Sykes' first submission with regard to this was that if this article in any respect varied, or purported to vary, the rights of the preference shareholders, it is to that extent not binding on them. This must be right, because the rights of the preference shareholders are by reference written into the memorandum of association and so are only capable of variation by a scheme of arrangement sanctioned by the court under the Companies Acts, except that possibly the rights so written into the memorandum ought to be taken as capable of being varied in accordance with the modification of rights clause contained in the original articles

[18] [1891] 2 Ch. 317. [19] 14 App.Cas. 525.

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of association, but this clause, as I have stated, has never been operated. Accordingly the question raised by the originating summons in respect of article 140 involves first the consideration of whether under the terms of that article amounts standing to the credit of all, or some, and if so which, of the accounts referred to in question 4 of the summons can be capitalised, and secondly the consideration of whether the power to capitalise so construed conflicts with any right of the preference shareholders.

Mr. Sykes concedes that capitalisation is authorised by the article under all of the heads mentioned in the question except reserves resulting from the revaluation of capital assets.

He relies, in this connection, upon *Westburn Sugar Refineries Ltd.* v. *Inland Revenue Commissioners*,[20] where a revaluation in 1948 of the company's buildings, plant and machinery disclosed an excess of £155,910 over book values. This excess was carried to capital reserve. In the following year the company capitalised £152,250 of the amount on capital reserve. In 1950 the company, having carried out certain other transactions, reduced its capital by repaying part of its paid-up capital. This reduction was confirmed, the application for confirmation being carried as far as the House of Lords (see *Ex parte Westburn Sugar Refineries Ltd.*[21]). In those proceedings the propriety of the 1949 capitalisation was not in issue, but it does not seem to have struck anybody that there might have been anything wrong about it. Later the question whether the capitalisation attracted profits tax as being a capitalisation of a "distributable sum" within section 31 of the Finance Act, 1951, came before the Court of Session. The Lord President (Lord Clyde) (who, incidentally, had been one of the counsel engaged in the proceedings before the House of Lords in 1951), after holding that the capitalisation having been of an increment in the value of fixed assets, the subject-matter could not have been utilised in making a distribution within the meaning of the section, went on to say,[22] as a separate ground for his decision, that it would have been illegal for the company to have distributed the amount in question. After referring to a passage in Palmer's Company Law (20th ed.) at p. 645, which, for myself, I read as saying that by law an unrealised profit resulting merely from revaluation of fixed assets can be treated as a profit for dividend purposes, but that this is not normally to be regarded as a wise commercial practice, but which the Lord President seems to have interpreted otherwise, he said[23]: "I am "of opinion that these observations are sound, and that particu- "larly in the case of an appreciation, which is neither realised "nor immediately realisable, it would be illegal to distribute the "surplus." Lord Sorn said[24]: "In my view, capital profits are "not distributable until they are realised."

[20] [1960] T.R. 105.

[21] [1951] A.C. 625; [1951] 1 T.L.R. 728; [1951] 1 All E.R. 881, H.L.

[22] [1960] T.R. 105, 107.

[23] Ibid.

[24] Ibid. 109.

Founding himself on these observations Mr. Sykes contends that a reserve fund resulting from a revaluation of fixed assets could not legitimately be distributed by way of dividend. Consequently, he says, it cannot legitimately be capitalised. It is to be observed that article 140 provides that the capitalised sum is to be "appropriated as capital to and amongst the shareholders "who would have been entitled thereto if the same had been "distributed by way of dividend in the shares and proportions in "which they would have been so entitled." These words are common form in articles of this kind, and I think that it is correct to say that a capitalisation of this sort is in essence the declaration of a dividend combined with the application of that dividend on behalf of the shareholders entitled to participate in it in paying up shares to be allotted and issued to them in satisfaction of their rights of participation: see *Hill* v. *Permanent Trustee Co. of New South Wales.*[25] As a general rule only that which could be distributed in dividends can be capitalised. Where the rights of various classes of shares to participate in profits differ from their rights of participating in a winding up, any other view or arrangement would lead to anomalous results. The exception to this general rule is that a sum standing to the credit of a share premium account or of a capital redemption reserve fund may not be distributed, except as provided by section 56 (1) or section 58 (1) of the Companies Act, 1948, but may be capitalised under section 56 (2) or section 58 (5). The Court of Appeal has held that, if a share premium account is distributed with the sanction of the court, the distribution must be treated as though it were not a distribution of profit but a repayment of paid-up capital: *In re Duff's Settlements.*[26] A share premium account and a capital redemption reserve fund are, however, statutory creatures and these statutory provisions governing their distribution are of a special and artificial character. This exception to the general rule which I have formulated accordingly does not, in my judgment, in any way discredit the rule.

If, therefore, the Court of Session was right in holding that a reserve fund constituted as a result of a revaluation of unrealised fixed assets could not legally be distributed, it would seem to me to follow that it likewise could not legally be capitalised. It has, I think, long been the generally accepted view of the law in this country (though not established by judicial authority) that, if the surplus on capital account results from a valuation made in good faith by competent valuers, and is not likely to be liable to short-term fluctuations, it may properly be capitalised: see *Inland Revenue Commissioners* v. *Thornton, Kelley & Co. Ltd.*[27] Indeed, as I have pointed out, this was actually done by Westburn Sugar Refineries Ltd. For myself, I can see no reason why,

[25] [1930] A.C. 720, P.C.
[26] [1951] Ch. 923; [1951] 2 T.L.R. 474; [1951] 2 All E.R. 534, C.A.
[27] [1957] 1 W.L.R. 482; [1957] 1 All E.R. 650.

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if the valuation is not open to criticism, this should not be so, or even why, in any case in which the regulations of the company permit the distribution by way of dividend of profit on capital account, a surplus so ascertained should not be distributed in that manner. After all, every profit and loss account of a trading concern which opens and closes with a stock figure necessarily embodies an element of estimate. The difference between ascertaining trading profits by, amongst other things, estimating the value of the stock in hand at the beginning and end of the accounting period, and ascertaining capital profits by comparing an estimated value of the assets with their book value, appears to me to be a difference of degree but not of principle. Moreover, if a company has fluid assets available for payment of a dividend, I can see nothing wrong in its using those assets for payment of a dividend, and at the same time, as a matter of account, treating that dividend as paid out of a capital surplus resulting from an appreciation in value of unrealised fixed assets. The proper balance of the company's balance-sheet would not be disturbed by such a course of action. The company would be left with assets of sufficient value to meet the commitments shown on the liabilities side of its balance-sheet, including paid-up share capital. A company is not required by law to keep any part of its assets in any particular form. I do not say that in many cases such a course of action would be a wise commercial practice, but for myself I see no ground for saying that it is illegal.

The Lord President and Lord Sorn both referred to dicta in various English cases, but with the exception of *Bolton* v. *Natal Land and Colonisation Co.*,[28] the decision in which has no bearing on the question I am considering, these cases all related to realised capital appreciation, not to surpluses founded on estimates of values.

I should naturally wish to pay the greatest respect to the decision of the Court of Session in the *Westburn Sugar* case,[29] notwithstanding that it is not binding on me, but for the reasons indicated above I feel constrained to differ from it.

For these reasons I reach the conclusion that, unless it conflicts with the rights of the preference shareholders, article 140 authorises capitalisation of a reserve resulting from the revaluation of capital assets.

As, for the same reasons, I have also reached the conclusion that the company could legitimately distribute a capital surplus of this nature by way of dividend, that is to say, exclusively amongst the ordinary shareholders at any time when the preference dividend has been paid in full, a capitalisation exclusively for the benefit of the ordinary shares in similar circumstances could not, in my opinion, encroach upon the rights of the preference shareholders.

Accordingly, I shall declare that the company has power

[28] [1892] Ch. 124; 8 T.L.R. 148. [29] [1960] T.R. 105.

pursuant to article 140 of its present articles of association to capitalise under all the heads set out in question 4 of the originating summons.

There remains only the question relating to voting rights. Neither counsel before me really sought to argue that question 5 of the originating summons ought not to be answered in the sense of paragraph (a). The increase of the ordinary shareholders' voting rights resulting from the subdivision of their shares did not alter the rights attached to the preference shares, although it decreased their effectiveness. The increase of the preference shareholders' voting rights effected in 1911 did not deprive the preference shareholders of any existing right: it conferred additional rights on them. Consequently, in my judgment, it did not vary or abrogate any right conferred on the preference shareholders by the memorandum of association: it reinforced such rights. Similarly, the increase in the ordinary shareholders' voting rights which was effected at the same time did not deprive them of any rights but conferred additional rights. In these circumstances I will make a declaration in the terms of paragraph (a) of question 5.

Declarations accordingly.
No order as to costs.

Solicitors: *Stephenson, Harwood & Tatham.*

M. G. T.

[HOUSE OF LORDS.]

RIVERSTONE MEAT CO. PTY. LTD. . . APPELLANTS;
AND
LANCASHIRE SHIPPING CO. LTD. . . RESPONDENTS.

H. L. (E.)*
1960 *Dec.* 5, 6, 7, 8, 12, 13.
1961 *Feb.* 7.

Shipping—Bill of lading—Seaworthiness—Hague Rules—Damage to cargo—Defect in storm valves—Negligence of independent contractor's fitter—Lack of due diligence—(Australian) Sea Carriage of Goods Act, 1924 (*No.* 22 *of* 1924), *s.* 5—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 1, *art. IV, r.* 1.

Negligence—Safe system of work—Plant and equipment—Latent defect—Principle governing employer's liability.

Vicarious Liability—Delegate or independent contractor—Specialised work—Principal's liability for want of due care.

Judicial Precedent—Foreign decision—Commercial law—Desirability for uniformity—Decisions on meaning of Hague Rules.

Judicial Precedent—Decision long undisturbed—Subsequent legislation—Construction of statute—Words of foreign statute used—Hague Rules.

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* *Present*: VISCOUNT SIMONDS, LORD MERRIMAN, LORD RADCLIFFE, LORD KEITH OF AVONHOLM and LORD HODSON.

H. L. (E.)
1961
Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.

Statute — Construction — International convention — Statute based on —Previous foreign decisions on meaning of words used.
Ships' Names—Muncaster Castle.

By article IV, rule 1 of the Hague Rules (given legislative force by the Schedules to the Carriage of Goods by Sea Act, 1924, and section 5 of the Sea Carriage of Goods Act, 1924, of Australia): "Neither the carrier nor the ship shall be liable for loss or damage "arising or resulting from unseaworthiness unless caused by want "of due diligence on the part of the carrier to make the ship sea-"worthy . . . and to make the holds . . . and all other parts of the "ship in which goods are carried fit and safe for their reception, "carriage and preservation . . . Whenever loss or damage has "resulted from unseaworthiness, the burden of proving the exercise "of due diligence shall be on the carrier or other person claiming "exemption under this section."

Several cases of tinned food were shipped on the respondents' vessel at Sydney for carriage to London under bills of lading subject to the Sea Carriage of Goods Act, 1924, of Australia, the appellants being parties to the bill. When the goods were discharged most of the cases were found damaged by seawater which had entered the hold through defective inspection covers to storm valves. Immediately before her outward voyage to Australia the ship was passed through No. 2 special survey and her annual load-line survey. For this purpose the marine superintendent employed by the respondents' agents instructed a reputable firm of ship repairers to open up all the storm valves and inspection covers. After the Lloyd's surveyor's inspection a fitter employed by the repairers closed each inspection cover and secured it with nuts. Once the nuts had been hardened up, no visual inspection could detect any unevenness in the position of the cover. No seawater entered the hold during the outward voyage. The presence of the water found in the hold on the unloading was due to the negligence of the fitter, who failed to secure the nuts sufficiently, with the result that they were loosened by the working of the ship in rough weather. There was no negligence on the part of anyone but the fitter:—

Held, that the respondents, the carriers, had not discharged the burden of proving that they had exercised due diligence to make the ship seaworthy, since a shipowner is not safeguarded by the fact that the negligence in repairing the ship is that of an independent contractor, and the obligation imposed on the shipowner in the work of repair is one of due diligence by whosoever it may be done, even when the work delegated to the independent contractor calls for technical or special knowledge or experience, and the negligence was not apparent to the shipowner.

When the shipowner puts his ship into the hands of third parties for repair, the same considerations do not apply as in the case where a ship is built for him or newly comes into his hands by purchase (post, pp. 279, 301, 304).

Dicta of Lord Wright in *W. Angliss & Co. Australia Pty. Ltd.* v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456, 462; 43 T.L.R. 675, and in *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628, H.L. explained.

Davie v. *New Merton Board Mills Ltd.* [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L. distinguished.

Decision of the Court of Appeal [1960] 1 Q.B. 536; [1960] 2 W.L.R. 86; [1960] 1 All E.R. 193, C.A. reversed.

Appeal from the Court of Appeal (Morris, Ormerod and Willmer L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 26, 1959, in favour of the respondents, Lancashire Shipping Co. Ltd., the defendants in the action, affirming an order of McNair J. dated July 31, 1958, in favour of the respondents. The trial of the action before McNair J. lasted seven days and the hearing of the appeal eleven days.

The short issue which arose on this appeal was whether, on the facts found by the trial judge, which were unchallenged in the Court of Appeal, the respondents exercised due diligence to make seaworthy their vessel the m.v. *Muncaster Castle* before the cargo of the appellants, Riverstone Meat Co. Pty. Ltd. the plaintiffs in the action, was loaded therein at Sydney in May, 1953, in accordance with their obligation to that effect contained in Article III, r. 1, of the rules, commonly known as the Hague Rules, scheduled to the Australian Sea Carriage of Goods Act, 1924.

The facts are fully stated in the opinion of Viscount Simonds.

A. W. Roskill Q.C. and *J. F. Willmer* for the appellant company.

A. A. Mocatta Q.C. and *M. Kerr* for the respondent company.

The following authorities, besides those referred to in their lordships' opinions, were cited in argument: *Bethlehem Shipbuilding Corporation Ltd.* v. *Joseph Gutradt & Co.*[1]; *London Rangoon Trading Co. Ltd.* v. *Ellerman Lines Ltd.*[2]; *Ellerman Lines Ltd.* v. *Smith's Dock Co.*[3]; *C. H. Smith & Sons Fellmongery Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.*[4]; *S. M. Bulley & Son,* v. *British & African Steam Navigation Co. Ltd.*[5]; *Waddle* v. *Wallsend Shipping Co. Ltd.*[6]; *Minister of Materials* v. *Wold Steamship Co. Ltd.*[7]; *The Abrazia*[8]; *International Packers London Ltd.* v. *Ocean Steamship Co. Ltd.*[9]; *The Assunzione*[10]; *The Waterville Victory*[11]; *Hole* v. *Sittingbourne & Sheerness Railway Co.*[12]; *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker A/B*[13]; *Anglo-African Co. Ltd.* v. *Lamzed*[14]; *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[15]; *McFadden* v. *Blue Star Line*[16]; *Mersey Docks and Harbour Board Trustees* v. *Gibbs*[17] and *Cassidy* v. *Ministry of Health.*[18]

Their Lordships took time for consideration.

1 (1926) 10 Fed. 769.
2 (1923) T.L.R. 284; (1923) 14 Ll.L.R. 497.
3 (1924) 18 Ll.L.R. 172.
4 (1933) 60 Ll.L.R. 419.
5 (1925) 22 Ll.L.R. 162.
6 [1952] 2 Lloyd's Rep. 105.
7 [1952] 1 Lloyd's Rep. 485.
8 (1904) 127 Fed.Rep. 495.
9 [1955] 2 Lloyd's Rep. 218.
10 [1953] 2 Lloyd's Rep. 716, C.A.
11 [1951] A.M.C. 320.
12 (1861) 6 H. & N. 488.
13 [1949] A.C. 196; 65 T.L.R. 217; [1949] 1 All E.R. 1, H.L.
14 (1866) L.R. 1 C.P. 266.
15 [1931] A.C. 726; 47 T.L.R. 542, H.L.
16 [1905] 1 K.B. 697; 21 T.L.R. 345.
17 (1864) L.R. 1 H.L. 93.
18 [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574, C.A.

H. L. (E.)

1961

Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.

Feb. 7, 1961. Viscount Simonds. My Lords, on May 7, 1953, 150 cases of canned ox tongue, the property of the appellants, Riverstone Meat Co. Pty. Ltd., were shipped in good order and condition on board the *Muncaster Castle* at Sydney under a bill of lading of that date for carriage to London. It was provided by the bill of lading that it should have effect subject to the rules (commonly known as the Hague Rules) which are contained in the Schedule to the Australian Sea Carriage of Goods Act, 1924, and that the carriers, the respondents, should be entitled to all the privileges, rights and immunities contained in that Act and in the Schedule thereto.

On July 16, 1953, four days after the beginning of the discharge in London, seawater was discovered in the hold in which the goods were stowed and 113 of the appellants' cases were found to be damaged thereby. It was admitted that in a certain respect, which I shall state in some detail, the ship was unseaworthy at the beginning of the voyage. I find it necessary to go into detail because it is upon the particular facts of the case that McNair J. and the Court of Appeal have relied and that the respondents rely in supporting their decision upon this appeal. In order that these facts may be presented in as favourable a light as possible to the respondents, I find it convenient to adopt the statement of them in the respondent's formal case, which I believe to be accurate. It is as follows:

"(i) The *Muncaster Castle* was built in the United States "during the 1939–1945 war and was acquired by the respondents "in 1949. She remained in the respondents' service until 1955. "Throughout this period she was well maintained and classed "with the British Corporation (which was united with Lloyd's "Register in 1949) in the highest class for vessels not built under "the supervision of this Classification Society.

"(ii) In February, 1953, immediately before her outward "voyage to Australia where she loaded the goods in question in "this action, she passed her No. 2 special survey by Lloyd's "Register surveyors and was reported to be 'so far as seen in "'good condition and eligible to remain as at present classed in "'the Register Book.' On the same occasion she was passed "through her annual load line survey pursuant to the Load Line "Rules, 1941, made under the Merchant Shipping (Safety and "Load Line Conventions) Act, 1932, and a report to this effect "was issued dated February 3, 1953.

"(iii) The normal practice for classed ships (see rules 60 and "64 of the 'Instructions to Surveyors' issued by the Ministry of "Transport and Civil Aviation in connection with load line "surveys) is to carry out the load line survey while the ship is "in a drydock and at the same time as a periodical classification "survey.

"(iv) For the purposes of the above special survey and annual "load line survey the vessel was placed in the hands of Alexander

"Stephen & Sons Ltd. of Glasgow, who are a ship-repairing "concern of the highest repute.

"(v) Under the Load Line Rules, 1941, provision is made for "the examination at the annual survey of the discharges leading "through the ship's side from spaces below the freeboard deck. "In practice, Lloyd's surveyors (acting as assigning authority on "behalf of the Ministry of Transport) are satisfied if 25 per cent. "of the sea outlets are opened up for inspection, but it was the "respondents' practice to insist that they should all be opened "up. In the case of the load line survey in the drydock in the "yard of Alexander Stephen & Son in February, 1953, 31 storm "valves in the vessel were accordingly opened up for inspection, "including the two storm valves in question in No. 5 hold. "This was done upon the instructions of one Atkinson, an "experienced and competent marine superintendent employed by "Moller Line U.K. Ltd., the managers of the vessel, who "attended the Glasgow surveys on behalf of the respondents. "The opening up of the storm valves necessarily involved opening "up the inspection covers.

"(vi) After the storm valves had been inspected by the sur-"veyor to Lloyd's Register it was the duty of a fitter employed "by Alexander Stephens to replace and close the inspection "cover. This is done by placing the inspection cover over the "studs in the top of the inspection chamber, placing the nuts in "position and tightening up the nuts. The nuts should be "tightened gradually at opposite angles so as to ensure that the "pressure all round is even. If the nuts are tightened up in the "wrong order, i.e., by tightening up all the nuts on one side "before those on the other side, the pressure will be uneven and "it will be impossible to make a secure joint, and this will also "be so if the nuts are not fully tightened. Once the nuts have "been tightened up, no visual inspection or tapping with a "spanner will reveal improper or insufficient tightening up.

"(vii) According to ordinary and prudent practice the task of "tightening up the nuts on the inspection cover is left to a "fitter and is well within the competence of a skilled fitter and "is not supervised by Lloyd's surveyors or by the owners' super-"intendent.

"(viii) The vessel carried cargo on the outward voyage to "Australia in No. 5 hold, but none of it was damaged by sea-"water. After the discharge at Sydney of the outward cargo "stowed in the after half of No. 5 hold the hold was inspected "by the vessel's chief officer. There was no sign of leakage of "seawater. The appellants' cargo was then loaded in the after "part of No. 5 lower hold. The vessel then proceeded to Bris-"bane where the outward cargo in the forward part of the said "hold was discharged, as a result of which the places where the "storm valves were situated became visible. The chief officer "again inspected the said hold and there were no signs of sea-"water staining or rust. No seawater in fact entered No. 5 hold

"either through the storm valves or at all on the outward voyage "to Australia.

"(ix) On the voyage from Australia to the United Kingdom "there was some heavy weather which caused the vessel to roll "and pitch, which was sufficient to loosen the nuts of the inspec- "tion covers in No. 5 hold if they had been improperly tightened "up in Glasgow and there had been some loosening in the working "of the ship on the outward voyage.

"(x) The cause of the admission of seawater into No. 5 hold "and of the damage to the cargo in question was that a fitter "employed by Alexander Stephen in Glasgow 'negligently failed "'to secure the nuts on the inspection cover evenly or sufficiently, "'with the result that the working of the ship on the outward "'voyage was sufficient to produce the condition, by the time "'the plaintiffs' cargo was loaded at Sydney, that the nuts had "'been loosened to such an extent that with the vessel rolling "'and waves striking the sides of the ship, seawater was forced "'through the interstices below the inspection covers.'

"(xi) There was no negligence on the part of anyone (other "than the fitter) in failing to discover that the nuts had not been "evenly or sufficiently tightened, in particular, the failure to "discover this was not due to any negligence on the part of "Lloyd's surveyor, the superintendent acting on behalf of the "respondents, or any of the ship's officers."

Upon these facts the appellants brought an action in the Queen's Bench Division against the respondents claiming that they were liable for the damage to their goods. The respondents pleaded that they were protected from liability by the Act and rules to which I have referred and their plea was upheld by the learned trial judge and by the Court of Appeal. They relied specifically on section 5 of the Act and article III, rule 1 and article IV, rule 1 of the rules which are as follows:

Section 5. "There shall not be implied in any contract for the "carriage of goods by sea to which this Act applies any absolute "undertaking by the carrier of the goods to provide a seaworthy "ship."

Article III, rule 1. "The carrier shall be bound before and at "the beginning of the voyage to exercise due diligence to: "(*a*) make the ship seaworthy . . . (*c*) make the holds, . . . "and all other parts . . . in which goods are carried fit and safe "for their reception, carriage and preservation."

Article IV, rule 1. "Neither the carrier nor the ship shall be "liable for loss or damage arising or resulting from unsea- "worthiness unless caused by want of due diligence on the part of "the carrier to make the ship seaworthy . . . and to make the "holds . . . and all other parts of the ship in which goods are "carried, fit and safe for their reception, carriage and preserva- "tion in accordance with the provisions of paragraph 1 of article "III. Whenever loss or damage has resulted from unseaworthi- "ness, the burden of proving the exercise of due diligence shall

"be on the carrier or other person claiming exemption under "this section."

The question, then, is whether the respondents discharged this burden and it is conceded that they did unless they are to be held responsible for the negligence of the fitter employed by Alexander Stephen & Sons Ltd. This is the single issue in the case. It was decided in favour of the respondents by McNair J. and the Court of Appeal. Its solution depends on the meaning of the words occurring in article III, rule 1, and repeated in article IV, rule 1, "due diligence to make the ship seaworthy." To ascertain their meaning it is, in my opinion, necessary to pay particular regard to their history, origin and context, and, as I think the courts below have not paid sufficient regard to this aspect of the case, I must deal with it at some length. The Hague Rules, as is well known, were the result of the Conferences on Maritime Law held at Brussels in 1922 and 1923. Their aim was broadly to standardise within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum for the responsibilities and liabilities to be undertaken by the latter. To guide them the framers of the rules had amongst other precedents the American Harter Act of 1893, the Australian Sea Carriage of Goods Act, 1904, the Canadian Water Carriage of Goods Act, 1910, and, though they had no British Act as a model, they had decisions of the English courts in which the language of the Harter Act had fallen to be construed by virtue of its provisions being embodied in bills of lading. In all these Acts the relevant words "exercise due diligence to make the ship seaworthy" are to be found. It was in these circumstances that these words were adopted in the Hague Rules.

My Lords, the question how far their meaning should be governed by previous decisions in the courts of America or this country has been more than once discussed in this House. Notwithstanding some apparent qualification of the proposition which is to be found in the speeches of Lords Atkin and Macmillan in *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*,[1] I think I am at liberty to adopt emphatically what was said by Lords Sumner and Hailsham in *Gosse Millerd Ltd.* v. *Canadian Government Merchant Marine Ltd.*[2] The former of them said[3]: "By for-"bearing to define 'management of the ship' . . . the legislature "has, in my opinion, shown a clear intention to continue and "enforce the old clause as it was previously understood and "regularly construed by the courts": the latter said[4]: "I am "unable to find any reason for supposing that the words as used "by the legislature in the Act of 1924 have any different meaning "to that which has been judicially assigned to them when used

[1] [1932] A.C. 328; 48 T.L.R. 127, H.L.
[2] [1929] A.C. 223; 45 T.L.R. 63, H.L.
[3] [1929] A.C. 223, 237.
[4] Ibid. 230.

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"in contracts for the carriage of goods by sea before that date: "and I think that the decisions which have already been given "are sufficient to determine the meaning to be put upon them in "the statute now under discussion." Mutatis mutandis these statements apply to the words we have to construe and that is why I think, with great respect to the Court of Appeal and to Willmer L.J. in particular, that it is a wrong approach to our problem to say[5] that "any examination of the [Hague Rules] "must . . . begin with *Angliss'* case."[6] To that case I must refer in detail later. I would only now observe that, whatever it decided, it is only a link—an important one, no doubt—in the chain of authority which starts at an earlier date.

First I would refer to *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[7] a case often referred to in the courts of this country and of the United States and never, so far as I am aware, dissented from. In that case the ship was unseaworthy owing to the negligence of the ship's carpenter. Into the bill of lading the words of the Harter Act were introduced, "which," said Lord Esher M.R.[8] "I decline to construe as an Act, but which we must "construe simply as words occurring in this bill of lading." Then he proceeds: "In section 3 of the Act so incorporated the excep-"tion which is to relieve the shipowner is made to depend on the "condition that the owner of the ship . . . shall exercise due dili-"gence to make the vessel in all respects seaworthy. If he does "not do that the exceptions in his favour do not take effect. "It is contended that the meaning of the clause is that if the "owner personally did all that he could do to make the ship sea-"worthy when she left America, then, although she was not "seaworthy, by the fault of some agent or servant, the owner "is not liable." And the learned Master of the Rolls, after rejecting this contention, went on: "It is obvious to my mind . . . "that the words of section 3 which limit the owner's liability if "he shall exercise due diligence to make the ship in all respects "seaworthy, must mean that it is to be done by the owner by "himself or the agents whom he employs to see to the seaworthi-"ness of the ship before she starts out of that port." So also Kay L.J.[9]: "It seems to me to be plain on the face of this con-"tract that what was intended was that the owner should, if not "with his own eyes, at any rate by the eyes of proper competent "agents, ensure that the ship was in a seaworthy condition "before she left port, and that it is not enough to say that he "appointed a proper and competent agent." I have cited from these judgments at some length because they determine decisively the meaning attached by the courts of this country to the relevant words. It is true that the negligence was that of a servant of

[5] [1960] 1 Q.B. 536, 583; [1960] 2 W.L.R. 86; [1960] 1 All E.R. 193, C.A.

[6] [1927] 2 K.B. 456; 43 T.L.R. 675.

[7] [1895] 2 Q.B. 408; 11 T.L.R. 501, C.A.

[8] [1895] 2 Q.B. 408, 413.

[9] Ibid. 416.

the shipowner, but the reasoning and the language of the judgments embrace any agent employed by him. These are wide words.

I turn now to a case decided two years later in the District Court, S.D. New York, *The Colima*,[10] and I quote at some length from the judgment of Brown J. In that case the vessel was unseaworthy owing to negligent loading by the stevedore which was done under the supervision and direction of the master and first officer of the ship. The learned judge said[11]: "This section [i.e., section 3 of the Harter Act] has been in "several cases adjudged to require due diligence, not merely in "the personal acts of the owner, but also on the part of the "agents he may employ, or to whom he may have committed "the work of fitting the vessel for sea. The Act requires in "other words, due diligence in the work itself," and after referring to American cases which amply bear out his reference, The Mary *L. Peters*,[12] *The Flamborough*,[13] *The Alvena*,[14] and the case of *The Rossmore*,[15] which I have already cited, he continues[16]: "On any other construction, owners would escape all responsi-"bility for the seaworthiness of their ships by merely employing "agents of good repute, whether any diligence and care to make "their vessels seaworthy were in fact exercised or not. On "reason and sound policy no such intent in the statute can be "supposed. The context and the pre-existing law indicate that "the intent of the act is to relieve the shipowner from his pre-"vious warranty of absolute seaworthiness in fact, and to substi-"tute for that warranty a warranty only of diligence, to make "the ship seaworthy. This difference is of great importance, as it "avoids responsibility for latent and undiscoverable defects. But "the warranty of diligence remains: and this requires the applica-"tion of the usual rule, that the acts and negligences of the agent "are deemed those of the principal." He had already made it clear[16] that "agents" means to him persons whom the shipowner "may employ, or to whom he may have committed the "work of fitting the vessel for sea." My Lords, I have without reluctance ventured on this long quotation because I can find no words more apt to express my own view as to the meaning of words taken from the Harter Act and embodied in the Hague Rules. To one thing in particular I call attention. The Harter Act did not in terms, as did the Australian Act by its fifth section, relieve the shipowners of the absolute warranty of the seaworthiness of the ship on sailing. But, in my opinion, this cannot affect the meaning of the relevant words. Here I may quote words of MacKinnon L.J. in *Smith Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[17]: "The limitation and

[10] (1897) 82 Fed.Rep. 665.
[11] Ibid. 678.
[12] (1895) 68 Fed.Rep. 919.
[13] (1895) 69 Fed.Rep. 470.
[14] (1896) 74 Fed. Rep. 252; affirmed (1897) 79 Fed.Rep. 973.
[15] [1895] 2 Q.B. 408.
[16] 82 Fed.Rep. 678.
[17] (1939) 55 T.L.R. 766, 767; [1939] 2 All E.R. 855, C.A.

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"qualification of the implied warranty of seaworthiness by cutting "down the duty of the shipowner to the obligation to use 'due "'diligence . . . to make the ship seaworthy' is a limitation or "qualification more apparent than real, because the exercise of "due diligence involves not merely that the shipowner personally "shall exercise due diligence, but that all his servants and agents "shall exercise due diligence. That is pointed out in a note in "Scrutton on Charterparties (14th ed., p. 110) which says that "this variation will not be 'of much practical value in face of the "dilemma that must constantly arise on the facts. In most cases "'if the vessel is unseaworthy due diligence cannot have been used "'by the owner, his servants, or agents; if due diligence has been "'used the vessel in fact will be seaworthy. The circumstances "'in which the dilemma does not arise (e.g., a defect causing "'unseaworthiness, but of so latent a nature that due diligence "'could not have discovered it) are not likely to occur often.'" In the same case on appeal to this House, Lord Wright said [18]: "The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of "due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does "not protect the shipowner. In effect such an exception can "only excuse against latent defects. The overloading was the "result of overt acts." See also *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[19] *per* Lord Wright. I have found no sufficient reason for the omission or alteration of the passage in Scrutton on Charterparties, which was approved by MacKinnon L.J., in later editions of that work.

My Lords, I have gone too far ahead in order to deal with a particular point. But before I come to the *Angliss* case,[20] upon which the respondents rely, I would observe that the law as expounded in *The Colima*[21] has been consistently followed from that day, more than 60 years ago, to this in the United States, and I would remind your Lordships of what Atkin L.J. said in *R. F. Brown & Co. Ltd.* v. *Harrison; Hourani* v. *Same*[22]: "Those are words which were found, and no doubt are still found, "in old bill of lading and charterparty exceptions, and they "are words that are found in legislation which preceded this Act "and upon which this Act was founded, and especially, it is to be "noted, are to be found in the Harter Act, which was the forerunner of all Acts of this kind, in relation to the carriage of goods "by sea. I think it is very important in commercial interests that "there should be uniformity of construction adopted by the "courts in dealing with words in statutes dealing with the same "subject-matter, and it is a matter of great satisfaction to me

[18] [1940] A.C. 997, 1001; 56 T.L.R. 893; [1940] 3 All E.R. 405, H.L.
[19] [1934] A.C. 538, 547; 51 T.L.R. 5, P.C.
[20] [1927] 2 K.B. 456.
[21] 82 Fed.Rep. 665.
[22] (1927) 137 L.T. 549, 556; 43 T.L.R. 633, C.A.

"to find that the decisions of these courts seem to correspond "with the decisions given by the courts of the highest authority "in the United States." It would, in my opinion, be a grave departure from the prevailing harmony if, upon, as I think, a false view of the decision in *Angliss*,[23] currency is given to the interpretation of the rules which commended itself to the Court of Appeal in the present case.

I come, then, to *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*,[23] which is said to be the first case in which the Hague Rules were discussed in an English court since the passing of the Australian Sea Carriage of Goods Act, 1924, which, as I should have mentioned, is in the same terms as the English Carriage of Goods by Sea Act of the same year. It is important to note what was the point of decision. It was whether, when the carrier has contracted for the building of a ship, he is liable for lack of due diligence on the part of the shipbuilders or their workmen if he has engaged builders of repute and has adopted all reasonable precautions, such as requiring the builders to satisfy one of the recognised classification societies and engaged skilled naval architects who advise him and skilled inspectors who supervise the work with due diligence. The learned judge, Wright J., as he then was, held that in such circumstances the carrier was not liable. I see no reason to question the correctness of this decision, and need say no more about it, for it does not in the present appeal fall to be reviewed. Of greater significance is that, except in a single passage where the learned judge was dealing with the employment of an inspector to supervise the work, no mention is made of the employment of agents to repair a ship. That passage is as follows[24]: "Again, the need of repairing may cast "on the carrier a special duty to see, as far as reasonably "possible, by special advisers for whom he is personally respon-"sible, that the repairs adequately make good the defects."

It is not possible to extract from this somewhat speculative dictum that the learned judge thought that the carrier would not in any case, with or without inspection, be liable for negligence on the part of those to whom (in the words of Brown J. in *The Colima*[25]) "he committed the work of fitting the vessel for sea." It was not a matter for his decision and he did not, in my opinion, purport to decide it. But it is upon this authority that the whole fabric of the respondents' case appears to rest. It is a reasonable construction of the words, which once again I quote, "to exercise due diligence to make the ship seaworthy" to say that in the case of a ship built for the carrier, or newly come into his hands by purchase, the carrier fulfils his obligation if he takes the precautions which the learned judge suggests. Until the ship is his he can have no further responsibility. I am

[23] [1927] 2 K.B. 456.
[24] Ibid. 462.
[25] 82 Fed.Rep. 665, 678.

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aware of no case either in the United States under the Harter Act or this country when its words fell to be construed in which the contrary has been suggested. But it is far otherwise where the shipowner puts his ship in the hands of third parties for repair. To such a case the words that I have cited from *The Rossmore*[26] and *The Colima*[27] are precisely applicable. An attempt was made to draw a distinction between negligence shown by the shipowner's servants, his agents and independent contractors. But this could but fail. For no sensible reason could be found for such a distinction. To take a relevant example: repair work might equally be entrusted by a shipowner to his own servants or to an independent contractor. To fasten him with liability for negligence in the one case but not in the other would wholly defeat the purpose of the Act. The holder of the bill of lading is only secure if (to use once more the words of Brown J.) due diligence is shown in the work. That the shipowner is not safeguarded by the fact that the negligence is that of an independent contractor is endorsed by *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[28] where Lord Roche (in delivering the judgment of the Judicial Committee of the Privy Council, consisting of Lord Atkin, Lord Thankerton and himself) held that a carrier was liable for the failure of a compass adjuster to exercise due diligence. As the Court of Appeal recognised in its judgment in the case under appeal, a compass adjuster can fairly be regarded as belonging to the category of independent contractor.

I will not multiply examples, but will cite one more case which introduced yet another category of persons for whose negligence the shipowner must be held liable. In *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*,[29] the same words occurring in the Canadian Water Carriage of Goods Act, 1910, had to be construed, and Lord Wright said: "The obligation to make a "ship seaworthy is personal to the owners, whether or not they "entrust the performance of that obligation to experts, servants, "or agents." It would be strange if the shipowner were liable for the negligence of an expert who is called in just because work is beyond the competence of the owner, but was not liable for that of the independent contractor. It may, indeed, be asked whether the expert is not typically an independent contractor.

Two Canadian cases may also be mentioned in the interest of uniformity. In *Australian Newsprint Mills Ltd.* v. *Canadian Union Line Ltd.*[30] it was said by Coady J. in the Supreme Court of British Columbia: "It seems to me that the due diligence "imposed by the statute and as interpreted by the authorities is "not made out by evidence that this duty someone else was "engaged to perform on the behalf of the defendants—someone on

[26] [1895] 2 Q.B. 408.
[27] 82 Fed.Rep. 665.
[28] (1938) 58 Ll.L.R. 33, P.C.
[29] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 658, H.L.
[30] [1952] 1 D.L.R. 850, 854.

"whom the defendants relied and in whom the defendants had "confidence. The duty of the defendants was to exercise due "diligence and this applies to their servants and agents and that "duty is absolute, except as to latent defects not discernible "by the exercise of due diligence." The learned judge supports this proposition by reference to numerous authorities, many of which I have cited. The other case is *Canadian Transport Co. Ltd.* v. *Hunt, Leuchars & Hepburn Ltd., The City of Alberni*,[31] which contrasts the liability of the shipowner under the Water Carriage of Goods Act and his right to limit his liability under the Canada Shipping Act, 1934.

The plea that the shipowner is not liable for the negligence of an independent contractor failing as a general proposition, as it was bound to fail, it was then urged that it was a question of fact in each case, and that upon the facts of the present case the respondents were not liable for the negligence of the fitter employed by the ship repairers. It was for this reason that I stated the facts fully at the beginning of this opinion. Having done so, I must say at once that I find it impossible to distinguish between one independent contractor and another, or between one kind of repair and another. I have no love for the argumentative question "Where is the line to be drawn?" but it would be an impossible task for the court to examine the facts of each case and determine whether the negligence of the independent contractor should be imputed to the shipowner. I do not know what criterion or criteria should be used nor were any suggested. Take the case of repair. Is there to be one result if the necessary repair is slight, another if it is extensive? Is it relevant that the shipowner might have done the work by his own servants but preferred to have it done by a reputable shipyard? These and many other questions that will occur to your Lordships show that no other solution is possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done.

In the course of the argument some reliance was placed on the fact that the work of repair, or some of it, was inspected by a competent and experienced surveyor. In fact, the negligent work of the fitter was not supervised or inspected by anyone. But this was excused on the ground that it was work that was in practice left to the fitter—a distinction which, in my opinion, illustrates how impossible it is to draw the necessary line. But, supposing that the surveyor had inspected all that he should have inspected, what follows? If there has been no negligent work, there is nothing for him to discover. If there has been and he does not discover it, what does it avail the shipowner that a negligent inspection follows negligent workmanship? I find nothing to help the shipowner in this plea.

I come now, my Lords, to a matter which I should dispose of

[31] [1947] 2 D.L.R. 647.

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very shortly but for the weight attached to it in the Court of Appeal. I refer to the reference to the English Carriage of Goods by Sea Act, 1924, by Lord Wright in his speech in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[32] and the comments made upon that reference by some of the noble Lords who took part in *Davie* v. *New Merton Board Mills Ltd.*[33] In the earlier of these cases the first point decided was (I quote from the headnote to the report) that "the provision of a safe system of working in a mine "is an obligation of the owner, who, if he appoints an agent to "perform it, remains vicariously responsible for the agent's "negligence." Lord Wright concurred in this decision and in the course of his speech[34] referred to the Carriage of Goods by Sea Act as an example of the creation of an absolute obligation which is not discharged by the shipowner taking reasonable care to appoint a competent expert. It was, as I have said before and as Lord Wright himself described it, an "analogy or instance." The obligation imposed by the Act is not, as he said it was, to "exercise due diligence . . . to *provide* a seaworthy ship" but "*to make the ship seaworthy.*" His own earlier decision in *Angliss*[35] had been that a shipowner, who had a ship built for him and could presumably be said to "provide" the ship, was not, due precautions being taken, liable for the negligence of the shipbuilders' workmen. It was natural that his observations in the *Wilsons case*[36] should be pressed upon the House in *Davie's* case,[37] and should be the subject of comment in the speeches of their Lordships, but in neither case was the construction of the Hague Rules in any degree relevant to the decision, and I must say with great respect to the Court of Appeal that they appear to have attached undue weight to what was said in them.

My Lords, I ought not altogether to neglect the argument that was urged with a wealth of illustration to the effect where a defendant has properly employed an independent contractor, particularly in relation to a matter which calls for technical or special knowledge or experience, he is not liable if the plaintiff has been injured by the negligence of the independent contractor or his servants, provided such negligence was not apparent to him. Such cases as *Searle* v. *Laverick*,[38] *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*,[39] *Hazeldine* v. *C. A. Daw & Son Ltd.*[40] and *Green* v. *Fibreglass Ltd.*,[41] were cited to support the proposition. No one, I think, doubts that in some circumstances a defendant can escape liability for the negligence of an independent contractor; nor could he doubt that in other circumstances

[32] [1938] A.C. 57, 80–81; 53 T.L.R. 944; [1937] 3 All E.R. 628, H.L.
[33] [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L.
[34] [1938] A.C. 57, 80.
[35] [1927] 2 K.B. 456.
[36] [1938] A.C. 57, 80–81.
[37] [1959] A.C. 604.
[38] (1874) L.R. 9 Q.B. 122.
[39] [1923] 1 K.B. 539; 39 T.L.R. 207, D.C.
[40] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156, C.A.
[41] [1958] 2 Q.B. 245; [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521.

he cannot so escape, for he would be faced by such authority as *Grote* v. *Chester & Holyhead Railway Co.*,[42] *Wilkinson* v. *Rea Ltd.*[43] *Francis* v. *Cockrell.*[44] I do not think it necessary to try to reconcile all the cases on this subject. It is surely sufficient to say that in the context of the Hague Rules it is patent that the obligation of the shipowner is in the latter category. As I have already pointed out, it was ultimately on the facts of the particular case that the respondents were compelled to rely; for the authority was overwhelming that the broad proposition, that the shipowner was protected by the employment of a competent independent contractor, could not stand. With this aspect of the case I have already dealt, and I will say no more about it.

Your Lordships were pressed with the argument that McNair J. had said[45] he had "no doubt that the innumerable disputes "between shippers and cargo owners have been settled on the "basis of this judgment," i.e., the judgment in *Angliss.*[46] Such a statement coming from so experienced a judge must carry great weight. But my difficulty lies in knowing just what were the disputes which were thus settled. As I have already pointed out, the only dispute in *Angliss*[46] was in respect of a defect due to the negligence of the shipbuilders' employees, and it may well be that what the learned judge said in regard to such a dispute has been treated as authoritative; but I find it impossible to suppose that his judgment has, in the face of all this authority, English and American, that I have cited, been regarded as governing every case where work of repair was entrusted to an independent contractor. Assuredly it should not have been.

Finally, there have been since *Angliss*[46] a number of cases in which the shipowner has successfully claimed exemption under the Hague Rules. I hope I shall not be thought wanting in respect to the learned judges who decided them if I do not traverse them one by one. So far as the question turned on negligence by the shipbuilder or his employee, I say nothing more about it; so far as it turned on the negligence of an independent contractor in respect of work upon the shipowner's ship, I do not think that the latter was rightly held to be entitled to exemption.

I will end by categorically repelling the second and third formal reasons in the respondents' case. They did not on the facts of the case by entrusting the vessel to reputable ship repairers perform their duty to exercise due diligence. They were vicariously liable for negligence of a servant of an independent contractor, namely, the fitter of Alexander Stephen & Sons Ltd. It follows that the appellants are entitled to recover from the respondents the sum of £974 0s. 3d., the admitted amount of

[42] (1848) 2 Ex. 251.
[43] [1941] 1 K.B. 688; [1941] 2 All E.R. 50, C.A.
[44] (1870) L.R. 5 Q.B. 501.
[45] [1959] 1 Q.B. 74, 91; [1958] 3 W.L.R. 482; [1959] 3 All E.R. 261.
[46] [1927] 2 K.B. 256.

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damage. The respondents must pay the appellants' costs of this appeal and in the courts below.

LORD MERRIMAN. My Lords, since I prepared my own opinion I have had the advantage of reading that of my noble and learned friend on the Woolsack, with which I might well have been content to say that I am wholly in agreement. But out of deference to the members of the courts below, from all of whom I am differing, I think that I ought to express my reasons for doing so in my own words.

It being found that this ship was unseaworthy because of the negligence of the fitter in the replacement of the inspection covers, it might appear on the face of it that there is some inconsistency in holding that there was lack of due diligence when it is found that it was in accordance with ordinary prudent practice to leave this task to a fitter unsupervised.

Morris L.J. said [47] that the conclusion of the trial judge was succinctly expressed in the words [48]: "unless the defendants are "in law responsible for the negligence of the fitter, as I have "found it, they have discharged the onus of proving the exercise "of due diligence so far as concerns the inspection covers."

Ormerod L.J. who was in full agreement with the views of the other Lords Justices, rightly accepted that this was the sole question in issue in the appeal.

Morris L.J. was of opinion that the question was primarily one of fact. He began his judgment by a detailed summary of the main conclusions of fact made by McNair J. He quoted [49] the judge as finding (No. 15) that the cause of admission of seawater was [50] "that the fitter at Glasgow negligently failed to secure "the nuts on the inspection cover evenly or sufficiently, with "the result that the working of the ship on the outward voyage "was sufficient to produce the condition, by the time the plain-"tiffs' cargo was loaded at Sydney, that the nuts had been "loosened to such an extent that with the vessel rolling and "waves striking the sides of the ship seawater was forced through "the interstices below the inspection covers." Other material facts he stated as follows [51]: "8. The task of tightening up the "nuts, when an inspection cover is replaced, is one that is well "within the competence of a skilled fitter. It is ordinary and "prudent practice to leave this task to a fitter and not to "have the supervision either of Lloyd's surveyors or of the "owner's superintendent. 9. Once the nuts have been tightened "up no visual inspection could detect any unevenness in the "positioning of the cover or any insufficiency in tightening up. "10. Alexander Stephen & Sons Ltd. are a ship repairing con-"cern of the highest repute."

[47] [1960] 1 Q.B. 536, 551, C.A.
[48] [1959] 1 Q.B. 74, 86.
[49] [1960] 1 Q.B. 536, 551.
[50] [1959] 1 Q.B. 74, 86.
[51] [1960] 1 Q.B. 536, 550.

Morris L.J. considered that the case fell to be decided according to whether the carriers delegated the performance of their duty or whether they themselves performed and discharged their duty. He expressed his own view as follows [52]: "There was no "delegation by them of their duty to exercise due diligence to "make their ship seaworthy. There was a performance by them "of that duty. They did exercise due diligence by taking steps "which included employing Alexander Stephen & Sons Ltd. The "particular task in regard to the inspection covers was well within "the competence of a fitter: no supervision of a fitter was either "in prudence or according to practice called for." He added in conclusion that the negligent fitter was not their servant and there was no room for the application of the principle respondeat superior. He saw no reason why on the particular facts of this case it was not proper to hold that the carriers did exercise reasonable care to make the ship seaworthy. After saying that McNair J. had referred to what Wright J. said and decided in *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*[53] and to the speech of Lord Wright in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[54] which I quote later, he pointed out that subsequently to the decision of the judge in the present case, this House had decided *Davie* v. *New Merton Board Mills Ltd.*[55] He said that the Court of Appeal therefore had the advantage of the authoritative guidance which was given in the speeches in *Davie's* case [55] and were relieved of the task of venturing to analyse the earlier pronouncements which were there considered.

The Lord Justice then reviewed the speeches in *Davie's* case.[55] That case was an action as between master and servant founded in tort, the accident to the workman being caused, it was said, by the negligence of the employers, their servants, or agents in failing to provide a suitable drift which could be hammered safely without the risk of pieces flying off.

I venture to doubt whether that case would have received the attention it did in the discussion of the present case in the Court of Appeal if it had not been for the fact that in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[56] another case between master and servant, Lord Wright had said in his speech: "But in truth the "employer's obligation, as it has been defined by this House, is "personal to the employer, and one to be performed by the em-"ployer per se or per alios. If I may take an analogy or instance "of a similar personal obligation, I note that the Carriage of Goods "by Sea Act, 1924, requires a shipowner to exercise due diligence "or to take reasonable care to provide a seaworthy ship. The ship-"owner is almost certainly not an expert naval architect, engi-"neer, or stevedore. So far as I know it has never been claimed "that this obligation is fulfilled by the shipowner taking

[52] [1960] 1 Q.B. 536, 552.
[53] [1927] 2 K.B. 456.
[54] [1938] A.C. 57.
[55] [1959] A.C. 604.
[56] [1938] A.C. 57, 80–81.

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"reasonable care to appoint a competent expert; the shipowner is "absolutely held to the fulfilment of the obligation. It is the "obligation which is personal to him, and not the performance." It was the intrusion of that analogy into the law of tort as between master and servant which has, in my opinion, been responsible for the introduction of so much of this latter branch of the law into the consideration of the present problem. I do not propose to pursue the discussion which took place in the *Davie* case[57] about whether what was said by Lord Wright in the *Wilsons & Clyde Coal* case[58] was inconsistent with, or could be reconciled with, what he said as the judge of first instance in the *Angliss* case.[59] Various cases of tort in which the employment of third parties is dealt with in connection with the duty to take reasonable care have been discussed on the basis that the duty to take reasonable care is the same as the duty to exercise due diligence. Much depends, however, on the context in which the duty is postulated. I am not convinced that cases of tort based on the relationship of master and servant, invitor and invitee, and the like, afford a sufficient basis for construing words embodied by statute in a bill of lading, the interpretation of which has been the subject of a long series of decisions.

In the early part of his judgment, Willmer L.J. dealt with many of the authorities on which the cargo owners relied in support of the contention that the shipowners are in law responsible for the negligence of the fitter.

The following are the more important:

In G. E. Dobell & Co. v. *Steamship Rossmore Co. Ltd.*[60] the Court of Appeal was concerned with a bill of lading which incorporated section 3 of the Harter Act, which had been passed by Congress in 1893. By that section it was enacted that "if the "owner of any vessel . . . shall exercise due diligence to make the "said vessel in all respects seaworthy and properly manned, "equipped, and supplied, neither the vessel, her owner or owners, "agent, or charterers, shall become or be held responsible for "damage or loss resulting from faults or errors in navigation or in "the management of the said vessel" or from perils, to which it is unnecessary to refer. Lord Esher said of this section[61]: "It "is obvious to my mind, from a consideration of the facts of this "case, that the words of section 3 which limit the owner's liability "if he shall exercise due diligence to make the ship in all respects "seaworthy, must mean that this is to be done by the owner "by himself or the agents whom he employs to see to the sea-"worthiness of the ship before she starts out of that port." Kay L.J. said[62]: "It seems to me to be plain on the face of this "contract that what was intended was that the owner should, "if not with his own eyes, at any rate by the eyes of proper "competent agents, ensure that the ship was in a seaworthy

[57] [1959] A.C. 604.
[58] [1938] A.C. 57.
[59] [1927] 2 K.B. 456.
[60] [1895] 2 Q.B. 408.
[61] Ibid. 413.
[62] Ibid. 416.

"condition before she left port, and that it is not enough to say "that he appointed a proper and competent agent." A. L. Smith L.J. said [63]: "To get himself within the exemption which "is in his favour the shipowner must make out that he has by "himself or his agents exercised the due diliegence which is "required."

American decisions were referred to which, as Willmer L.J. acknowledges in his judgment, show that the approach to the problem of construing the Harter Act was the same on both sides of the Atlantic. *The Irrawaddy* [64] decided that the purpose of the Harter Act was to relieve the shipowner from latent defects. In *The Mary L. Peters* [65] it was held that what was required was the diligence of the owner or those who represented him in the inspection and repair of the ship before sailing. In *The Colima* [66] it was held that the owner was responsible for such agents as he might employ, and that what was required was due diligence in the work itself. It was pointed out that on any other construction owners would escape all responsibility merely by employing agents of good repute. The decision in the *Nord Deutscher Lloyd* v. *President Insurance Co. of North America* [67] was to the same effect.

In the case of *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*,[68] a case on which much reliance was placed both in the argument for the shipowners and in the judgment appealed from, Wright J., at he then was, said [69]: "The question is: How wide is the category of agents or servants "with reference to the obligation now being considered."

Before returning to a closer examination of that case, I will refer to other cases which are in line with those already cited.

Paterson Steamships Ltd. v. *Canadian Co-operative Wheat Producers Ltd.*[70] was a case under the Canadian Water Carriage of Goods Act, 1927, by section 6 of which the protection afforded to the shipowner is conditional upon his having exercised due diligence to make the vessel seaworthy. Unlike the English Act of 1924 and the Australian Act under which the present case arises, but like the Harter Act, the Canadian Act does not contain an express abolition of the absolute warranty of seaworthiness which prevailed at common law. In the judgment it was pointed out [71] that the Canadian Act had a certain kinship with similar legislation in other countries on the same subject-matter, in particular with the Harter Act, 1893, the New Zealand Carriage of Goods Act, 1922, and the British Carriage of Goods by Sea Act, 1924, with which in substance the Australian Act of 1924 is identical. Lord Wright said [71]: "These Acts differ in general "scheme and framework from the Canadian Act, but in certain

[63] [1895] 2 Q.B. 408, 417.
[64] (1897) 171 U.S. 187.
[65] 68 Fed.Rep. 919.
[66] 82 Fed.Rep. 665.
[67] 110 Fed.Rep. 420.
[68] [1927] 2 K.B. 456.
[69] Ibid. 460.
[70] [1934] A.C. 538.
[71] Ibid. 544.

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"respects decisions under them may be helpful in construing the "Canadian Act," and added: "all these Acts agree in this "respect, that they superimpose statutory restrictions on the "freedom possessed by the shipowner at common law to restrict "his liability as carrier, and at the same time give him the benefit "of statutory provisions in his favour." He went on: "These "Acts accordingly cannot be understood or construed except in "the light of the shipowners' common law liability and the usual "methods of limiting that liability previously in vogue," which he then proceded to examine. He noted [72] that what was meant in the British Act by due diligence to make the ship seaworthy was discussed in the *Angliss* case,[73] saying: " . . . it is not "limited to personal diligence on the part of the owner," and he concluded [74] a full examination of the terms of the Canadian Act, as follows: "The operative obligation to provide a seaworthy "ship is thus under the Act reduced, even when unseaworthiness "causes the loss, to an obligation which may be compendiously "described as an obligation to use due diligence to make the ship "seaworthy."

In *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*,[75] the wording of section 6 of the Canadian Act was again in question. Your Lordships' House dismissed the appeal from the Court of Appeal, which had upheld the decision of MacKinnon L.J., sitting as a judge of first instance, that there had been a breach of the duty to exercise due diligence to make the ship in all respects seaworthy. In the course of his speech, with which Lord Atkin and Lord Thankerton expressed their agreement, Lord Wright said [76]: "Whether the appellants could successfully rely "on section 6 depended on whether they could show that they "exercised due diligence to make the vessel seaworthy and thus "fulfilled the condition imposed by the section. This issue "turned solely on the sufficiency of the bunkers on leaving Van-"couver. As already stated, MacKinnon L.J. held that they "had not fulfilled the condition. The obligation to make a ship "seaworthy is personal to the owners, whether or not they entrust "the performance of that obligation to experts, servants, or "agents."

In *Smith Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*,[77] the relevant provision in the charterparty was that the shipowner should not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy.

In delivering the leading judgment in the Court of Appeal, MacKinnon L.J. said [78]: "The limitation and qualification of the "implied warranty of seaworthiness, by cutting down the

[72] [1934] A.C. 538, 547.
[73] [1927] 2 K.B. 456.
[74] [1934] A.C. 538, 550.
[75] [1939] A.C. 397.
[76] Ibid. 403.
[77] 55 T.L.R. 766.
[78] Ibid. 767.

"duty of the shipowner to the obligation to use 'due diligence "'. . . to make the ship seaworthy' is a limitation or qualification "more apparent than real, because the exercise of due diligence "involves not merely that the shipowner personally shall exercise "due diligence, but that all his servants and agents shall exercise "due diligence. That is pointed out in a note in Scrutton on "Charterparties (14th ed., p. 110) which says that this variation "will not be 'of much practical value in face of the dilemma that "must constantly arise on the facts. In most cases if the "'vessel is unseaworthy due diligence cannot have been used "'by the owner, his servants, or agents; if due diligence has been "'used the vessel in fact will be seaworthy. The circumstances "'in which the dilemma does not arise (e.g., a defect causing "'unseaworthiness, but of so latent a nature that due diligence "'could not have discovered it) are not likely to occur often.'" MacKinnon L.J. was quoting from the 14th edition of Scrutton, published in 1939. The same view is expressed in the text of the 12th and 13th editions, edited by Lord Porter and McNair J. MacKinnon L.J. had very great experience in this class of case, and had himself edited the 5th to the 11th editions of that work.

Of the decisions of your Lordships' House, affirming the decision of the Court of Appeal, it is sufficient to say that Lord Wright, with whose judgment Lord Maugham and Lord Atkin concurred, says this [79]: "The unseaworthiness, constituted as it "was by loading an excessive deck cargo, was obviously only "consistent with want of due diligence on the part of the ship-"owner to make her seaworthy. Hence the qualified exception "of unseaworthiness does not protect the shipowner," and added: "In effect such an exception can only excuse against latent defects"; and later he said [80] that he agreed with MacKinnon L.J.'s statement of the law. No disapproval of this statement of the law was expressed in any of the other speeches.

As there has been no finding that this was a case of latent defect it is unnecessary to discuss the question whether careless work which could obviously have been detected by competent supervision while the work was proceeding could be described as a "latent defect" merely because subsequent inspection would not necessarily detect it.

The *Angliss* case [81] concerned a bill of lading incorporating the Australian Sea Carriage of Goods Act, 1924, which is in all material respects identical with the English Act. It raised the question of the liability for unseaworthiness resulting from negligence of a workman in the employ of shipbuilders of repute, whom the shipowner had employed to build the ship in question. Lord Wright said [82]: ". . . the Acts have expressly abolished the "previous absolute obligation to provide a seaworthy ship and "have substituted an obligation to use due diligence to that

[79] [1940] A.C. 997, 1001.
[80] Ibid. 1003.
[81] [1927] 2 K.B. 456.
[82] Ibid. 461.

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"effect." The ratio decidendi can be found in the passage that follows. He pointed out that the carrier might not be the owner of the ship but merely the charterer; he might not have contracted for the building of the ship, as in the *Angliss* case,[82] but merely have purchased her, possibly years after she had been built, and added: "In the two latter cases the builders and their men "cannot possibly be deemed to have been the agents or servants "of the carrier and it is illogical that there should be such differ-"ence in the carrier's obligations merely because he has bought "the ship by the method of contracting with the builders to build "it for him. In addition, if the carrier were held liable for the "bad workmanship of the builders' men, he might equally be "held liable for bad workmanship by the men employed by the "various sub-contractors who supply material for the builders, "such as steel-workers in furnaces and rolling mills, or who "supply special articles such as castings, pumps or proprietary "machines, which would involve an almost unlimited retrogres-"sion."

Whatever retrogression may be involved in an attempt to fix the shipowner with liability for bad workmanship before the ship comes into existence as a ship, or before an existing ship comes into his possession at all, there is, in my opinion, no question of undue retrogression in attaching to the shipowner responsibility for a person in the employ of those to whom he has entrusted the repair of his own ship.

Paterson Steamships Ltd. v. *Robin Hood Mills Ltd.*[83] was another case under the Canadian Act of 1927. Two cases had been tried, the action of the cargo owner against the ship and an action by the shipowner to limit his liability. The latter alone was the subject of an appeal to the Privy Council. In the other action the lack of due diligence alleged was in connection with the adjustment of the compass, and the important point is that this involved the alleged neglect of a compass-adjuster, who might be regarded as an independent expert, as well as of the master who had checked his adjustment.

In giving the judgment of the Board in the limitation action, Lord Roche said that in the other action the question was whether the condition of the exercise of due diligence to make the vessel seaworthy had been fulfilled, as it was necessary that it should be fulfilled to bring into operation the protective provisions of section 6 of the Act. He added[84]: "The condition is not fulfilled "merely because the shipowner is personally diligent. The condi-"tion requires that diligence shall in fact have been exercised by "the shipowner or by those whom he employs for the purpose—"see *Dobell* v. *Steamship Rossmore Co.*[85] Therefore, with "regard to the *Thordoc* in the cargo action, want of diligence in "the compass adjuster who adjusted the compasses or in the

[82] [1927] 2 K.B. 456, 461.
[83] 58 Ll.L.R. 33.
[84] Ibid. 40.
[85] [1895] 2 Q.B. 408.

"captain who said he checked or verified the adjuster's work "would be material, and a finding adverse to the shipowner could "be arrived at upon the ground of want of diligence in these "persons."

This statement of the law was followed by the Privy Council in the *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*,[86] a case under the Canadian Water Carriage of Goods Act, 1936. Lord Somervell of Harrow, who delivered the judgment, also repeated what had been said by Lord Macmillan in *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.*,[87] about the importance of remembering that the Act was the outcome of an international conference, and the rules in the schedule having an international currency, and about the desirability of uniformity of interpretation. See also Atkin L.J. in *R. F. Brown & Co. Ltd.* v. *Harrison*; *Hourari* v. *Same*,[88] and Lord Hailsham in *Gosse Millerd Ltd.* v. *Canadian Government Merchant Marine Ltd.*,[89] where of the words "management of the ship" in article IV, incorporated in the English Act of 1924, he said that they first appeared in an English statute in that Act, but nevertheless they had a long judicial history in this country. The same words were to be found in the well-known Harter Act and had often been incorporated in bills of lading which had been the subject of judicial consideration in the courts of this country. He was unable to find any reason for supposing that the words used in the Act of 1924 had any different meaning from that which had been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; adding "and I think that the "decisions which have already been given are sufficient to deter-"mine the meaning to be put upon them in the statute now under "discussion." The same considerations apply, in my opinion, to the words in question in this appeal. It seems to me to be impossible to resist the conclusion that when those words were chosen by international convention as being the test of the carrier's liability, and at the same time of his rights and immunities, the words were selected because they had already acquired a known connotation. Equally it is impossible, in my opinion, to ignore the desirability of preserving the uniformity of interpretation which has been given to these words in American, Canadian and New Zealand authorities, as well as in decisions of the courts of this country.

Again, in *Australian Newsprint Mills Ltd.* v. *Canadian Union Line Ltd.*,[90] a case in which a defect would have been obvious if care had been exercised in the course of overhaul and repairs, the judge said: "it is my view on the authorities, that the defen-"dants cannot avoid liability to the plaintiff by attempting to cast

[86] [1959] A.C. 589, 602; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740, P.C.

[87] [1932] A.C. 328, 350; 48 T.L.R. 127, H.L.

[88] 137 L.T. 549, 556.

[89] [1929] A.C. 223, 230.

[90] [1952] 1 D.L.R. 850, 854.

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"upon the shoulders of some third party, engaged by them to do "work upon this ship, a duty which the Act places upon the "defendants."

To the same effect was the decision in the New Zealand case, *B. J. Ball (New Zealand) Ltd.* v. *Federal Steam Navigation Co. Ltd.*,[91] and in *American Linseed Co.* v. *Norfolk and North American Steamshipping Co.*[92]

Finally, in *International Packers (London) Ltd.* v. *Ocean Steamship Co. Ltd.*,[93] a case under the Australian Act of damage to cargo by the entry of seawater through the hatch covers, McNair J. said: "The obligation imposed by Article III, rule 2, "like the obligation imposed by article III, rule 1, to exercise "due diligence to make the ship seaworthy, is an obligation "imposed upon the shipowner himself which he cannot escape on "proof that he employed a competent independent contractor who "was in fact negligent." Mr. Mocatta admitted—quite rightly, as I think—that the point is in no way affected by the learned judge's emendation in the present case of "surveyor" for "contractor."[94]

Great reliance was placed by Mr. Mocatta on the decision of Hilbery J. in *Cranfield Bros. Ltd.* v. *Tatem Steam Navigation Co. Ltd.*[95] This was a case under the Canadian Act of 1936 concerning damage to a cargo of wheat by unseaworthiness owing to the leakage of seawater through a rivet hole, held by the judge to have been in a defective condition caused by corrosion.

Hilbery J., while recognising that the shipowner does not discharge his duty to exercise due diligence to make the ship seaworthy merely by establishing that she passed her classification survey, or merely by showing that he has appointed someone who by qualification should be a skilled person to examine it, said that both these things were elements to be taken into account in considering whether the shipowner had exercised due diligence to make the ship seaworthy. He found that there had been no lack of diligence about the ship's surveys for her qualification, or about the frequency with which she was dry-docked, and he held that the graving dock company concerned were highly skilled, experienced and competent people to examine the vessel and to report upon any disrepair that might be found, and that their representative was a highly experienced and responsible man, suitably skilled to make such an examination, and to report, and that he did, when the vessel was docked in 1937, make a proper and thorough examination of her with a view to ascertaining anything that required to be done in the way of repairs, and that he saw this very rivet, but noticed nothing the matter with it then.

The judge called attention to the evidence that the only way of finding that defective rivet would have been to scale the plating

[91] [1950] N.Z.L.R. 954.
[92] (1929) 32 Fed. 2nd 281, 282.
[93] [1955] 2 Lloyd's Rep. 218, 236.
[94] [1959] 1 Q.B. 74, 94.
[95] (1939) 64 Ll.L.R. 264.

and that it had been said that it would have been prudent to scale the plating, in the way of the collision bulkhead particularly. But he said that it was one thing to say in court that it would have been prudent, but he had to consider the question in the circumstances that obtained in the graving dock at Barry or at Vancouver before the ship set out on her homeward voyage.

He was not satisfied that a reasonably careful owner would have scaled the plating round the area of this particular rivet, and was satisfied that a reasonable examination was made. Hilbery J., however, having been referred to the case of *The Dimitrios Rallias*,[96] doubted, though he did not think it necessary to decide, whether this was a latent defect within the strict meaning of article IV, rule 2 (*p*).

It is, however, worth noting that the industry of Mr. Roskill brought to our attention the fact that this case was decided on July 3 and 4, 1939, and that so far as the report shows, MacKinnon L.J.'s judgment, already quoted, in the *Smith, Hogg* case,[97] which had been given on May 12, 1939, was not cited to Hilbery J. It may well be that if Hilbery J. had been aware of what had been said by MacKinnon L.J. six weeks earlier, he might have approached the question of the responsibility of the shipowner differently, and might have felt himself obliged to come to a definite decision as to whether the case was truly one of latent defect, upon which the shipowner could escape the consequences of that recent judgment in the Court of Appeal.

Of the argument for the cargo owners, based on what he described [97a] as "a consistent stream of authority" for the principle contended for by the cargo owners, Willmer L.J. said that he certainly appreciated its force, but came to the conclusion that it was not well founded.

I confess that I am not convinced by the reasons for this decision. In the first place, he adopts the criticism of McNair J. that the construction sought to be put on article III, rule 1, would be in effect to substitute for the new qualified obligation something barely distinguishable from the old absolute undertaking except in the necessarily rare cases of true latent defect. But that is precisely what MacKinnon L.J. had said in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[97b] Incidentally, although the point must not be pressed too far, it is the interpretation put upon the words of article III, rule 1, by the learned judge himself as editor of the 12th and 13th editions of Scrutton on Charterparties.

Next, while Willmer L.J. recognises that the words are wide enough to render the carrier liable for lack of due diligence on the part of his own servants and possibly of an independent contractor engaged by the carrier to perform on his behalf any part of the ordinary business of carrying goods (e.g., a firm of stevedores employed to load cargo), he could well understand that failure on

[96] (1922) 128 L.T. 491, 495, C.A.
[97] 55 T.L.R. 766.
[97a] [1960] 1 Q.B. 536, 580.
[97b] 55 T.L.R. 766.

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the part of such contractor to exercise due diligence could be held to be a failure on the part of the carrier.

Similarly, the shipowner might become liable for want of due diligence on the part of some independent person to act as his representative, such as a firm of ships' agents, or surveyor or engineer appointed to supervise the building or repair of a ship, as being the equivalent of his own want of due diligence, on the ground that such persons could properly be regarded in law as his servants, pro hac vice, although not in his regular employment.

But the Lord Justice says that this is far removed from saying that every time a shipowner engages some outside person or independent contractor to perform some work on a ship which goes outside the carrier's own business of carrying goods, he renders himself liable for any lack of due diligence on the part of such person or contractor.

For my part, I doubt whether putting a ship in dry dock for a periodical survey combined, as in this case, with her load-line survey, could properly be described as going outside the carrier's own business of carrying goods.

This leads the Lord Justice to the conclusion that while the matter in question is one of the building, rebuilding or repairing of a ship, or of the supply of equipment or spare parts, there is no reason in principle why the court cannot be invited to conclude as a jury question that the carrier has exercised due diligence, upon proof (a) that he has engaged a reputable contractor or supplier; (b) that he has provided for the work to be properly superintended by his own representative; and (c) that such representative has in fact exercised due diligence.

I am not quite clear, as a matter of law, how conditions (b) and (c) fit the case of the negligence of a fitter of whom it is said, as a matter of fact, to be the ordinary and prudent practice to leave him unsupervised by anybody.

It is to be observed that in the concluding passage of his judgment, Willmer L.J. utters the caution that on future occasions the shipowner who entrusts the performance of his duties to a negligent and unsupervised fitter may find that he is held responsible. The question is whether there is any reason why the responsibility should not attach in this case.

The Lord Justice goes on to draw a distinction between employing someone else to carry on one's own business, and engaging someone else to perform something which is his business.

It seems to me that the same operation may well be the business of both. How is it less the business of the shipowner to have some particular repair done than it is the business of the repairer whom he employs to do the repair? The conclusion reached by Willmer L.J. is that in so far as the shipowner can be said to delegate to the repairers at all, he delegates the performance of the actual job of doing the repairs and making the ship seaworthy. Just so. The authorities already quoted make

it clear that what is required is due diligence in the work itself, and that this is the personal responsibility of the shipowner.

This brings me to the Lord Justice's review of the *Angliss* case.[98] For reasons which will be apparent from what I have already said, I disagree with his statement that any examination of the authorities must begin with that case. On the contrary, it is implicit in the statement already quoted from the judgment of MacKinnon L.J. in the *Smith, Hogg* case,[99] and is expressed by Lord Hailsham in the *Gosse Millerd* case,[100] that one must begin with the Harter Act and the authorities under that and similar Acts which substituted a statutory obligation for the absolute warranty of seaworthiness at common law.

Much reliance was placed on a short passage of the judgment of Lord Wright, when he said [101]: "Again, the need of repairing "a ship may cast on the carrier a special duty to see, as far as "reasonably possible, by special advisers for whom he is "personally responsible, that the repairs adequately make good "the defects." This passage was relied on by Willmer L.J., and in the argument, as authority for the proposition [102] that in respect of the protection of the shipowner by the employment of a specialist of repute there is no "distinction in principle between "bad workmanship on the part of the original builders' men and "bad workmanship on the part of the repairers' men at a later "period in the ship's history."

In my opinion, this ignores the ratio decidendi of *Angliss*,[103] which is based upon the consideration that whether a ship is built for, bought by, or chartered to the carrier, he should not be held liable for bad workmanship for which he had no responsibility before the ship came into his possession.

There is no doubt that the judgment in the *Angliss* case [103] covers wider ground. But when it is said that the decision in *Angliss* [103] has been repeatedly followed with approval, it is important to remember how limited was the extent of the actual decision. From this it follows that valuable as was the survey of what, in this country, was new legislation dealing with the carriage of goods by sea, much of what was said was obiter, and it must be recalled that Lord Wright, as he had meanwhile become, in *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[104] said what has already been quoted by way of illustrating the duty of an employer to provide a safe system of working in a mine.

Finally, Willmer L.J. found that the work done by the fitter was well within the competence of one of the engineer members of the ship's crew, and as such was something within the ordinary course of the carrier's business, rather than a matter calling for the exercise of any specialised technical skill. In fact, the work was done in this very way after the defect had been discovered.

[98] [1927] 2 K.B. 456.
[99] 55 T.L.R. 766.
[100] [1929] A.C. 223.
[101] [1927] 2 K.B. 456, 462.
[102] [1960] 1 Q.B. 536, 583–584.
[103] [1927] 2 K.B. 456.
[104] [1938] A.C. 57.

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Nevertheless, he held that the case must be approached on the basis that the replacement of the inspection covers of the storm-valves was part of the specialised and technical work which Messrs. Alexander Stephen were properly engaged to do.

On this point it was argued that it would be wholly artificial and unreasonable to isolate work which was plainly incidental to the specialised operation of repairing the ship because it was in itself the type of work which required no specialised or technical knowledge or experience.

I am not convinced by this argument, but, assuming it to have some force, it seems to me that a much more unreasonable breach is made in the duty of the carrier to the cargo owner if the carrier can escape responsibility for negligent performance of work which is well within the scope of his own business and the competence of his own servants by entrusting the whole operation to a ship repairer of repute.

I would allow this appeal, and enter judgment for the appellants for the amount claimed.

Lord Radcliffe. My Lords, I have no doubt that this case is important in its implications and that it has merited the full consideration that it has received at all its hearings. Nevertheless, it appears to me that the answer to be returned to the problem it raises depends upon a very short question, what kind of obligation is imported by the words "shall be bound . . . to "exercise due diligence to make the ship seaworthy" that appear in article III (1) of the Rules scheduled to the Australian Sea Carriage of Goods Act, 1924. As we know, these are in fact the Hague Rules. Read them in one way, the answer must necessarily be for the appellants, the cargo owners: read them in another, it must be for the respondents, the carriers.

The relevant facts are of the simplest. Cargo has been damaged in the course of a voyage and it was damaged because the ship on which it was carried was unseaworthy. The unseaworthiness was caused by the carelessness of a fitter employed by skilled repairers working for the carriers. The work that they were doing was in connection with the ship's No. 2 special survey and annual load-line survey, in other words, work which was reasonably required in order to keep the ship in a seaworthy condition.

Now, I am quite satisfied that, treating the carriers as a legal person, a limited company whose mind, will and actions are determined by its officers and servants, they did nothing but what they should have done as responsible and careful persons in the carrying business. They were not themselves in the repairing business and there is no reason why they should have been, but they were mindful of their duty to have their ship in good order for its voyage or voyages and they not only entrusted her to a ship-repairing company of repute for reception in dry-dock

but also employed an experienced and competent marine superintendent to act on their behalf. He, in his turn, acted with more than usual caution in requiring all the ship's storm-valves to be opened up for inspection and, although it was the carelessness of one of the repairers' fitters that left one of these valves ineffectively closed, it was ordinary prudent practice to entrust the work of closing up to a fitter and not to subject such work to an independent inspection.

I see no ground, therefore, for saying that the carriers themselves were negligent in anything that they did. If the content of their obligation is that they should, as a legal person, observe the standard of reasonable care that would be required at common law in a matter of this sort, which involves skilled and technical work, and if there is nothing more in their obligation than that, then I should not regard them as in default or, consequently, as liable to the cargo owners. Full and instructive as are the several judgments of the members of the Court of Appeal, I do not think that in the end they amount to more than an acceptance of this standard of obligation and a drawing of the necessary conclusion from the facts.

But there is, on the other hand, a way of looking at the intrinsic nature of the obligation that is materially different from this. It is to ask the question, when there has been damage to cargo and that damage is traceable to unseaworthiness of the vessel, whether that unseaworthiness is due to any lack of diligence in those who have been implicated by the carriers in the work of keeping or making the vessel seaworthy. Such persons are then agents whose diligence or lack of it is attributable to the carriers. An inquiry on these lines is not concerned with distinctions between carelessness on the part of officers or servants of the carriers or their supervising agents, on the one hand, and carelessness on the part of their contractors or those contractors' contractors, on the other. The carriers must answer for anything that has been done amiss in the work. It is the work itself that delimits the area of the obligation, just as it is the period "before "or at the beginning of the voyage" that delimits the time at which any obligation imputed to the carriers can be thought to begin. If these last points are borne in mind, I think that the difficulties about "an almost unlimited retrogression" (see *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*[105]) tend to disappear: for there is a point in each case at which defective work is not the work of any agent of the carrier and the duty to be diligent is no more than a duty to be skilled and careful in inspection. But the inspection that is relevant in such a case is not merely the carrier's inspection of his contractor's work: it is inspection on the part of anyone working for the carrier who is concerned to make sure that he does not accept defective materials or use defective tools.

[105] [1927] 2 K.B. 456, 461.

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If one had to choose between these two alternatives without any background in the way of previous authority or opinion with regard to the interpretation of this section of the Hague Rules, I think it would be very difficult to know which way one ought to turn. The natural meaning of the words does not seem to me to accord well with either reading. Whatever the responsibility is, it is imposed on the carrier and no one else—that is clear—but it is equally clear that no one would regard the carrier as being in the wrong merely because he gets whatever requires to be done, inspection, survey or work, done for him by someone else. If the respondents' reading is adopted, the one that has commended itself to McNair J. and the Court of Appeal, one must treat the words "due diligence to make the ship seaworthy" as if they were equivalent to "due diligence to see that the ship is "made seaworthy" and that is not the same thing. On the other hand, the reading for which the appellants contend is not in truth consistent with the grammatical meaning of the words they have to rely upon, for the exercise of due diligence to which the carrier would be held would include the performance or omission of acts that were not in law the acts of the carrier at all.

Such general considerations as occur to me appear to favour the cargo owner's claim. He is not in any sense behind the scenes with regard to what is done to the vessel or how or when it is done. His concern with it begins and ends with the loading and discharge of his goods. The carrier, on the other hand, must have some form of ownership of the vessel and some measure of responsibility for seeing that it is fit and in proper condition for the carriage undertaken. He may qualify that responsibility by stipulation, if the law allows him to; or the law may write out the terms of his responsibility for him; but within those limits the responsibility is there. I should regard it as unsatisfactory, where a cargo owner has found his goods damaged through a defect in the seaworthiness of the vessel, that his rights of recovering from the carrier should depend on particular circumstances in the carrier's situation and arrangements with which the cargo owner has nothing to do; as, for instance, that liability should depend upon the measure of control that the carrier had exercised over persons engaged on surveying or repairing the ship or upon such questions as whether the carrier had, or could have done, whatever was needed by the hands of his own servants or had been sensible or prudent in getting it done by other hands. Carriers would find themselves liable or not liable, according to circumstances quite extraneous to the sea carriage itself.

What I think should determine this appeal, however, is what we know of the history of these words "due diligence to make "the ship seaworthy" in connection with sea carriage of goods, and what I regard as the settled interpretation of their significance which has been alluded to from time to time in the English courts. These sources seem to me to be wholly in favour of the

appellants' claim. We have, to begin with, the common learning that the words in question were adopted by international convention in the Hague Rules at a time when they had been for many years familiar in the Harter Act of the United States. We know what content successive decisions of American courts had given those words: that the carrier was responsible to the cargo owner unless due diligence in the work had been shown by every person to whom any part of the necessary work had been entrusted, no matter whether he was the carrier's servant, agent or independent contractor. "Merely employing agents of good "repute" was not enough. There is no point in lengthening this opinion by citing the individual cases which have already been mentioned in the opinion of my noble and learned friend on the Woolsack, and to which reference can be found in our own text-books on carriage of goods by sea.

I regard *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[106] as affirming for English courts the same view of the significance of these words in the Harter Act, and I ought to say in passing, since the point was raised, that I cannot see why the meaning of the particular words "exercise due diligence" should be affected by the circumstance that the Harter Act was brought in force in the United States at a time when a carrier's absolute warranty of seaworthiness was still implied. It is true that the act of negligence in the *Dobell* case[106] was that of the ship's carpenter, who was probably the carrier's servant in the ordinary sense, but there is no warrant for treating the decision of the Court of Appeal as turning upon that point. On the contrary, all three Lords Justices agreed in rejecting the idea that the diligence to be exercised is merely that of the owner himself, and in insisting that his responsibility extends to the acts of anyone who may be his agent for the purpose of putting the ship in order. I will quote a passage from the judgment of Kay L.J.[107] which is crucial to this issue, for if it is correct it strikes at the root of the respondents' argument in the present case. "The essential "question then is," he says, "Was there want of due diligence "on the part of the owners? It is said that they did all that they "could by providing proper equipment and appointing proper "agents. It was the duty of the ship's carpenter to close this "porthole, and they appointed a carpenter to whose competence "no one makes any objection. It is said, therefore, that they "personally exercised diligence, and thereby fulfilled the con-"dition. I do not agree with this contention. It seems to me "to be plain on the face of this contract that what was intended "was that the owner should, if not with his own eyes, at any "rate by the eyes of proper competent agents, ensure that the "ship was in a seaworthy condition before she left port, and "that it is not enough to say that he appointed a proper and "competent agent. It is obvious that the owner cannot himself

[106] [1895] 2 Q.B. 408. [107] Ibid. 416.

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"with his own hands make the ship seaworthy; he must act "through other persons; but I do not read the contract as "exempting him from liability in the case of negligence of the "agents whom he employs to act for him in this respect." This is not the doctrine of respondeat superior, or of a limited company's liability for the acts of its servants.

It was in 1924 that the Hague Rules were adopted into the English law of carriage of goods by sea, the same year as that in which they became law in Australia. It appears to me that since then there has been in this country a steady current of judicial and expert opinion to the effect that article III (1) of those rules is to be understood in the sense explained in *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[108] or, to put it in another way, in the Harter Act sense. With great respect to the judgments that have been given in the High Court and the Court of Appeal, I think that if they were to stand, they would be the first diversion of that current on a different course.

Again, it is not necessary that I should make a detailed citation of what is already before your Lordships. What is stressed throughout is that the obligation of the carrier is "not limited "to his personal diligence" (see the *Angliss* case[109]). The carrier's responsibility for the diligence of all those whom he employs to discharge his own primary duty has been stated and recognised by such eminent commercial lawyers as Lord Roche in delivering the opinion of the Judicial Committee in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[110] by Lord Somervell (see *Maxime Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[111]), by Lord Wright (see *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*,[112] *Wilsons & Clyde Coal Co. Ltd.* v. *English*[113]), and by MacKinnon L.J. in *Smith, Hogg & Co. Ltd.* v. *Black Sea & Baltic General Insurance Co. Ltd.*[114] The learned Lord Justice there summarises the practical effect of article III (1) in words avowedly drawn from the then current edition of Scrutton on Charterparties. The 13th edition of that work, published in 1931 and edited jointly by Mr. (later Lord) Porter and Mr. McNair (now McNair J.) makes the following comment on that article (p. 513, note (*z*)): "In appearance the undertaking to use due "diligence to make the ship seaworthy is less onerous than the "old common law undertaking that the ship is in fact seaworthy. "In reality there is no great gain to the shipowner by the sub-"stitution. For . . . the relief to the shipowner will occur only "in cases where the unseaworthiness is due to some cause which "the due diligence of all his servants and agents could not

[108] [1895] 2 Q.B. 408.
[109] [1927] 2 K.B. 456, 460.
[110] 58 Ll.L.R. 33.
[111] [1959] A.C. 589, 602; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740, P.C.
[112] [1934] A.C. 538.
[113] [1938] A.C. 57, 80–81.
[114] 55 T.L.R. 766.

"discover, e.g., in the case of 'latent defects not discoverable by "'due diligence.'" I cannot see that there is anything to quarrel with in this analysis of the carrier's responsibility. But it is quite inconsistent with judgment for the defendants in this case. Here there was no latent defect that could not be detected. There was carelessness in completing the work of survey for the carriers, and no one corrected it.

The passage that I have just quoted vouches the *Angliss* case [115] as its authority. It is an odd feature of the present appeal that the argument for the respondents has nevertheless treated the same decision as its main support, and that the Court of Appeal's judgments were evidently very much influenced in their favour by what the learned judges regarded as the principle of that decision. In my opinion, there was in that a misconception. I do not consider that judgment for the cargo owners in this case would be inconsistent with anything that *Angliss* [115] decided. It becomes necessary, therefore, to see clearly what the decision was.

Angliss [115] was a case about the liability of carriers for the bad workmanship of employees of shipbuilders occurring during the construction of the carrying vessel. It was not about carelessness of ship repairers in carrying out survey or repairs. The analogy between builders and repairers is as delusive as it is attractive: it leads only to confusion to argue from the situation of the one to the situation of the other when the carrier's liability for diligence in making the ship seaworthy is in question.

The principle of the learned judge's decision in *Angliss* [115] is stated at the outset of his judgment. Premising that the obligation of the carrier is not limited to his personal diligence, he states the essential question to be [116]: "How wide is the category "of agents or servants with reference to the obligation now being "considered." His answer is that where unseaworthiness is due to a fault of workmanship on the part of builders which was committed in the course of constructing the ship, the builders were not agents of the carrier for the purpose of discharging the duty imposed by article III (1). As a general proposition this must surely be true. The reasoning is based on the position of builders, what I may call their time situation. "The carrier," as he says,[117] "may not be the owner of the ship, but merely the "charterer; he may not have contracted for the building of the "ship, but merely have purchased her, possibly years after she "has been built. In the two latter cases the builders and their "men cannot possibly be deemed to have been the agents or "servants of the carrier and it is illogical that there should be "such difference in the carrier's obligations merely because he "has bought the ship by the method of contracting with the "builders to build it for him."

[115] [1927] 2 K.B. 456.
[116] Ibid. 460.
[117] Ibid. 461.

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It is plain to me that this conclusion turns on the consideration that the causative carelessness took place at a time before the carrier's obligation under article III (1) had attached and in circumstances, therefore, when the builders and their men could not be described as agents for the carrier "before and at the "beginning of the voyage to . . . make the ship seaworthy." This is a tenable position for those who engage themselves upon the work of bringing the ship into existence. The carrier's responsiblity for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to make sure by careful and skilled inspection that what he is taking into his service is in fit condition for the purpose and, if there is anything lacking that is fairly discoverable, to put right. This is recognised in the judgment. But if the bad work that has been done is "concealed"[118] and so cannot be detected by any reasonable care, then the lack of diligence to which unseaworthiness is due is not to be attributed to the carrier.

It is, I think, impossible to transfer these considerations which are apposite to the building of ships to the case of the survey and repair of a ship which is already in the service of a carrier. There the duty to have the necessary work done is directly upon the carrier from whatever moment of time is chosen as the date when the duty attaches, and whatever is done is necessarily done by agents on his behalf. Any faults of such agents, therefore, are attributable to him, provided only that they are employed upon the work. For this reason I am of opinion that there would be nothing inconsistent between the *Angliss* decision,[119] which exempted the carriers, and a decision in favour of the appellants in this case, which would hold the carriers to liability.

The *Angliss* judgment[119] contains a good many more observations than those that are essential to the actual conclusion, and I have no doubt that much of what the learned judge said there, though of a general and sometimes hypothetical nature, has from the first been found helpful and illuminating in expounding the significance of article III. But I cannot treat these observations as having for that reason any special authority. The only one that matters for the present purpose is the sentence[120]: "Again, "the need of repairing a ship may cast on the carrier a special "duty to see, as far as reasonably possible, by special advisers for "whom he is personally responsible, that the repairs adequately "make good the defects." I do not myself think it necessary to treat this as intended to lay down that, where repairs are in question, a carrier is automatically protected from liability once he has appointed the "special adviser" referred to. If it does mean that, it would be a return to that mistaken view that the carrier's liability is commensurate with his personal care and prudence which the learned judge had rejected at the outset of his

[118] [1927] 2 K.B. 456, 462.
[119] [1927] 2 K.B. 456.
[120] Ibid. 462.

judgment. It would be to say that it is enough for the carrier to appoint competent agents. This would be in conflict with other and later statements as to the nature of the liability which were made by the learned judge himself and by other authorities to whom I have referred. I prefer to treat it therefore rather as a general pointer to the sort of precautions which a carrier would be wise to take in his own interest than as a comprehensive definition of the circumstances in which his responsibility under article III (1) should be held to have been discharged.

We are dealing, of course, with the Australian, not the United Kingdom, Act. The purport of the two Acts is, however, the same, and each is designed to adopt the international Hague Rules. In the absence of any decisions of courts in Australia dealing with this particular point it is natural to found ourselves on English as well as American, Canadian and New Zealand decisions.

I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, I agree. I would only add a few words out of respect to the judgment of the learned trial judge, well versed in this branch of the law, and the unanimous judgments of the Court of Appeal supporting him, from which we differ.

The weight of authority, not only in this country but in other countries of the Commonwealth and in the United States of America, whose sea trade and commerce form no negligible part of their economy, as also the history of the origins of the Hague Rules and the desirability of uniformity in their construction as between different nations, all go, in my view, to support the contentions of the appellants. These aspects have already been so fully dealt with that I find it unnecessary to refer to them further. On practical considerations alone it is, I think, only reasonable that owners of ships should be responsible to shippers with whom they contract under bills of lading for the seaworthiness of their vessels at the start of a voyage, so far as that can be achieved by the exercise of due diligence whether by themselves and their servants, or by others to whom that task is specially entrusted. There may be cases where the owners can discharge this duty through members of the crew or other servants, but in other cases, perhaps the majority of cases in these days of floating leviathans, the duty can only be discharged by the employment of persons who may conveniently be described as independent contractors. If the carrier's liability were not to subsist in all these cases the shipper, now that the carrier's absolute warranty of seaworthiness has been abolished, would be dependent for a remedy, in respect of lack of seaworthiness, on the chance whether the owner had committed the seaworthiness of his ship to the care of an independent contractor, or had dealt with that directly through his own servants. It would involve, I think, a considerable extension of the doctrine of *Donoghue*

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v. *Stevenson*[121] to say that he would have a remedy against the independent contractor for want of due diligence. Nor would he have a claim against an insurer, as insurance of goods for carriage by sea implies an absolute warranty by him of the seaworthiness of the carrying vessel at the commencement of the voyage, breach of which, apart from waiver by the insurer, would avoid the policy of insurance.

Apart, however, from the considerations to which I have adverted, there are certain principles which, in my opinion, at once limit and fix the liability of a carrier, in a case such as the present.

1. He cannot, subject to a possible qualification to which I shall refer in a moment, be liable for unseaworthiness in a ship which results from lack of due diligence at a time when the ship was not his to possess and control, and which could not be detected by due diligence after the ship came into his possession. This is implicit in the language of the Hague Rules themselves and was recognised by Wright J. (as he then was) in the case of *Angliss*.[122] Where due diligence of a carrier is concerned there can be no liability for anterior failure of diligence by a previous owner or by someone with whom the carrier had no previous concern. This, in my opinion, is the ratio of, and the only point decided by, the case of *Angliss*.[122] The point is, I think, plain enough in the case of a ship bought from a previous owner, or in the case of a ship chartered from the owner. Where a ship is built to the order of a purchaser, as was the case in *Angliss*,[122] there is no material difference in principle, though special circumstances in such a case may introduce special considerations. As Wright J. said, it would be illogical to make a distinction merely because the carrier had bought a ship by having it built for him. There may be shipbuilding contracts where the property in a ship passes in stages to the prospective owner, for various reasons convenient to the parties. But the ship as a whole cannot pass until it is completed, and it is impossible to say what defects may exist by the time it is completed. The vessel then comes into the possession of its owner for the first time. No distinction can, in general, be made between this case and the case of a ship bought from a previous owner. Liability will attach to the owner, as in the other cases, from failure to discover defects making for unseaworthiness which he ought to have discovered by the exercise of due diligence on or after the transfer of possession.

There is, however, one qualification, or rather, reservation, I would make in such a case. The prospective owner may have taken some part in the project of the building of the ship, either in the matter of design, or by supervision in the course of building, or otherwise, and in such case it may well be that he is responsible for unseaworthiness of which he is the cause, or

[121] [1932] A.C. 562; 48 T.L.R. 494, H.L.

[122] [1927] 2 K.B. 456.

which he should have detected in the course of the building. It may be, indeed, that in some circumstances a measure of supervision is required. These considerations were referred to by Wright J. in the case of *Angliss*,[122] and may give rise to specialties which stand apart from the general case, and which will have to be dealt with when they arise. They stand quite apart, in my opinion, from the issue that is raised here. They do not, as I see it, make the carrier responsible for the negligence of the builders, as his agents, but, if at all, for his own negligence operating retrospectively from the time when he took over the ship and put it into service for the carriage of goods. He then knew or ought to have known of defects occurring in the course of the construction of the ship. Something was said, I think, in the course of the argument about the carrier's duty to exercise due diligence to provide a seaworthy ship. But that is not what the statute says. The former common law implied an absolute obligation to provide a seaworthy ship. The qualified duty now is to make a ship seaworthy. The distinction may be a fine one but a carrier cannot, in general, make a ship seaworthy unless he has first a ship to make seaworthy.

2. The obligation is a statutory obligation imposed in defined contracts between the carrier and the shipper. There is nothing novel in a statutory obligation being held to be incapable of delegation so as to free the person bound of liability for breach of the obligation, and the reasons for this become, I think, more compelling where the obligation is made part of a contract between parties. We are not faced with a question in the realm of tort, or negligence. The obligation is a statutory contractual obligation. The novelty, if there is one, is that the statutory obligation is expressed in terms of an obligation to exercise due diligence, etc. There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure. The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation. Perform it as you please. The performance is the carrier's performance. As was said in a corresponding case under the Harter Act: "The Act requires due diligence in the work "itself"—*The Colima*.[123] Ample other authority in the same direction has already been cited by my noble and learned friends. I am only concerned here to say that it seems to me to proceed on sound principle. I should only add that when I refer to repairers I include sub-contractors brought on to the ship by the repairers to enable them to perform the work which they contracted to do. Their failure, in my opinion, must also be the failure of the carrier on whom the statutory duty rests, unless in

[122] [1927] 2 K.B. 456.

[123] 82 Fed.Rep. 665.

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some very exceptional circumstances their employment can be said to be without any authority, express or implied, of the carrier, a case which can be considered if ever it arises.

3. The Hague Rules abolished the absolute warranty of seaworthiness. They substituted a lower measure of obligation. The old law no doubt worked hardly on shipowners and charterers, in the absence of exception or exclusion. The change in the law, not confined entirely to England, operated to afford relief to shipowners, as well as some protection to shippers. It would, however, be a most sweeping change if it had the result of providing carriers with a simple escape from their new obligation to exercise due diligence to make a ship seaworthy. If this were the plain effect of the statute, cadit quaestio. But in dubio the courts should, in a change of the suggested dimensions, lean the other way. The language of the Hague Rules does not, I think, lead to the result contended for by the respondents. The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers, and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence.

For these reasons, which I find it unnecessary further to amplify, I would allow the appeal.

Lord Hodson. My Lords, the contention of the respondents may be summarised in this way: It is a question of fact in each case whether due diligence has been exercised by a carrier and the question is to be answered by deciding whether a prudent shipowner would have acted in the same way. If he would have so acted the respondents say they are not liable. They do not contend that it is sufficient that they employed a competent shipyard to effect repairs. They do however maintain that, while the owner remains responsible for supervision and inspection where necessary, yet in the case of specialised work, which is to be regarded as within the competence of ship repairers rather than in that of owners of ships and their servants, this work and everything incidental thereto can properly be left to the ship repairers.

The contention of the appellants is summarised effectively in a passage from a judgment of MacKinnon L.J. in *Smith Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[124] which reads as follows: "The limitation and qualification of the "implied warranty of seaworthiness by cutting down the duty "of the shipowner to the obligation to use 'due diligence . . .

[124] 55 T.L.R. 766, 767.

"'to make the ship seaworthy' is a limitation or qualification "more apparent than real, because the exercise of due diligence "involves not merely that the shipowner personally shall exer- "cise due diligence, but that all his servants and agents shall "use due diligence. That is pointed out in Scrutton on Charter- "parties (14th ed., p. 110) which says that this variation will "not be 'of much practical value in face of the dilemma that "'must constantly arise on the facts. In most cases is the "'vessel is unseaworthy due diligence cannot have been used "'by the owner, his servants, or agents; if due diligence has "'been used the vessel in fact will be seaworthy. The circum- "'stances in which the dilemma does not arise (e.g., a defect "'causing unseaworthiness, but of so latent a nature that due "'diligence could not have discovered it) are not likely to occur "'often.'"

At first sight the argument which found favour with McNair J. and the Court of Appeal, that the question is one of fact to which the standard of the prudent shipowner should be applied, is an attractive one for it can fairly be said that the obligation is indistinguishable from the obligation to exercise reasonable care to which the common law is accustomed to apply itself, so that if a shipowner has done the sensible thing in employing competent repairers to do work on his ship he ought not to be penalised because one of the servants of the repairers has been negligent.

Articles III and IV, however, cannot be construed in isolation and regard must be had to the history of the obligation and the way in which the mandatory direction contained in article III and other words to the like effect have been construed over the years not only in this country but elsewhere. As was said by Lord Macmillan in *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[125] in relation to the Carriage of Goods by Sea Act, 1924: "It is important to remember that the Act of 1924 was the "outcome of an international conference and that the rules in "the schedule have an international currency. As these rules "must come under the consideration of foreign courts it is de- "sirable in the interests of uniformity that their interpretation "should not be rigidly controlled by domestic precedents of ante- "cedent date, but rather that the language of the rule should "be construed on broad principles of general acceptation." It is true that the possibilities of research are limited and that we have had no citation of authority from European maritime countries, but so far as this country, Canada, New Zealand and the United States of America are concerned it is clear that, subject to what may be said about the decision of Wright J., as he then was, in *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*,[126] to which I will refer later, the authorities are all consistent with one another and are adverse to the

[125] [1932] A.C. 328, 350. [126] [1927] 2 K.B. 456.

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contention of the respondents. The authorities go back long before 1924, the date of the passing of the English and the Australian Acts which adopted the Hague Rules following upon the Brussels Conference of 1922.

The earliest Act to which our attention has been drawn was the Harter Act, an Act of Congress of the United States, passed in 1893, which has been called the forerunner of the Hague Rules. This Act was considered in this country by the Court of Appeal in *G. E. Dobell & Co.* v. *Steamship Rossmore Co. Ltd.*[127]; the words to be construed were contained in section 3, which provides: "That if the owner of any vessel . . . shall "exercise due diligence to make the said vessel in all respects "seaworthy and properly manned equipped and supplied neither "the vessel her owner or owner's agent or charterers shall be-"come or be held responsible for damage or loss, . . . " etc. It is true that the negligence therein which caused unseaworthiness was that of a ship's carpenter, the servant of the owners, and the argument was in no way addressed to the position of independent contractors. Nevertheless wide language was used by all the members of the court. A. L. Smith L.J., in discussing the phrase "If the owner shall exercise due diligence to make "the vessel in all respects seaworthy," said [128]: "In my opinion, "it does not mean by himself personally, but by himself and "his agents; so that if by himself and his agents he exercises "due diligence to make the vessel seaworthy, then he is not to "be liable for loss or damage resulting afterwards from faults "or errors in navigation or in the management of the vessel." In 1897 in *The Colima*,[129] where the negligence was that of stevedores acting under the direction of the ship's officers, Brown J. referred to diligence on the part of the agents he may employ and to whom he may have committed the work of fitting the vessel for sea, and said: "the Act [i.e. the Harter Act] requires ". . . due diligence in the work itself. . . . On any other "construction, owners would escape all responsibility for the "seaworthiness of their ships by merely employing agents of good "repute, whether any diligence and care to make their vessels "seaworthy were in fact exercised or not." This construction gives practical effect to the words of the Act and the language used by the learned judge appears to me to be of great assistance, in particular by reason of his emphasis on diligence in the work itself.

It is true that in the Harter Act, as also in the Canada Water Carriage of Goods Act, 1910, the absolute undertaking by the carrier to provide a seaworthy ship, implied at common law in any contract of carriage, is not expressly negatived. Contrast the English Act of 1924, which has expressly negatived the implied undertaking. This difference was noted by Willmer L.J.,

[127] [1895] 2 Q.B. 408, 417.
[128] Ibid.
[129] 82 Fed.Rep. 665, 678.

as it had been in earlier cases, but in my opinion no inference can properly be drawn for this reason in favour of the carrier so as to enable a more lenient interpretation to be given to the words of the statute under consideration.

Of the American cases in addition to *The Colima*,[129] *The Irawaddy*[130] *The Mary L. Peters*[131] *and Nord Deutscher Lloyd* v. *Provident Insurance Co. of North America*[132] all reflect the same view. The same is true of the Canadian cases. Of these *Canada Transport Co. Ltd.* v. *Hunt Leuchars Hepburn Ltd., The City of Alberni*[133] was decided under the Canadian Act of 1936 whereby the warranty of seaworthiness was expressly negatived. There dry rot in the ship was not discovered by surveyors employed by the owners; the dry rot was not latent and Sydney Smith, B.J.A., held that he should apply the law as found in the English authorities. In doing so he referred to the current edition of Scrutton on Charterparties which contained a summary of the passage from the judgment of MacKinnon L.J. in the *Smith, Hogg* case[134] which I have said summarises the contentions of the appellants. It is true that in *The City of Alberni*[135] the negligence found to have been committed was that of surveyors employed by the shipowners and not that of ship repairers employed as independent contractors. In another Canadian case, however, namely, *Australian Newsprint Mills Ltd.* v. *Canadian Union Line Ltd.*,[136] the owners had entrusted their ship to a dry-dock company for overhaul and repairs and it was held, applying the statement of the law to be found in *Smith Hogg's* case,[137] that they could not be said to have complied with the statutory duty by entrusting compliance to an independent contractor.

There a cargo of wood pulp was damaged because storm valves had not been sufficiently screwed down and the ship was consequently unseaworthy. It was held that the owners could not avoid liability by attempting to cast upon the shoulders of some third party, engaged by them to do work upon the ship, a duty which the Act placed upon them. The learned judge said[138]: "It seems to me that the due diligence imposed by "the statute . . . is not made out by evidence that this duty "someone else was engaged to perform on the behalf of the "defendants—someone on whom the defendants relied and in "whom the defendants had confidence." The statute referred to is the Canadian Act of 1936.

I will not refer in detail to the cases decided in the Privy Council and to the passage in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[139] where Lord Wright himself and other members of this House have repeatedly stated the law in terms virtually

[129] 82 Fed.Rep. 665, 678.
[130] 17 U.S. 187.
[131] 68 Fed.Rep. 919.
[132] 110 Fed.Rep. 420.
[133] [1947] 2 D.L.R. 647.
[134] 55 T.L.R. 265, 767.
[135] [1947] 2 D.L.R. 647.
[136] [1959] 1 D.L.R. 850.
[137] 55 T.L.R. 766.
[138] [1952] 1 D.L.R. 850, 854.
[139] [1933] A.C. 57, 80.

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indistinguishable from those employed by MacKinnon L.J. in the *Smith Hogg* case.[140]

The stream of judicial dicta and of such direct authority as there is flows only in one direction and lends support to the contention of the appellants.

The respondents have argued, however, that the point is not expressly covered by authority and that in nearly all the cases where the question of liability for failure to exercise due diligence to make a ship seaworthy has arisen, the failure has turned out to be that of the owner or his servant or representative, not that of any independent contractor, so that there was in such cases sufficient ground for the strict application of the Rule against the owner. The position of ship repairers, it is said, is so clearly analogous to that of shipbuilders that repairers cannot fairly be distinguished from shipbuilders.

This brings me to the *Angliss* case,[141] the decision of Wright J. given shortly after the passing of our Act and containing the dictum about ship repairers which has been read and upon which the defendants strongly rely. In that case the decision was that the owners of a new ship specially built for them were not guilty of want of due diligence where the unseaworthiness complained of was caused or contributed to by bad workmanship in the construction of the ship on the part of the shipbuilders' workmen.

I do not propose to re-read the passages relied upon but observe that the passage about ship repairing is part of a paragraph in which the learned judge is dealing with the necessity of supervision on the part of the owner. It is true, as Willmer L.J. pointed out, that the learned judge would not have said what he did about the supervision of repair work unless he had been of opinion that the shipowner would not necessarily be responsible for want of due diligence on the part of repairers. I do not, however, regard repair work on the same footing as the building of a new ship to the order of owners. It could be argued that the *Angliss* case,[141] in so far as it deals with shipbuilders, was dealing with something outside the scope of article III, for to make a ship seaworthy is not the same as to make a seaworthy ship, but the expression "to make a ship seaworthy" is in my opinion wide enough to cover the work of repair however extensive those repairs may be.

I recognise that the *Angliss* case[141] has been followed where the negligence of shipbuilders is involved, see *The Australian Star*,[142] and recognised as authoritative in later cases, including the recent decision of this House in *Davie* v. *New Merton Board Mills Ltd.*,[143] but all the noble and learned lords who discussed the case were careful to notice that it was a case dealing with shipbuilders and that the decision was limited to the subject-matter.

It appears that Lord Wright in his subsequent utterances in

[140] 55 T.L.R. 766, 767.
[141] [1927] 2 K.B. 456, 462.
[142] (1940) 67 Ll.L.R. 110.
[143] [1959] A.C. 604.

the Privy Council and in this House said nothing to support the proposition for which the owners now contend. I have in mind his dictum in *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[144] (a case on the Canadian Act of 1910) where he said: "The obligation to make a ship seaworthy is personal to "the owners, whether or not they entrust the performance of "that obligation to experts, servants, or agents," and the passage from *Wilsons & Clyde Coal Co. Ltd.* v. *English*[145] which has already been noticed.

Compare also the dictum of Lord Roche delivering the judgment of the Privy Council in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[146] a case under the Canadian Act of 1910: "The condition is not fulfilled merely because the shipowner is "personally diligent. The condition required that diligence shall "in fact have been exercised by the shipowner or by those whom "he employs for the purpose—see *Dobell* v. *S.S. Rossmore Co.*[147] "Therefore . . . want of diligence in the compass adjuster who "adjusted the compasses or in the captain who said he checked "or verified the adjuster's work would be material, and a finding "adverse to the shipowner could be arrived at upon the ground "of want of due diligence in those persons." As Willmer L.J. pointed out, a compass adjuster could fairly be regarded as belonging to the category of independent contractor. This last dictum of the Privy Council was repeated in a later case where the judgment was delivered by Lord Somervell of Harrow—*Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[148]

The respondents, recognising that they cannot contend that it is an answer to an allegation of want of due diligence merely to say they have employed competent experts, seek to justify their contention in this case by saying that the work or repair and survey is of a specialised nature and of a kind proper, subject to supervision, to be contracted out to a reputable yard. They seek to meet the difficulty on the facts of this case that the act and work of securing the valves was ultimately performed by the ship's crew and was well within their competence by saying that once a ship has gone to repair the whole job must in practice be done and that it is impossible to reserve for the master and crew the sort of work which they can easily do. Although the owner of a car can generally change a wheel himself —it is the kind of thing which is often and properly left to a garage. I find this argument about specialised work being properly handed out in appropriate cases unacceptable as a justification for excluding the owner from responsibility for want of due

[144] [1939] A.C. 397, 403.
[145] [1938] A.C. 57, 80–81.
[146] 58 Ll.L.R. 33, 40.
[147] [1895] 2 Q.B. 408.
[148] [1959] A.C. 589, 602.

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diligence. It is true that ships have become more and more complicated since the days of sail and complications have no doubt multiplied since the passing of the 1924 Act but this does not justify a more lenient construction being put upon the Act in favour of shipowners.

The obligation in article III is not subject to any qualification and it is generally recognised that the Act was not passed for the relief of shipowners but to standardise within certain limits the rights of the holder of every bill of lading against the shipowner.

The position of the holders of bills of lading would be much worsened if the respondents were right in their contention that given the right conditions a shipowner can perform his obligation by putting out repair work to competent experts and shelter behind them if the work is negligently done.

Reliance was placed on common law cases in tort, not only master and servant cases like *Wilsons & Clyde Coal Co. Ltd.* v. *English* [149] (supra) but invitor and invitee cases like *Haseldine* v. *C. A. Daw & Son Ltd.*[150] and *Woodward* v. *Mayor of Hastings.*[151] It is not necessary to discuss in detail those cases where the common law duty to exercise reasonable care in other relationships has had to be considered. It may be, however, that the distinction between the last two cases based on specialised work being necessary in the case of the repair of a lift and being unnecessary in the case of the cleaning of a school may have to be reconsidered. Whether this is so or not I do not find such cases of assistance in reaching a conclusion in the matter which the House has now to decide.

In my opinion, on the facts of this case, the respondents did not exercise due diligence to make their ship seaworthy.

I would allow the appeal.

Appeal allowed.

Solicitors: *Clyde & Co.; Norton, Rose, Botterell & Roche.*

F. C.

[149] [1938] A.C. 57.
[150] [1941] 2 K.B. 343; [1941] 3 All E.R. 156, C.A.
[151] [1945] K.B. 174; 61 T.L.R. 94; [1944] 2 All E.R. 565, C.A.

[COURT OF APPEAL.]

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Feb. 9, 10.

Holroyd Pearce, Harman and Davies L.JJ.

Husband and Wife—Maintenance—Justices—Jurisdiction—Potentially polygamous marriage.

Husband and Wife — Marriage — Polygamous marriage system — Inapplicability of English matrimonial law—Justices—Maintenance application.

A polygamous marriage does not come within the word "marriage," nor do the parties to it come within the words "wife," "married woman" or "husband" for the purposes of the Matrimonial Causes Acts or the Summary Jurisdiction Acts relating to matrimonial matters; for the purpose of enabling relief to be granted no distinction could be drawn between (a) the High Court jurisdiction and summary jurisdiction, or (b) polygamous marriages and those which though potentially polygamous are de facto monogamous.

Where, therefore, a woman who had entered into a potentially polygamous marriage in Ghana applied to a magistrates' court for a maintenance order against the man on the grounds of desertion:—

Held, that as the parties to a polygamous marriage were not entitled to the remedies or relief of the matrimonial law of England, the woman was not entitled to a maintenance order.

Hyde v. *Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130 applied.

Decision of Divisional Court [1960] 3 W.L.R. 733; [1960] 3 All E.R. 196 affirmed.

APPEAL from Divisional Court (Lord Merriman P. and Marshall J.).[1]

The parties were natives of, and domiciled in, Ghana. They were both members of the tribe of Ga. In September, 1955, the husband became engaged to the wife in Ghana, and presented her with a ring and a Bible, which symbolised an intention on his part to convert a marriage which by tribal custom was potentially polygamous into a Christian, and therefore monogamous, marriage. In October, 1955, the husband left Ghana for England. In November, 1955, a marriage by proxy according to the customs of the tribe of Ga, was performed; it was a valid marriage. In January, 1956, the wife came to England and lived with the husband in Liverpool. From that time, the wife made many requests to the husband to convert the marriage into a Christian and monogamous one, but those requests were all refused. On November 1, 1958, the wife left the husband. Thereafter, she made a complaint to the Liverpool magistrates' court that the husband had deserted her. That complaint was found proved, the wife was granted the custody of the child and the husband was ordered to pay £4 10s. a week for the wife and 30s. a week for the child. The husband appealed against that order and the Divisional Court set it aside. The wife appealed.

[1] [1960] 3 W.L.R. 733; [1960] 3 All E.R. 196.

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J. S. Watson Q.C. and *W. G. O. Morgan* for the wife.
R. Z. H. Montgomery for the husband.

In addition to the cases referred to in the judgments *Srini Vasan (orse. Clayton)* v. *Srini Vasan* [2] was cited in argument.

Holroyd Pearce L.J. This is an appeal from the Divisional Court of the Probate Divorce and Admiralty Division. That court set aside a maintenance order made by the Liverpool stipendiary magistrate on the ground of the husband's desertion. It took the view that an appeal to this court was desirable owing to the general importance of the matter, and not because of any doubt that it felt.

The merits are entirely on the wife's side. The husband has behaved so badly that I fully share the regrets expressed by the Divisional Court at finding itself unable to uphold the magistrate's order. One is inclined to echo the words of Crew C.J. in the case of the Earldom of Oxford [1] when he said that there was none but would "take hold of a twig or twine thread to uphold it." Unfortunately the point taken by the husband which goes to jurisdiction seems to me unassailable; and I cannot but agree with the clear judgment of the President, which is founded on a vast experience of such matters.

The wife and husband are inhabitants of Ghana, and are domiciled there. They went through a tribal customary ceremony of marriage which is potentially polygamous. The husband had promised the wife that he would go through a further ceremony of marriage which would by the laws of Ghana convert the potentially polygamous marriage into a monogamous or Christian marriage. He declined to carry out his promise. Therefore, although neither of the parties has in fact ever taken another spouse, and the husband admitted on oath in court that she was his wife, the only tie that binds them is a potentially polygamous marriage.

In *Hyde* v. *Hyde and Woodmansee* [2] Lord Penzance held that such a marriage (in that case a Mormon marriage) although it was a valid marriage by the lex loci, and at the time the man and woman were single, would not be recognised by the English matrimonial court as a valid marriage in a suit instituted by one of the parties against the other for the purposes of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations. He accepted that for various other purposes the courts might take a different view, and concluded in these words [3]: "This court does not profess to decide upon the rights "of succession or legitimacy which it might be proper to accord "to the issue of the polygamous unions, nor upon the rights or "obligations in relation to third persons which people living under

[2] [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.

[1] *Willoughby of Eresby & Oxford (Earl) Case* (1625) W.Jo. 96, 130, H.L.

[2] (1866) L.R. 1 P. & D. 130.

[3] Ibid. 138.

"the sanction of such unions may have created for themselves. "All that is intended to be here decided is that as between each "other they are not entitled to the remedies, the adjudication, "or the relief of the matrimonial law of England."

The Judge Ordinary[4] supported that conclusion by careful and sound reasoning. He said: "the matrimonial law of this country "is adapted to the Christian marriage, and it is wholly inapplic-"able to polygamy. The matrimonial law is correspondent to the "rights and obligations which the contract of marriage has, by "the common understanding of the parties, created." He deals with the various remedies and shows that they are inapplicable to polygamous marriage. "If, then," he says, "the provisions "adapted to our matrimonial system are not applicable to such "a union as the present, is there any other to which the court "can resort? We have in England no law framed on the scale "of polygamy, or adjusted to its requirements." He rejects an argument which has been suggested in the present case also that the court would be justified in treating the first union as a Christian marriage, and all subsequent unions as void. He points to the startling inconsistencies that would flow from such a doctrine.

I find the reasoning of *Hyde* v. *Hyde*[5] inescapable. It has been approved in this court in *Baindail* (*orse. Lawson*) v. *Baindail*[6] where Lord Greene M.R. said: "For the purpose of enforc-"ing the rights of marriage, or for the purpose of dissolving a "marriage it has always been accepted as the case, following "Lord Penzance's decision, that the courts of this country exer-"cising jurisdiction in matrimonial affairs do not and cannot give "effect to, or dissolve, marriages which are not monogamous "marriages. The word 'marriage' in the Matrimonial Causes "Act, has to be construed for the purpose of ascertaining what "the jurisdiction of the English courts is in these matters. The "reasons are that the powers conferred on the courts for enforcing "or dissolving a marriage tie are not adapted to any form of "union between a man and a woman save a monogamous "union." And he concluded[7]: rightly or wrongly, the courts "have refused to regard a polygamous marriage as one which "entitles the parties to come for matrimonial relief to the courts "of this country."

It was argued that since in 1866 at the date of the decision in *Hyde* v. *Hyde*[8] no matrimonial jurisdiction similiar to that which magistrates now have existed, we should regard the summary matrimonial jurisdiction as not subject to the principle set out in *Hyde* v. *Hyde*.[8] But the observations of Lord Greene M.R.[9] above apply to matrimonial relief in general, and are clearly not intended to draw any distinction between the High

[4] 1 P. & D. 130, 135.
[5] Ibid. 130.
[6] [1946] P. 122, 125; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.
[7] Ibid. 126.
[8] 1 P. & D. 130.
[9] [1946] P. 122, 125, 126.

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Court and the magistrates' courts. Nor could such a distinction be supported by any logic or principle. The same difficulties would arise in the magistrates' courts in applying to polygamous unions, rights and remedies that are intended for and adapted to Christian marriages.

It is argued that for practical convenience the courts could and should deal with marriages which though potentially polygamous are in fact monogamous. But the fact that a marriage happens at the moment to consist only of two formerly single spouses is irrelevant and may be altered at any time by the husband taking another wife. A husband could always invalidate a pending summons simply by so doing. Such a situation would be incongruous and shows the undesirability of seeking to alter the principle on the ground of convenience in particular cases.

The essential question is what is the nature of the union, and what are the bonds and implications of the marriage ceremony in question. If the ceremony is polygamous then it does not come within the word "marriage" for the purposes of the Acts relating to matrimonial matters, nor do the parties to it come within the words "wife," "married woman" or "husband." I find it impossible to read "married woman" in the Summary Jurisdiction Acts as intended to have a wider meaning than the word "wife" in the Matrimonial Causes Acts, or to read "husband" in the former Acts as having a different meaning from "hus-"band" in the latter Acts, or to interpret the marriage connoted in the former Acts by the words "married woman" as a wider or looser tie than that intended by the word "marriage" in the latter Acts. The fact that the Summary Jurisdiction Acts provide somewhat different relief on sometimes different grounds from the Matrimonial Causes Act is no ground for inferring that the former were not intended to be governed by the principle of *Hyde* v. *Hyde*.[10] Moreover, Parliament would, in the light of the decision in *Hyde* v. *Hyde*, have clearly expressed its intention that the principle of that case should not apply to the Summary Jurisdiction Acts had it so intended.

Mr. Watson referred to the Family Allowances and National Insurance Act, 1956, s. 3, whereby, for the purposes of family allowances, the authority may treat a marriage, performed outside the United Kingdom under a law which permits polygamy, as valid if and so long as the authority is satisfied that the marriage has in fact at all time been monogamous. That, it is said, shows that there is a real difference between polygamous marriages and marriages which, though potentially polygamous, are de facto monogamous. It is argued that we should by reason of that distinction allow the latter to be the subject of applications to courts of summary jurisdiction. I can see no justification for such a departure from principle. That section shows that the

[10] 1 P. & D. 130.

words "marriage," "wife" and "husband" had not theretofore been thought to cover a polygamous marriage, and Parliament, therefore, found it necessary to enact section 3 of the Act of 1956. Parliament could make, if it so desired, for courts of summary jurisdiction a provision similar to that enacted in respect of family allowances. It would, however, be attended by many obvious incongruities and difficulties.

Mr. Watson sought to obtain some help from *Baindail* v. *Baindail*[11] but that case does not affect the present. It was there held that a party to a previous potentially polygamous marriage could not validly contract a subsequent Christian monogamous marriage, and that our Divorce Court would recognise the existence of the potentially polygamous marriage for the purpose of pronouncing a decree of nullity in respect of a subsequent Christian marriage. That decision does not touch this point. The recognition of the fact of the previous polygamous marriage is no recognition of it as a marriage suited to and within the matrimonial procedure and jurisdiction of our courts. It is merely the recognition of a fact disabling a party from entering into a later Christian marriage which as such was a proper subject for consideration and decree by the courts.

Two cases in the Privy Council—*Khoo Hooi Leong* v. *Khoo Chong Yeok*[12] and *Bamgbose* v. *Daniel*[13]—were relied on as showing that the courts have narrowed the principle in *Hyde* v. *Hyde*.[14] But those cases merely show that (as envisaged in *Hyde* v. *Hyde*) courts other than matrimonial may take account of polygamous marriages for the purpose of ascertaining such rights as those of succession. They do not affect the principle that our matrimonial courts will not deal with polygamous marriages as a subject for the exercise of their jurisdiction. *Mehta* (*orse. Kohn*) v. *Mehta*[15] provides no help. There the marriage in respect of which the court was prepared to consider granting a decree was monogamous. The fact that the husband might by a change of faith have possibly been able to take other wives did not make the marriage polygamous.

Although, like the Divisional Court, I have listened with every sympathy to the arguments put forward for the wife, I, too, find its conclusion inevitable. I would therefore dismiss the appeal.

Harman L.J. I agree, and for the reasons Pearce L.J. has given. It seems clear that the legislature takes the same view, hence section 3 of the Family Allowances and National Insurance Act, 1956, to which we have been referred. Whether the legislature would think it right to make a similar provision in regard to matrimonial proceedings is for them and not for us. Whether

[11] [1946] P. 122.
[12] [1930] A.C. 346, P.C.
[13] [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C.
[14] 1 P. & D. 130.
[15] [1945] 2 All E.R. 690.

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this complainant is without remedy of another sort again is not for us. I can only say that it seems that this husband did promise by the gift of a Bible and a ring to marry this woman in a Christian union; and if that was the contract which he made, and which he has not fulfilled, it may well be that her advisers might think it worth while to sue him for damages for breach of that contract. Whether in that way some justice can be wrung from him I do not presume here to pronounce. For the present I shall only concur in the dismissal of the lady's appeal.

Davies L.J. I also agree.

Appeal dismissed.
No order as to costs.
Leave to appeal to House of Lords refused.

Solicitors: *Helder, Roberts & Co. for John A. Behn, Twyford & Reece, Liverpool; Michael Kramer & Co. for I. Canter, Levin & Mannheim, Liverpool.*

C. J. E.

[HOUSE OF LORDS.]

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1961
Jan. 16, 17, 18; *Feb.* 13.

VERDIN AND OTHERS . . . . . APPELLANTS;
AND
COUGHTRIE (INSPECTOR OF TAXES) . RESPONDENT.

[APPEAL IN TOLLEMACHE SETTLED ESTATES TRUSTEES *v.* COUGHTRIE.]

Revenue—Income tax—Excess rents—Computation—Royalties of sand-pit—Assessment—Actual or notional receipts—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 82 (*Sch. A, paras.* 1, 2), *s.* 175 (1) (*a*).

Schedule A in section 82 of the Income Tax Act, 1952, provides: "1. Tax under this Schedule shall be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom . . . for every twenty shillings of the annual value thereof: Provided that tax . . . in the case of the following concerns, namely—(*a*) quarries of stone, slate, limestone, or chalk; and (*b*) mines of coal, tin, lead, copper, mundic, iron and other mines; and (*c*) ironworks, gasworks, salt springs or works, alum mines or works . . . and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments

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* *Present*: Viscount Kilmuir L.C., Lord Denning, Lord Morris of Borth-y-Gest and Lord Hodson.

"or heritages, shall not be charged under this Schedule, but the "profits . . . shall be charged to tax under Case I of Schedule D, ". . . 2. The annual value for the purposes of this Schedule shall, "in the case of all lands, tenements, hereditaments or heritages, of "whatever nature and for whatever purpose occupied or enjoyed, "and of whatever value, be understood to be—(*a*) if they are let "at a rack rent and the amount of that rent has been fixed by "agreement commencing within the period of seven years preceding April 5 next before the time of making the assessment, the "amount of the rent by the year at which they are let; or (*b*) if "they are not let at a rack rent so fixed, then the rack rent at "which they are worth to be let by the year: . . ."

By section 175 (1): "If, as respects any year of assessment, "the immediate lessor of a unit of assessment is entitled in respect "of the unit to any rent payable under a lease or leases to which "this section applies, he shall be chargeable to tax under Case VI "of Schedule D in respect of the excess, if any, of the amount "which would have been the amount of the assessment of the unit "for the purposes of Schedule A, as reduced for the purpose of "collection, if the annual value of the unit had been determined "(in accordance, in whatever part of the United Kingdom the "unit is situated, with the provisions of Part III of this Act) by "reference to that rent and the other terms of the lease or leases, "over whichever is the greater of—(*a*) the actual amount of the "assessment of the unit for the purposes of Schedule A, as reduced "for the purpose of collection; or (*b*) the amount of any rent "payable by the immediate lessor in respect of the unit under any "short lease or short leases. . . ."

By a lease dated December 17, 1946, a sand-pit was let for a term of 21 years from March 26, 1946, at an annual surface rent of £10 and a royalty of 6d. a ton for all sand worked. In the year 1946–47 the royalties payable under the lease were £96 12s. 6d., but they rose steadily and in 1952–53 were £841 14s. 6d. In 1953–54 they were £646 1s., and in that year an assessment to tax under Schedule A was made in respect of the sand-pit for the first time in the sum of £3 5s., and assessments of £5 and £1,000 in respect of excess rents and royalties respectively were made under Schedule D. On appeal the General Commissioners held that the royalties were within section 175 and should be treated as excess rents under Schedule D, and they altered the assessment to £35 in respect of the dead rent and £646 in respect of the actual royalties received in that year, less the Schedule A assessment:—

Held, that on its true construction section 175 (1) (within which the parties now agreed the rent and royalties fell) required the calculation to be made as follows: (1) one was directed to the year of assessment; (2) one must proceed to the rent actually payable; (3) one must consider whether it was the true rent; (4) one must make the reduction for collection in accordance with Part III of the Act.

The material factors were the actual payments made and conditions obtaining in the year of assessment. The subsection did not require a computation to be made on Schedule A principles of the annual value of the land.

Barron v. *Littman* [1953] A.C. 96; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548, H.L. considered.

Decision of the Court of Appeal (sub nom. *Tollemache Settled Estates Trustees* v. *Coughtrie*) [1960] Ch. 475; [1960] 2 W.L.R. 825; [1960] 2 All E.R. 122, C.A. affirmed.

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Tollemache Settled Estates Trustees v. Coughtrie.

Appeal from the Court of Appeal (Lord Evershed M.R., Pearce and Harman L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 24, 1960, allowing an appeal by the respondent, William Donald Coughtrie (H.M. Inspector of Taxes), from an order of the High Court (Upjohn J.) dated May 11, 1959, whereby an appeal by the appellants, Richard Bertram Verdin, Sir Randle John Baker Willbraham, Bart., and Wilfrid Pymont, the trustees of the Tollemache Settled Estates, by way of case stated from a determination of the Commissioners for the General Purposes of the Income Tax for the Drayton Division of Shropshire was allowed and the determination of those commissioners was reversed.

The facts are set out in the opinions of Viscount Kilmuir L.C. and Lord Denning.

H. H. Monroe Q.C. and *R. Buchanan-Dunlop* for the appellants.

Roy Borneman Q.C. and *Alan Orr* for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Russell* v. *Scott* [1] and *Strick* v. *Longsdon*.[2]

Their Lordships took time for consideration.

Feb. 13. Viscount Kilmuir L.C. My Lords, this is an appeal from an order of the Court of Appeal (Lord Evershed M.R., Pearce and Harman L.JJ.), allowing an appeal by the respondent from an order of the High Court (Upjohn J.) by which an appeal by the appellants by way of case stated from a determination of the General Commissioners for the Drayton Division of Shropshire was allowed and the determination of those commissioners was reversed.

The matter arises upon an assessment made upon the appellants under Schedule D of the Income Tax Act, 1952, for the year of assessment 1953–54, and concerns surface rent and royalties received by the appellants under a 21-year lease, granted by them in the year 1946, of certain land, comprising a sand-pit. Under the lease the tenants paid £10 a year rent and a royalty of 6d. per ton of sand taken from the land. There was also provision, of which in the event the tenants took advantage, for additional land to be taken on similar terms.

The sand-pit was assessed to Schedule A for the first time for the year 1953–54 and the additional land taken over by the tenants was the subject of a separate assessment. It is not necessary for me to state the details. Royalties paid by the tenants rose steadily from £90-odd for the year 1946–47 to over £840 for the year 1952–53; for the year 1953–54 they were £646 1s.

[1] [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1, H.L.

[2] (1953) 34 T.C. 528.

Evidence was given before the general commissioners by surveyors on behalf of the appellants and the respondent, respectively, as to what would have been a reasonable fixed rent in respect of the original area of the sand-pit, together with the additional five acres for a 21-year lease from March 25, 1946. Such reasonable rent was estimated by the appellants' surveyor at £292 per annum and by the respondent's surveyor at £500 per annum, but both surveyors were of opinion that a sand-pit would rarely be let at a fixed rent for a term of 21 years and that the only terms of letting which would be satisfactory to both landlord and tenant would be those adopted in the present case, namely, a small fixed rent and a royalty per ton of sand extracted.

Both surveyors were agreed that if required to estimate at the beginning of a year a fair annual value for occupation of the sand-pit over the coming year (in accordance with the respondent's alternative contention), they would have to consider all the circumstances, including the results of the previous year's workings and the likely commercial demand for sand in the coming year but that, in the absence of any significant change of circumstances, their valuation would not differ greatly from that shown by the previous year's working.

It is common ground between the parties that the rent and royalties fall within section 175 of the Income Tax Act, 1952, which subjects what are commonly called "excess rents" to income tax under Case VI of Schedule D, and the question at issue in the appeal is whether, as the respondent contends, the appellants are, by the provisions of that section, assessable for the year of assessment on the basis of the rent and royalties actually received by them in that year (less the amount of the Schedule A assessment on the land, and subject to such reduction as is allowable under Schedule A for the purpose of collection), or whether, as the appellants contend, the section on its true construction requires a computation to be made (in accordance with certain provisions applicable to Schedule A, and having regard to the rent and royalties reserved by, and the other terms of, the lease), of the annual value of the land. It is common ground that such a computation would result in a different, and in almost all cases a lower, assessment than would be produced on the basis of the rent and royalties actually received in the year of assessment.

The history of section 175 and its statutory ancestor, section 15 of the Finance Act, 1940, is set out at length in the judgment of Upjohn J., and I need only make a short reference to it at this stage, adapting slightly the words of Lord Asquith of Bishopstone in *Barron* v. *Littman*[1]: "The [old] system [of taxing under "Schedule A only] worked fairly, so long as Schedule A value was "frequently revised and so kept in step with commercial value. "But when, during the war, quinquennial revaluations under this

[1] [1953] A.C. 96, 122; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548, H.L.

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"Schedule were suspended, an increasing disparity declared itself "between the old Sch. A values and the rents which the premises "in fact commanded in the market, and therewith an increasing "tax-free commercial profit lodged in the hands of the entre-"preneur. Section 15 of the Act of 1940 was clearly designed to "'catch' this profit."

It is, I think, convenient to split section 175 (1) into the following parts:

A. "If, as respects any year of assessment, the immediate "lessor of a unit of assessment is entitled in respect of the unit "to any rent payable under a lease or leases to which this section "applies, . . ."

By these words: (a) one is intructed to look at the year of assessment, in this case 1953–54; (b) the lease in question is one to which this section applies under subsection (4); (c) the appellants are immediate lessors entitled to any rent payable under this lease.

B. ". . . he shall be chargeable to tax under Case VI of "Schedule D in respect of the excess, if any, . . ."

With regard to these words I note: (a) that the assessment is under Case VI of Schedule D; (b) that it is in respect of an excess. The top line of the subtraction sum which gives the excess is derived from the formula in the subsection and the bottom line is the actual amount of the assessment for Schedule A as stated in paragraph (a) of the subsection.

C. ". . . of the amount which would have been the amount "of the assessment of the unit for the purposes of Schedule A, "as reduced for the purpose of collection, if the annual value of "the unit had been determined (in accordance, in whatever part "of the United Kingdom the unit is situated, with the provisions "of Part III of this Act) by reference to that rent and the other "terms of the lease. . . ."

This is the formula and it is essential to note: (a) that despite the reference to Schedule A, the wording keeps one's view focused on an annual value determined in accordance with the words which follow. One is taken away from the conception of an objective rack-rent to the term of the lease in question. This fits in with the need for determining not the market value of the land, but the profit of the immediate lessor in question; (b) the determination of the annual value in this subsection has two constituents: (i) it must be by reference to "that rent and the "other terms of the lease." The words "that rent" refer back to "any rent payable under a lease" in the earlier part of the subsection; (ii) it must (in order to give effect to the words in brackets) be "in accordance . . . with the provisions of Part III "of this Act."

From this analysis of the subsection it is, in my opinion, impossible to escape the following construction. First and foremost, one is directed to the year of assessment. Secondly, as might be expected in a section the precondition of which is that

a lessor should be entitled to rent, one proceeds to "that rent," in other words, the rent actually payable. This is emphasised by the fact that the words chosen are not "the terms of the lease "including the rent" but "that rent and the other terms of the "lease." Thirdly, having reached the figure of the rent actually paid, one has to consider whether it is the true rent.

At this point, one must bear in mind the two constituents of the formula to which I have referred. In other words, one has to look at "the other terms of the lease" but "in accordance "with the provisions of Part III of this Act." This means, in my view, that one has at this point to consider section 86, which deals with tenants' rates, etc., paid by the landlord and owner-occupier, and section 88, which is concerned with, inter alia, cases where the rent is not the true consideration but by reason of other terms of the lease an adjustment must be made. The fourth step is to make the reduction for collection also in accordance with Part III of the Act. That is how the top line of the necessary subtraction sum is arrived at. This construction, which is that which appealed to Pearce and Harman L.JJ., sends me to the actual payments made and conditions obtaining in this year of assessment. I have given full consideration to the view of Upjohn J. that the section uses the words "the amount which "would have been the amount of the assessment of the unit "for the purposes of Schedule A," and these predicate a notional figure. I have also considered the doubts of Lord Evershed M.R. based on the use of "annual value." I do not, however, find that there is anything in the section which drives one from reading the book to looking in the crystal, but, on the contrary, it is from beginning to end looking at the actualities of the year of assessment.

For these reasons I would dismiss the appeal.

LORD DENNING. My Lords, this case concerns a sand-pit in Cheshire. In 1946 the owners let some two acres of it to a firm of builders' merchants for a term of 21 years. The rent payable was a surface rent of £10 a year for the two acres and a royalty of 6d per ton on all sand worked and gotten from the land. The tenants covenanted that they would effectually and vigorously work and get the sand, unless it would be unprofitable on account of depression of trade or unless prevented by strikes, and so forth. The royalties went up year by year from some £100 in 1947 to some £800 in 1952. By September, 1953, the tenants had got all the sand they could from the first two acres and thereupon became entitled under the leases to take up another five acres at an additional £25 a year surface rent. They took up these extra five acres and thenceforward paid £35 a year surface rent and royalty of 6d. a ton. We do not know whether there was enough sand to last out the full term of 21 years or not.

We are only concerned with the tax payable by the owners

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for the year 1953/54. During that year from April 1, 1953, to March 31, 1954, the owners received a surface rent of £22 and royalties of £646, making £668 altogether. These two sums together are to be regarded as the rent, see *Reg.* v. *Westbrook.*[2] The Schedule A figure for that period was only some £7, for it was apparently assessed on the agricultural value of the land.

Both sides agree that the relevant section is section 175 of the Income Tax Act, 1952, which provides for a tax on excess rents, that is, roughly speaking, on rents which exceed the Schedule A figure. But the dispute is how the excess rent is to be calculated. The Crown say that it is to be calculated by reference to the *actual* figure of rent, namely, £668 received by the owners during the year in question. The owners say it is to be assessed by reference to an *estimate* of the annual value spread over the period of the lease.

The nature of the contest can best be seen by giving the actual figures. The Crown say that the amount chargeable to tax is £577, made up as follows:

Royalties actually received during the year April 1, 1953, to March 31, 1954	£646
Surface rent actually received for the same period (apportioned for two acres from April 1, 1953, to September 29, 1953, and for seven acres from September 29, 1953, to March 31, 1954)	£22
The rent received under the lease was therefore	£668
This must be reduced by one-eighth for purposes of collection under section 99	£84
Leaving	£584
Less Schedule A assessment on the land (apportioned for the acreage occupied during the year)	£7
The excess rent chargeable under section 175 is therefore	£577

The owners say that the Crown's assessment is wrong in taking the *actual* sum of £646 royalties received during the year. That figure, they say, should be replaced in the calculation by an *estimated* figure of the annual value. Mr. Monroe for the owners said that the Commissioners should be directed "to find what "was the consideration agreed to be paid under the lease and "to express that consideration (in the light of evidence as to the "amount of sand available and the rate at which it was likely "to be used up) as a figure of annual value." By this I understand that according to Mr. Monroe the Commissioners should be directed to estimate the amount of sand to be gotten

[2] (1847) 10 Q.B. 178.

from the pit and see whether or not it was likely to be used up before the end of the 21 years. They should then estimate the royalties which the owners were likely to receive over the 21 years and then average it out so as to get a yearly figure. In short, they should spread the anticipated royalties over the period of the lease. Mr. Monroe said, however, that they could revise it in any particular year if circumstances required, as, for instance, if there was a depression in trade.

My Lords, I think that the Crown's contention is correct and the owners are wrong for the simple reason that the words of the Income Tax Act, 1952, compel this result. Section 175 compels you to take "that rent," that is, the rent payable under the lease for the year of assessment, and to feed that rent into the Schedule A machine in this way:

First, you take "that rent," i.e., the actual rent, as the starting point.

Secondly, you take "the other terms of the lease" and make such adjustments, if any, in that figure of rent as are warranted "by Part III of the Act." For instance, if the landlord pays the rates, the figure must be reduced under section 86. If the tenant does the repairs, the figure must be increased under section 88 (3) (*b*). And so forth. No such adjustments arise in the present case.

Thirdly, you must deduct one-eighth, being the repairs allowance permitted "for the purposes of collection," under section 99.

The result of that calculation is to give you the top figure. Then in order to ascertain "the excess" on which tax is chargeable, you do this: You take the "actual amount" of the Schedule A assessment (usually a low figure left over from the past), reduce it by one-eighth for the purpose of collection, then deduct it from the top figure and you have "the excess" on which tax is chargeable under Case VI of Schedule D.

Mr. Monroe sought to escape from this result by minimising the impact of the words "that rent." He wished to read the section as if it read that you must determine the annual value "by reference to the terms of the lease." Whereas it distinctly says that you must determine it "by reference to *that rent* and "the other terms of the lease." *That rent* is clearly the actual figure.

Mr. Monroe sought to support his argument by saying that injustice would result unless the section was read in his way. He took two hypothetical cases:

First, a lease for seven years granted for a *premium* of £700 and a rent of £100 a year. Secondly, a lease for three years granted at a *rising rent* of £100 for the first year, £200 for the second year and £300 for the third year. Injustice, said Mr. Monroe, would result in those cases if the Schedule A figure was fixed at £200 and in addition "the excess" was calculated on the actual rent for the year of assessment.

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My Lords, I am always ready, I hope, to look at any possible injustices said to be created by an Act of Parliament and to construe it whenever possible so as to remove them: for I take it that Parliament never intends to do an injustice to anyone. But I am quite unmoved by the possible injustices suggested by Mr. Monroe in this case. They are purely hypothetical and I doubt if they will ever arise in practice. If they should, there are ways and means, as Mr. Orr suggested, of overcoming them. On the other hand, I see every reason in common sense for taking the *actual* figure of rent and not resorting to an estimate: and that is what I think the statute requires. I would therefore dismiss the appeal.

Lord Morris of Borth-y-Gest. My Lords, the opening words of section 175 show that from year to year a lessor may be chargeable to tax under Schedule D. He will be so chargeable in respect of any excess that in any one year there may be of one amount denoted by the words of the section over another. In the present case no question arose as to the latter amount. It was the actual amount of the Schedule A assessment (as reduced for the purpose of collection). In order to arrive at the other amount denoted by the section it has to be ascertained whether, in the particular year of assessment which is being considered, the lessor (the immediate lessor) was entitled to a rent which was payable under a lease to which the section applies. When ascertained that rent becomes an essential part of the determination or special calculation which the section requires. The section requires a determination as to what "would have been" the Schedule A assessment (as reduced for the purpose of collection) on a certain given basis. What would it have been if the annual value had been determined by reference to "that rent" and the other terms of the lease? The rent so referred to is, in my judgment, the actual rent for the year in question as ascertained. In the present case the lessors were entitled to a surface rent and to a royalty per ton "for all sand "worked and gotten." The combined amount of the rent and royalty payments can be regarded as the rent payable.

When assessment for the purposes of Schedule A is being made and the annual value of property is being ascertained it has to be considered whether there has been a letting at a rack-rent fixed within a certain period and, if not, what is the rack-rent at which the lands are worth to be let by the year. When the directions given in section 175 are being followed, then inquiry has to take place as to what would have been the Schedule A assessment if the annual value had been determined (in accordance with the provisions of Part III) by reference to the actual rent payable to the lessor in the particular year of assessment (and to the other terms of the lease). Instead, therefore, of determining the annual value by making an assessment or a valuation under section 82, the figure actually payable to the

lessor in the particular year is to be taken. Stated otherwise, if for the purposes of Schedule A the annual value had been determined by reference to the actual figure payable, then that actual figure would take the place of (or would be regarded as) the rack-rent. No occasion for any further valuation or calculation under section 82 (2) (*a*) or (*b*) would arise.

Section 175 also requires the supposition that annual value had been determined in accordance, in whatever part of the United Kingdom the unit of assessment is situated, with the provisions of Part III of the Act. This introduces the relevant provisions of Part III for determining assessments. Sections 86 and 88 may, for example, in particular cases require consideration. Furthermore, section 175 in directing the inquiry as to what, on the given basis, would have been the amount of the assessment of the unit for the purposes of Schedule A, uses also the words "as reduced for the purpose of collection." Such a reduction may be seen in section 99.

This being as a matter of construction my reading of section 175, I add that this reading of it conforms with what must have been the object of the section which, broadly stated, was to impose an annual tax, being a tax under Schedule D, on differences between out-of-date Schedule A assessments and rents actually being received.

I would dismiss the appeal.

LORD HODSON. My Lords, section 175 of the Income Tax Act, 1952, repeats the language of section 15 of the Income Tax Act, 1940, which was considered by your Lordships' House in the case of *Barron* v. *Littman*.[3] That case sustained the claim of the taxpayer to deduct losses suffered by him in respect of certain properties from excess rents chargeable under section 15. All of their Lordships considered the operation of that section. My noble and learned friend, Lord Reid, said[4]: ". . . the "provisions of section 15 can be regarded as supplementary to "Schedule A. But they are not an extension of Schedule A. They "tax a new kind of profits or gains, and they tax it under Case VI "of Schedule D because it does not come within the scope of any "other Schedule or Case. Moreover, liability to pay tax under "section 15 is imposed directly on the lessor who makes the "profit, whereas the occupier pays tax, at least in the first "instance, under Schedule A. Section 15 imposes liability to "tax if a notional revaluation of the property, based on the rent "which the taxpayer actually receives, exceeds whichever is "the greater of the actual Schedule A assessment or any rent "which he has to pay under a short lease. Broadly speaking, that "is a case where the taxpayer has made a profit by letting or "sub-letting and where tax on the amount of his profit would "exceed the tax due under Schedule A, or such part of that tax

[3] [1953] A.C. 96.

[4] Ibid. 117.

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"as he has to bear himself: and the amount of tax payable "under section 15 when added to the tax under Schedule A or that "part of it which he bears himself will roughly correspond to "what he would have had to pay in tax if he had to pay "nothing under Schedule A but had been taxed on his whole "profit from letting or sub-letting the property."

Later, Lord Reid said [5]: "The calculation which section 15 "directs is simply the method by which the profits from the "transaction are to be measured for income tax purposes, and "the assessment and charge to tax under the section are in "respect of the profits so measured."

True that the House was not concerned with how the notional revaluation or, as it may be called, "the top figure" was to be calculated, but the language used supports the contention of the Crown that the calculation is to be made by reference to the actual figure of rent received by the taxpayer during the year in question.

The appellants contended that the measure to be used is not the actual rent, including in this case royalties received, but the annual value computed by reference to the terms of the current lease. They argued that the figure of £646 (the royalties received during the year April 1, 1953, to March 31, 1954) is only relevant evidence to enable the annual value to be computed and that the Commissioners should be directed to find what is the consideration agreed to be paid under the lease and to express that consideration in the light of evidence as to sand available and the rate at which it is likely to be used up as a figure of annual value.

The words of the section, however, are, in my opinion, too strong for them. The section provides a formula by which the excess rent is to be calculated. It begins by referring to the year of assessment and to "any rent" to which the lessor is entitled. This rent must be the sum of money payable as rent in respect of that year. The "top figure" is to be calculated by reference to "that rent and the other terms of the lease," but the calculation is to be made in accordance with the provisions of Part III of the Act. This means that such adjustments are to be made as are to be found in Part III of the Act as, for example, provisions relating to repairs and payments of rates: see sections 86 and 88 (3) (*b*) of the Act. Finally, by section 99, a repairs allowance is permitted, as the result of which the assessment is, for the purposes of collection, reduced by one-eighth.

The emphasis is on the word "rent"; that rent is the rent for the year of assessment and there is no ground for treating the rent as one of the terms of the lease to be used only as evidence upon which a notional rent is to be fixed on a Schedule A basis. The words "other terms" cannot embrace rent for other years. The assessment is a Schedule D assessment under

[5] [1953] A.C. 96, 119.

Case VI on profits and gains for the year of assessment and the reference to Schedule A provisions is necessary in order that the taxpayer may not suffer the injustice of being deprived of any adjustments to which he should be entitled.

The appellants sought to support their argument by the example of a case where the Crown's contention that the actual rent for the year is the basis of assessment would cause an injustice. If, it is said, one takes a lease for three years at a rent of £100 for the first, £200 for the second and £300 for the third year, the Schedule A assessment being £200, the landlord would, if directly assessed, pay tax on £100 excess rent in the third year, which on the face of it is unjust, since in the first year his actual rent was less by the same amount than the Schedule A figure on which he had to pay tax. Anomalies there must be, perhaps not infrequently, in tax cases, but I am not driven by this apparent anomaly to adopt the construction of section 175 put forward by the appellants.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Peake & Co.; Solicitor of Inland Revenue.*

F. C.

[CHANCERY DIVISION.]

In re BERRY, DECD.
LLOYDS BANK LTD. *v.* BERRY AND OTHERS.

1961
Jan. 18, 19, 25.

Pennycuick J.

[1960 B. 2170.]

Trusts—Howe v. *Lord Dartmouth, rule in—Trust for conversion with power to postpone—Hotel business carried on by trustees until sale —Unauthorised investment—Whether life tenant entitled to profits of business.*

By his will dated March 17, 1955, a testator gave his residuary estate to trustees on trust for sale and conversion with power to postpone sale and to invest the same and hold the residue and investments on trust to pay the income thereof to his wife for life and after her death, and after paying certain pecuniary legacies to his grandchildren, on trust as to both capital and income for his two daughters in equal shares. Clause 7 of his will provided: "... no part of any dividends rents interest or moneys of the "nature of income shall be apportioned to or treated as capital of "my estate and I declare that the whole thereof (whether the same "be paid in respect of a period wholly or only partly prior to my "death) shall belong to the person entitled under my will to the "investment or property from which the same respectively arose "and if there shall be a tenant for life of such investment or "property such dividend rent interest or money shall be income

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

1961

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"payable to such tenant for life." By clause 8: "I declare that "no part of my estate not actually producing income shall be "treated as producing income for the purposes of the will." Clause 9 provided that: "Any moneys requiring investment under the "provisions of this my will may be invested in any investments "which my trustees shall in their absolute discretion think fit "whether trustee securities or not."

The testator died on September 30, 1958, survived by his wife and two daughters. His principal asset was an hotel business which he had carried on alone, the accounts of which were made up in respect of the accounting period ending on March 31 in each year. The testator's trustees carried on the business after the testator's death until May 11, 1959, when it was sold for a net price of £36,770. An account taken for the period March 31 to the testator's death, showed a profit of some £6,000, on which the testator had drawn some £400. During the period from the date of death to the sale, the business made a loss of some £1,400.

On a summons to determine whether the profits of £6,000 less the testator's drawings and the loss of £1,400 should be attributed to capital or income or should be apportioned between them:—

Held, (1) that the rule in *Howe* v. *Lord Dartmouth* (1802) 7 Vesey 137 applied although the will contained a trust for conversion with power to postpone (post, p. 340).

In re Chaytor [1905] 1 Ch. 233 applied.

In re Fisher [1943] 1 Ch. 377 not followed.

(2) That there was nothing in the terms of the will to exclude the application of the rule in *Howe* v. *Lord Dartmouth* (supra) so that the widow was not entitled to the actual income arising from the testator's business, which was not an authorised investment, in respect of any period, but was merely entitled to 4 per cent. on the proceeds of sale of the business in respect of the period from the date of the testator's death to the date of the sale of the business (post, p. 342).

Dicta of Simonds J. in *In re Robbins* [1941] Ch. 434; [1941] 2 All E.R. 601 considered.

Adjourned summons.

By his will, dated March 17, 1955, the testator, Donald Dodgson Berry, having appointed executors and trustees and made certain specific and pecuniary legacies, disposed, by clause 6, of the residue of his estate as follows: "I give devise bequeath "and appoint all the remainder of my estate whatsoever and "wheresoever both real and personal unto my trustees upon trust "to sell call in collect and convert into money the same or such "part thereof as shall not consist of money with power at their "discretion to postpone such sale calling in collection and con-"version for so long as they shall think proper without being "responsible for loss and to hold the proceeds of such sale calling "in collection and conversion and my ready money after payment "thereout of my just debts and funeral and testamentary "expenses and the legacies given by this my will or by any "codicil hereto and all death duties arising on my death (herein-"after called 'my residuary estate') upon trust to invest the "same and to hold my residuary estate and the investments for "the time being representing the same upon the following trusts "namely:— (a) To pay the income arising therefrom to my wife

"the said Elsie Florence Berry during her life and after her "death (b) To pay the following pecuniary legacies free of all "death duties:— To each of my grandsons John and Michael "Broadbent the sum of five hundred pounds on their attaining "the age of twenty-one years To my grandson Jonathan Price the "sum of one hundred pounds To Caroline Kirby the daughter of "my step-son the said Paul Kirby the sum of one hundred pounds "(c) Upon trust as to both capital and income of the remainder "of my residuary estate for such of them my said two daughters "Melanie Patricia Broadbent and Jocelyn Mary Price as shall be "living at the date of my death and if more than one in equal "shares as tenants in common." Clause 7 of the will provided: "I declare that no part of any dividends rents interest or moneys "of the nature of income shall be apportioned to or treated as "capital of my estate and I declare that the whole thereof "(whether the same be paid in respect of a period wholly or only "partly prior to my death) shall belong to the person entitled "under my will to the investment or property from which the "same respectively arose and if there shall be a tenant for life "of such investment or property such dividend rent interest or "money shall be income payable to such tenant for life." By clause 8: "I declare that no part of my estate not actually "producing income shall be treated as producing income for the "purposes of this my will," and by clause 9: "Any moneys "requiring investment under the provisions of this my will may "be invested in any investments which my trustees shall in their "absolute discretion think fit whether trustee securities or not."

The testator died on September 30, 1958, survived by his wife and his two named daughters. At the date of his death he was the owner of the Royal Hotel, Bognor, where he carried on the business of a hotelier, the business being carried on by him alone and not in partnership with any other person. The accounts of the business were made up in respect of the accounting period ending on March 31 in each year. At the date of the testator's death, the value of the business, according to the balance-sheet, was approximately £30,000. After his death his trustees, Lloyds Bank Ltd. and James Buchanan, carried on the business of the hotel for a few months with a view to sale and on May 11, 1959, sold it as a going concern at a net profit of £36,770. An account taken in respect of the period March 31, 1958, to September 30, 1958, showed a profit of £6,000 10s. 8d., of which the testator had drawn £483 2s. 11d. during his lifetime. No account was in fact taken on March 31, 1959, but during the period from the date of his death to the date of the sale the business made a loss of approximately £1,400.

The trustees took out an originating summons for the determination of the question: whether, on the true construction of the will of the testator and having regard in particular to the provisions of clause 7 thereof, the following respective sums, namely: (a) the profit of £6,000 10s. 8d. earned by the testator

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in his business of an hotelier from April 1, 1958, to September 30, 1958, less the sum of £483 2s. 11d. drawn out of the business by the testator during that period; (b) the income tax, surtax and estate duty paid or payable by the trustees as executors and attributable to the undrawn profit; and (c) the loss of £1,398 6s. 6d. incurred by the trustees as executors in carrying on the business during the period from October 1, 1958, to May 11, 1959, ought, respectively, as between the persons interested in capital and income of the testator's residuary estate (i) to be attributed wholly to capital or (ii) to be attributed wholly to income or (iii) to be apportioned in some and what manner between capital and income.

E. I. Goulding for the trustees.

R. Cozens-Hardy Horne for the first defendant, the testator's widow.

A. C. Sparrow for the second and third defendants, the testator's daughters.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

January 25. Pennycuick J. read the following judgment. This summons raises a question as to the division between the life tenant and the reversioners of the profits earned during the year in which the testator died, of a business which he carried on. [His Lordship stated the facts and continued:] It will be observed that the actual trading surplus—I include in that expression debits and credits—derived in respect of the operation of the business during the period from April 1, 1958, to September 30, 1958, was in the hands of the testator before his death and was reflected in the assets and liabilities of the business at the death. The profit and loss account at March 31, 1959, had one been taken, would have disclosed a trading profit for the whole year, but no part of the surplus was received by the executors after the death of the testator.

In support of the contention that the widow as life tenant is entitled to the whole of the profits earned by the business in respect of the year April 1, 1958 to March 31, 1959, less the drawings made by the testator during his lifetime, Mr. Cozens-Hardy Horne, for the widow, relied on *In re Robbins*,[1] in the course of which Simonds J. stated with approval the rule set out in Gover on Capital and Income, 3rd ed., p. 30 It is necessary to read the headnote and then a few passages of the judgment in full: "By his will a testator settled his residue in "equal half shares, his son, W., being tenant for life of one, and "his brother, A., of the other. Clause 13 provided"—I am now

[1] [1941] Ch. 434; [1941] 2 All E.R. 601.

reading from the statement of facts and not the headnote: "I "declare that all income produced from every part of my residuary "estate previously to the sale and conversion thereof shall be "applied in the same manner in all respects as if the same were "income from investments hereby authorised. . . . And I further "declare that rents, dividends and other periodical payments in "the nature of income current at the date of my death shall not "be apportionable but that the same and also all such income "accrued but not received at the date of my death shall be "treated as income and not as capital." Going back to the head-note: "Clause 14 provided: 'With regard to any business . . . in "'which I may be interested whether solely or jointly with any-"'one else . . . my trustees shall have all such powers as would "'be possessed by a single person absolutely entitled as regards "'the mode and time of realisation of any such business . . . or "'my share or interest therein or otherwise in relation "'thereto. . . . My trustees may . . . continue . . . any such "'business . . . with power to enter into any new arrangement "'or agreement with any person . . . with whom at my death "'I may have been carrying on any such business . . . either in "'partnership or otherwise . . . and to retain or employ in any "'such business . . . such part of my residuary estate . . . as my "'trustees may . . . think proper.' The testator owned theatres "in an oral partnership at will in equal shares with his brother, "F., the accounts of the business being made up to December 25 "in each year, December 26 to December 25 thus being the "conventional period for ascertaining the profits. The testator "and F. left most of their shares of the profits in their capital "accounts. The testator died on February 28, 1937. At that "date there were standing to his credit in the accounts sums "representing undrawn profits from December 26, 1935, to "December 25, 1936. After the testator's death his trustees "carried on the business on the same terms with F., who died "on April 5, 1938, and thereafter with F.'s executors. A. died "in March, 1938. W., the surviving tenant for life, claimed to "be entitled to the profits for the periods from December 26, "1935, to December 25, 1936, and from December 26, 1936, to "February 28, 1937. The children of A., the deceased tenant for "life, claimed that the profits of the business as at A.'s death "should be apportioned in respect of the share of income settled "on A for life:— *Held*, (1) that, although the partnership ended "when the testator died, the profits for the conventional period "during which his death occurred were to be computed at the "end of that period, namely, as at December 25, 1937, and that, "as the business was carried on after the testator's death in "accordance with his directions, so that there was one continued "business, all the profits for that conventional period were income "and went to W.; (2) that the undrawn profits for the conven-"tional period from December 26, 1935, to December 25, 1936, "were capital, as the will did not otherwise provide, and, therefore,

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"did not go to W.; (3) that A. was not entitled to any of the "profits for the conventional period, during which he died, ending "December 25, 1938, all of which would go to W."

Simonds J., after stating the facts, said [2]: "For the period up "to December 25, 1936, the surviving tenant for life founds "himself solely on the language of the will, but for that from "December 26, 1936, to the death of the testator on February "28, 1937, he founds himself, not only on the language of the "will, but also on the general principle of law for which he relies "on such cases as *Browne* v. *Collins*.[3] I will deal first with the "period from December 26, 1936, to the death of the testator. "The general law is conveniently stated in 'Capital and Income,' "by the late Mr. Gover, 3rd ed., p. 30, where the learned author "is dealing with the Apportionment Act, 1870, and says: 'Profits "'of a private business or partnership are not apportionable under "'the Act (*Jones* v. *Ogle* [4]), but must be taken as having accrued "'entirely at the end of the period for which they are declared, "'and not before.' For that he relies on *Browne* v. *Collins* [5] and "*Lambert* v. *Lambert*.[6] He goes on: 'and if the life tenant dies "'before the expiration of that period, they belong to the next "'life tenant or remainderman then in possession.' He cites "*In re Cox's Trusts* [7] for that. 'Delay in ascertaining the profits "'does not affect the rights of the parties interested: (*Browne* v. "'*Collins* [8]); but where the partners have power to capitalise "'profits, there may be a question whether the omission to "'divide the profits is due to an intention to capitalise: . . . .' "In the present case the executors continued to carry on the "business which the testator had theretofore carried on in partner-"ship with his brother. The accounting period of the business "was from December 26 to December 25 in the following year. "Accordingly, the accounting period with which I am primarily "concerned in this part of the case was from December 26, 1936, "to December 25, 1937, which embraced two months or so of the "testator's life and ten months after his death. It appears to "me that, applying the principle stated in the textbook which I "have read, the line must be drawn not at the death of the "testator, as the accountants have drawn it, but at the end of "the accounting period, for it is only then that it can be dis-"covered whether the business made a profit for the relevant "period. Therefore, I propose to declare, that the tenant for life "became entitled, not to the profits somewhat arbitrarily ascer-"tained for the period from December 26, 1936, to February 28, "1937, but to the whole of the profits from the period from "December 26, 1936, to December 25, 1937. It is suggested that "that is not a proper principle to apply, because the partnership "was a partnership at will, carried on under an oral agreement,

[2] [1941] Ch. 434, 439.
[3] (1871) L.R. 12 Eq. 586.
[4] (1872) L.R. 8 Ch. 192.
[5] L.R. 12 Eq. 586.
[6] (1874) 22 W.R. 359.
[7] (1878) 9 Ch.D. 159.
[8] L.R. 12 Eq. 586.

"so that, under the Partnership Act, it was automatically dis-"solved on the death of the testator, and, accordingly, there is "no room for saying that anything which had accrued by way of "profits down to the testator's death could be regarded as a "profit, but it must be treated as part of the capital of the "estate. I do not think that that is the correct way of looking "at the situation where the business is carried on under the "direction of the testator, so that there is one continuous period "in which it is conducted, first by the testator, and then by the "executors under his directions. It seems to me proper, in such "a case, to apply the principle which I have stated, and to treat "the whole of the income for the conventional period as belonging "to the person who is living at the expiration of that period." The judge then went on to deal with the profits for the last completed year of account before the realisation of the testator's estate, and I will come back to that part of his judgment in another connection later on.

Mr. Cozens-Hardy Horne relies on that decision as showing that, in a case such as the present, the life-tenant is entitled to the whole of the profits earned by the business of the testator in respect of the period of account during which the testator died. Mr. Cozens-Hardy Horne relied on the earlier case cited there of *In re Cox's Trusts*,[9] but I do not think that takes the matter any further. In that case[9] the headnote reads: "A testatrix "bequeathed a newspaper to trustees upon trust to continue the "publication thereof as long as they thought fit, and to pay one-"fourth share of the net profits to J. C. during his life, and after "his death to his widow during her life; and the testatrix "declared that no person entitled to participate in the profits "should have any right to interfere in the management of the "publication or the mode or time of ascertaining and dividing "the profits thereof, but the same should be wholly in the "discretion of the trustees, except that they should every January "draw up a balance-sheet shewing the net profits during the year "ending on the then preceding December 31. The trustees "carried on the paper, gave notice to J. C. and the other "beneficiaries that they intended, until further notice, to divide "the net accrued profits half-yearly up to June 30 and December "31 in each year, and they did so divide the same up to June 30, "1877. On December 23, 1877, J. C. died, and his widow "claimed the one-fourth share of the net profits of the half-year "ending on December 31, 1877:— *Held*, first, that upon the "terms of the will the person to take a share of the profits must "be living at the time when it was ascertained that there were "profits to be divided; secondly, that the profits in question were "neither 'rents, annuities, dividends, or other periodical pay-"'ments, within the meaning of the Apportionment Act, 1870; "and, consequently, that that Act did not apply, and the widow

[9] 9 Ch.D. 159.

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"was entitled to the whole profits of the half-year in question." It will be observed that there was there a specific bequest of the newspaper, and that the tenant for life concerned was only entitled to one-fourth share of the net profits, so that in no sense could the tenant for life be said to be entitled to receive any part of the profits until the dates of June 30 and December 31 in each year at which the trustees determined to divide the profits.

In answer to that contention on behalf of the widow, Mr. Sparrow, for the reversioners, has raised two quite independent contentions. The contention which he put in the forefront was that the rule cited with approval by Simonds J. from Gover in *In re Robbins* [10] is not applicable where, as here, the testator was the sole owner of the business in contradistinction to the case where the testator was a partner in the business. His second answer is that the rule generally known as the rule in *Howe* v. *Lord Dartmouth* [11] applies to the will of this testator, and, accordingly, that the widow is not entitled to the actual income of the residuary estate at all. Those two contentions are distinct and independent contentions, and it is perfectly logical to do what Mr. Sparrow has done, namely, to put the first of those two contentions in the forefront of his argument. I propose, however, to deal with the second of the two contentions first.

As regards the rule in *Howe* v. *Lord Dartmouth*,[12] I quote first a passage from Jarman on Wills, 8th ed., p. 1223, which is in these terms: "Although strictly the rule in *Howe* v. *The Earl of* "*Dartmouth* [12] only applies to cases where there is no trust for "conversion, the expression is frequently used to describe all "those cases where, whether or not there is a trust for conversion, "the tenant for life is not entitled to the actual income of a "residuary estate but to a notional income which will do justice "between the tenant for life and remainderman." Broadly, the rule commonly known as the rule in *Howe* v. *Lord Dartmouth* [12] is applied not only to cases where there is no trust for conversion but to cases where there is a trust for conversion, so that if the residuary estate includes any item of property which is not an authorised investment, then, unless the will manifests a contrary intention, the life-tenant is only entitled to an income of some notional fund and not to the actual income arising from that item of property. In a case where the unauthorised investment is sold within the period of one year from the date of the testator's death, the rule is as follows (I quote from Jarman, 8th ed., p. 1210): "That in the "case of unauthorised investments realised during the first year, "the tenant for life is entitled to interest at the same rate [now "4 per cent.] on the net proceeds [of sale] from the date of "death to the date of completion of the sale." Unless there is something in the terms of the will from which there can be derived

[10] [1941] Ch. 434.
[11] (1802) 7 Ves. 137.
[12] Ibid.

an intention to exclude the rule in *Howe* v. *Lord Dartmouth*,[13] it seems to me that the widow here is only entitled to income representing 4 per cent. on the proceeds of sale of the business during the period from the date of the death until the date of the sale and is not entitled to the actual profits earned from the business at all.

In answer to that contention, Mr. Cozens-Hardy Horne advanced three points. The first is that the rule in *Howe* v. *Lord Dartmouth*[13] does not apply where the will contains a trust for conversion, or, alternatively, a trust for conversion with power to postpone. It seems to me that it is established by an overwhelming weight of authority that the rule does indeed apply where there is a trust for conversion and a power to postpone and nothing more. I refer first to Jarman on Wills, 8th ed., p. 1216: "If the testator directs his residue to be converted and invested, "and the income of his 'residuary trust moneys and the invest-"'ments representing the same' to be paid to A for life, a mere "power to postpone conversion does not entitle A to the whole "income of unauthorised investments retained by the trustees." On this point it will be necessary for me to cite three authorities apart from the one relied on by Mr. Cozens-Hardy Horne.

The first is *In re Chaytor*.[14] The headnote reads: "The test-"ator devised and bequeathed all his real and personal estate "not by his will otherwise disposed of to trustees upon "trust to sell and convert the same, with power "to postpone conversion as long as the trustees thought "proper and to retain any investments subsisting at his "death, whether of the kind thereinafter authorised or not, and "out of the proceeds to pay debts and legacies, and at the "discretion of the trustees to invest the residue and to stand "possessed of the residuary trust moneys and the investments "for the time being representing the same (thereinafter called "'the residuary trust funds') in trust to pay the income thereof "to his wife during her life. At the time of his death the testator "was possessed of preference and ordinary shares in a coal-"mining company. The ordinary shares, although not of a "wasting character, were not authorised by the investment clause "in the will. The trustees therefore sold some of them, and "proposed to sell more on a favourable opportunity. They "declined to pay to the widow in the meantime the full dividends "on the ordinary shares thus retained:— *Held*, that, in the "absence of any express or implied gift of the income pending "conversion, the widow was entitled only to interest at 3 per "cent. on the value of the ordinary shares at the testator's "death, and the rest of those dividends must be invested. This "rule was well settled, and applied to unauthorised securities "whether they were of a wasting character or not." In the

[13] 7 Ves. 137.

[14] [1905] 1 Ch. 233.

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course of his judgment Warrington J. said[15]: "As regards "the unauthorised securities, there is no express gift of the "income of the funds or items of property forming part of "the testator's estate during postponement of conversion; but I "am invited by Mr. Carson to find such a gift by construction in "the will. In the first place, what is the general principle which "is applied in such a case as this, where there is an express "trust for conversion and a power to retain securities of every "kind, authorised and unauthorised, and there is no express gift "of the income pending conversion? As I understand it, the "general rule is that the tenant for life is entitled to the income "of authorised securities, but not entitled to the income of "unauthorised securities. In the latter case he is only entitled "to interest, which is now fixed at the rate of 3 per cent., on their "value at the testator's death." In my judgment, that is a correct statement of the principle to be applied.

Then, in *In re Chancellor*[16] in the Court of Appeal, the headnote is: "A testator devised and bequeathed his real and per-"sonal estate upon usual trusts for sale and conversion, the "proceeds to be invested and to be held upon trust for his wife "for life, and, after her death, for his children. The will "contained the usual power to postpone the sale and conversion "of the real and personal estate, and the usual direction that "until sale and conversion the rents, profits, and income thereof "should be paid and applied to the same persons and in the "same manner as the income of the trust estate. The will "contained no reference whatever to the business of the testator, "which comprised the bulk of his estate. The executors carried "on the business for nearly two years with a view to its sale as a "going concern, and the question arose whether the profits of "the business during that period were to be treated as capital or "income:— *Held*, that the executors had power to carry on the "business for a reasonable period with a view to its sale as a "going concern; and that, as the testator had expressly directed "that the profits of the personal estate until conversion were "to be treated as income, the general rule laid down in *Howe* v. "*Earl of Dartmouth*[17] did not apply, and therefore the widow "was entitled to the profits of the business." Cotton L.J., after quoting the direction that the profits of the personal estate, subject to conversion, were to be treated as income, said[18]: "If "there had been no such direction here, no doubt the general rule "would have applied, and the widow would only have been "entitled to interest at 4 per cent. on the income of the busi-"ness." That is a decision expressly directed to the case of a business.

Finally, I was referred to *In re Parry*.[19] The headnote in that case is: "A testator who died in 1936 leaving a large estate

[15] [1905] 1 Ch. 233, 238.
[16] (1884) 26 Ch.D. 42, C.A.
[17] 7 Ves. 137.
[18] 26 Ch.D. 42, 46.
[19] [1947] Ch. 23; [1946] 2 All E.R. 412.

"much of which was invested in securities not authorised by the "investment clause of his will, gave his residue on trust for sale "and conversion, but with the fullest discretion to postpone "conversion for as long as should be thought fit, and after "directing the payment of an annuity to his wife, settled the "trust funds on two tenants for life in succession, with "remainders over:— *Held*, (1) that the rule in *Howe* v. *Lord "Dartmouth*[20] must be applied in the administration of the "estate." Romer J. said[21]: "In these circumstances, the first "question raised by the present summons is whether the whole "of the actual net income of the testator's residuary personal "estate ought to be treated as income as between the persons "interested in the income and the capital respectively of such "estate or whether the rule in *Howe* v. *Lord Dartmouth*[22] or the "corresponding rule applicable where there is a trust for sale, "ought to be applied. As to this, Mr. Jennings and Mr. Droop, "who appeared on behalf of the first two defendants, admitted "that, in view of authority which is binding on a court of first "instance, they were unable to argue before me that the rule did "not apply to the present case. They reserved, however, the "right to contend before a higher tribunal that the rule has no "application, and ought not to have been applied in the past to "cases such as the present where a testamentary trust for sale "is coupled with a power, exercisable in the discretion of the "trustees, to postpone conversion for an indefinite period." In that case counsel are all recorded as saying that Mr. Cozens-Hardy Horne's present contention is something which could not be argued.

In support of his contention Mr. Cozens-Hardy Horne has based himself on the decision of Bennett J. in *In re Fisher*.[23] The headnote reads: "By a policy of life assurance, the insurers "undertook to pay £500 with profits on the death of the assured "or his attaining the age of sixty, and, if the assured should die "within twenty years of the date of the policy, to pay £50 on "death, £52 a year by monthly instalments for the remainder "of the twenty years, and £450 at the expiration of the period. "The assured died intestate three years and nine months after "the date of the policy, without issue but leaving a widow "surviving and next-of-kin:— *Held*, that the monthly instal-"ments paid and to become payable under the policy were capital "and not income of the residuary estate, within section 33 (4), "of the Administration of Estates Act, 1925, and must be con-"verted and invested as a wasting security under the rule in *Howe* "v. *Lord Dartmouth*[24]; and that past payments of the instal-"ments ought to be apportioned as between capital and income "on the principle of *In re Earl of Chesterfield's Trusts*.[25] The

[20] 7 Ves. 137.

[21] [1947] Ch. 23, 28; [1946] 2 All E.R. 412.

[22] 7 Ves. 137.

[23] [1943] Ch. 377; [1943] 2 All E.R. 615.

[24] 7 Ves. 137.

[25] (1883) 24 Ch.D. 643.

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"rule in *Howe* v. *Lord Dartmouth* [26] does not apply where there "is a trust for conversion and a power to postpone conversion "duly exercised, but section 33 (1), of the Administration of "Estates Act, 1925, which imposes on an intestate's estate a "statutory trust for conversion and a power to postpone does not "abolish the rule in cases of intestacy, and it will still apply "where there has been no exercise of the power to postpone "conversion." In the course of his judgment Bennett J. did indeed say [27]: "In the case of a residuary bequest of personalty "to trustees on trust for conversion with a power to postpone "and a trust to pay the income of the subject of a bequest to a "person for life with a gift over, the rule of administration "formulated by Lord Eldon in *Howe* v. *Lord Dartmouth* [28] never "arises. It only arises in cases where there is a residuary "bequest to persons in succession and no trust for conversion," and [28]: "The rule cannot apply to a case where the trust is one "to convert with a power to postpone." In so far as Bennett J. was saying that the rule in *Howe* v. *Lord Dartmouth* [29] strictly so-called only applies where there is no trust for conversion, that may be right, but where in the course of his judgment, he says that the principle embodied in that rule and habitually applied to cases where there is a trust for conversion does not apply where there is a trust for conversion with a power to postpone, that seems to me to be contrary to the whole current of authority, and I do not follow it. *In re Fisher* [30] was referred to by Cohen J. in *In re Hey's Settlement* [31] on another point, and I do not think that I can usefully quote that case. I also have been referred to *In re Elford*,[32] but in that case there was an express provision to exclude the rule in *Howe* v. *Lord Dartmouth*,[33] and I do not think that case helps. It seems to me, therefore, that on the overwhelming balance of authority, the first point relied upon by Mr. Cozens-Hardy Horne fails.

The second point is that the business of the hotel was an authorised investment under the will of this particular testator. It is true that the expression in the will is in wide terms because the testator says in clause 9: "Any moneys requiring investment "under the provisions of this my will may be invested in any "investment which my trustees shall in their absolute discretion "think fit whether trustee securities or not." That clause authorises an investment of trust moneys in any form of property which can be properly described as an investment according to the normal use of that word; but it seems to me that the question whether this business is an investment according to the normal use of that word can be simply tested by considering whether the trustees had power under this will to carry on the business

[26] 7 Ves. 137.
[27] [1943] Ch. 377, 385.
[28] Ibid. 387.
[29] 7 Ves. 137.
[30] [1943] Ch. 377.
[31] [1945] Ch. 294; [1945] 1 All E.R. 618.
[32] [1910] 1 Ch. 814.
[33] 7 Ves. 137.

except with a view to realisation. It is well established that trustees can only carry on a business if there is power in the will to do so. If authority is wanted for that proposition it will be found in Jarman, 8th ed., p. 1206: "Without such authorisation "they"—that is, the executors or trustees—"may not carry on "the business or employ trust moneys in carrying it on, except "so far as is necessary for the winding up or disposing of the "business." The present will contains no power to the executors to carry on the testator's business except for the purpose of winding up, and they had no power to do so. It would be impossible for them to retain this hotel business as an investment without carrying it on as a business, and, therefore, it seems to me that the hotel business cannot fall within the terms of clause 9 of this will.

The third point advanced by Mr. Cozens-Hardy Horne is that clauses 7 and 8 of this will represent an express provision excluding the rule in *Howe* v. *Lord Dartmouth* [34] altogether. Clause 8 is concerned only with items of property not actually producing income. Clause 7 is the provision directed to this point and I will read it again: "I declare that no part of any "dividends rents interest or moneys of the nature of income shall "be apportioned to or treated as capital of my estate and I "declare that the whole thereof (whether the same be paid in "respect of a period wholly or only partly prior to my death) "shall belong to the person entitled under my will to the invest-"ment or property from which the same respectively arose and "if there shall be a tenant for life of such investment or property "such dividend rent interest or money shall be income payable "to such tenant for life." It is quite clear that that provision is not apt to exclude the rule in *Howe* v. *Lord Dartmouth* [34] indefinitely because it is only related to such moneys as are received in respect of a period wholly or partly prior to the testator's death. It is said, however, that it does apply to the profits of his business for the year in question because those are indeed paid in respect of a period partly prior to the testator's death. It seems that the answer to that contention is contained in a passage from the judgment of Simonds J. in *In re Robbins* [35] which I have not yet read. Simonds J., going on from the passage I have already cited, said [36]: "In coming to that conclu-"sion, I do not rely in the least on the terms of the will. But, "with regard to the period before the testator's death, that "is to say, the conventional period which expired on December "25, 1936, there can be no doubt on general principles that the "profits undrawn for that period are capital of the testator's "estate, unless there is something in his will which provides "for a different destination. I, therefore, turn again to the "terms of the will, to see whether there is anything which affects "the position. Counsel for the tenant for life has founded on

[34] 7 Ves. 137.
[35] [1941] Ch. 434.
[36] Ibid. 440.

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Pennycuick J.

"a passage in clause 13, namely, the declaration that 'rents, "'dividends and other periodical payments in the nature of "'income current at the date of my death shall not be appor- "'tionable, but that the same and also all such income accrued "'but not received at the date of my death shall be treated as "'income and not as capital.' Counsel contends that the profits "accruing before December 26, 1936, which were subsequently "ascertained but had not been received by the testator at the "date of his death, fall within that declaration. I think it is "quite clear that, unless there is some special context, the words "which I have read are not apt to carry the profits of a partner- "ship. That, indeed, is stated in the passage in Gover which "I have already read, and is clear on the authority of *Jones* "v. *Ogle*,[37] the case which the learned author cites." The words in the will which Simonds J. was there construing are almost identical with the words in clause 7 of this will, and the judge says that those words "are not apt to carry "the profits of a "partnership"; a fortiori they can not be apt to carry the profits of a business carried on by a testator alone. The reasoning which underlies that passage is, I think, that the words in question are designed only to exclude the operation of the Apportionment Act, 1870, which would otherwise apply and that the Apportionment Act has no application to the profits of a partnership or the profits of a business carried on by a testator alone.

For the reasons which I have endeavoured to give, it seems to me that there is nothing in this will which excludes the application of the rule in *Howe* v. *Lord Dartmouth*[38]: the consequence being that, as regards this business, which was not an authorised investment, the widow is not entitled to the actual income arising from the business in respect of any period but is merely entitled to 4 per cent. on the proceeds of sale of the business in respect of the period from the date of death to the date of the sale.

I now turn to the first point relied on by Mr. Sparrow for the reversioners. On this point the contention was that in *In re Robbins*[39] Simonds J. stated the rule too widely, that the rule which he stated is only properly applicable to a case where a testator carried on business in partnership, and is not properly applicable to a case where the testator was carrying on business alone, and that, in so far as Simonds J. treated the rule as so applicable, what he said was obiter. On that point Mr. Sparrow quoted a passage from another judgment of the same judge in *In re Rhagg*.[40] According to the headnote: "A testator by his "will bequeathed his business of a solicitor and the office furni- "ture, law books, and other articles in the office to his managing "clerk, and bequeathed the residue of his estate to charities. "Some time after the date of the will the testator made the

[37] L.R. 8 Ch. 192.

[38] 7 Ves. 137.

[39] [1941] Ch. 434.

[40] [1938] 1 Ch. 828; [1938] 3 All E.R. 314.

"legatee his partner, giving him one-half of the profits. On a "summons taken out to determine the question what passed "under the bequest:— *Held*, (1) that the bequest was not "adeemed by the partnership agreement; (2) that all the assets "and moneys employed in the business, including the office "premises, undrawn profits, the testator's capital therein, and "loans made to clients or prospective clients, and not merely "the goodwill of the business, passed to the legatee." In the course of his judgment Simonds J. said[41]: "Secondly, I must "observe that somewhat different considerations may be involved "where the business was that of the testator alone and where "he carried it on in partnership. In the former case to speak "of his 'capital' in the business or his undrawn profits may be "wholly misleading. The substance of the bequest is the assets "of the business subject to its liabilities. There may be balancing "figures in the accounts of the business which are called "capital and undrawn profits, but, in fact, those figures are "represented by the assets of the business, the stock-in-trade, "cash at the bank, and so on. It is these items which constitute "the business and which will, in my view, ordinarily pass under "a bequest of the business. Where, on the other hand, the "testator carries on a business in partnership, and bequeaths "his share in the business, the result can only be to put the "legatee in his place in relation to his partner. The legatee "will, subject to the partnership articles, become co-owner of "the several assets of the business, but the right and the obliga-"tion to account is of the essence of the relation, and in that "connection it is sensible to speak of the capital and undrawn "profits of the testator. They are things which have a real "meaning as distinct from the assets of the business in the "relation which exists between the partners. The distinction "may be of no practical importance where the legatee is himself "the sole surviving partner, but it would be vital if he were not." That passage contains an analysis of the difference between the case of a testator who owns the assets of a business and that of a testator who has an interest in the assets of a partnership business. While I see the force, as a matter of principle, of the argument advanced by Mr. Sparrow on that point, it seems to me that, having already decided this case in his favour on the other point, it is not necessary for me to express any concluded opinion upon it, and I think it is better that I should not do so.

Declaration accordingly.
Costs to be taxed and paid in due course of administration on a common fund basis.

Solicitors: *Woodcock, Ryland & Co. for Preston & Redman, Bournemouth; Stephenson, Harwood & Tatham; Ford, Harris & Co.; T. D. Jones & Co. for W. D. Clark Brookes, Smethwick.*

[41] [1938] 1 Ch. 828, 836.

[CHANCERY DIVISION.]

1961
Feb. 20, 21.

Buckley J.

In re NEW TIMBIQUI GOLD MINES LTD.

[No. 001171 of 1960.]

Company—Register—Name struck off register—Application "by member "or creditor" to restore—Petitioner not member or creditor when company struck off—Bearer shares acquired by and debts assigned to petitioners after dissolution—Whether "member or creditor"—Whether entitled to petition for restoration—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 353 (6).

In 1955, the registrar of companies, pusuant to section 353 of the Companies Act, 1948, struck the name of a company off the register of companies. The petitioners, at that date, were neither members nor creditors of the company. In 1959, the first petitioner acquired a number of bearer shares in the company and, in 1960, debts due from the company were assigned to both petitioners.

On a petition, under section 353 (6) [1] of the Act of 1948, to restore the name of the company to the register of companies:—

Held, that, in order to qualify as a "member or creditor" of a company within the meaning of section 353 (6), the petitioner must show that he was a member or creditor of the company at the date when the company was dissolved, and that anyone, whether in ignorance or otherwise of the dissolution of the company, who purported to become a member or creditor of the company after its dissolution was not within the subsection. The petitioners, therefore, were not entitled to apply to the court for the name of the company to be restored to the register.

Petition.

A company, New Timbiqui Gold Mines Ltd., was incorporated in 1905 with the object of acquiring and taking over as a going concern the undertaking of Timbiqui Gold Mines Co. Ltd. and the assets and liabilities of that company and to acquire any concessions, grants, rights, powers, privileges, claims or contracts from any company, state, sovereign or authority which might seem to the company capable of being turned to account and to work, develop, carry out, exercise and turn to account the same. The share capital of the new company was £200,000 divided into 200,000 shares of £1 each each of which 194,678 were issued and fully paid. 75,387 of those shares were held by share warrants to bearer in denominations of 1, 5, 10 and 25 shares. The remainder of the issued shares were registered shares.

The company acquired certain mining property at Timbiqui

[1] Companies Act, 1948, s. 353 (6): "If a company or any member or "creditor thereof feels aggrieved by "the company having been struck off "the register, the court on an application made by the company or "member or creditor before the expiration of twenty years from the "publication in the Gazette of the "notice aforesaid may, if satisfied "that the company was at the time "of the striking off carrying on business or in operation, or otherwise "that it is just that the company be "restored to the register, order the "name of the company to be restored "to the register. . . ."

in the Republic of Colombia in South America from the liquidator of Timbiqui Gold Mines Co. Ltd. together with certain mining rights. These rights were free of all payments in the nature of mining taxes and royalties by virtue of a composition made by the predecessors of the company with the Government of Colombia.

The registered office of the company was in England but its principal place of business was in Paris and the directors were, at all material times, resident in France. The register of members of the company was destroyed by enemy action in 1940. The rights of the company to its land in Timbiqui were confirmed by a judgment of the Supreme Court of Justice in Colombia in 1942.

In 1944, bankruptcy proceedings were instituted against the company in Colombia. The debts admitted by the competent court in Colombia, the Court of Cali, amounted to 40,000 pesos for Government taxation and 380,000 pesos for other debts.

In August, 1955, the registrar of companies, pursuant to section 353 of the Companies Act, 1948, struck the name of the company off the register of companies.

In September, 1959, the first petitioner, Albert Rodolphe Modiano, acquired 5,894 bearer shares and he also claimed to have acquired and be entitled to a further 42,643 bearer shares. In 1960, the first petitioner and the second petitioner, Etablissement Forrestal Industrial Development, acquired the debts of 380,000 pesos admitted in the company's bankruptcy, the first petitioner as to 20,000 pesos and the second petitioner as to 360,000 pesos.

In December, 1960, the petitioners petitioned the court for an order that the name of the company might be restored to the register of companies. The petition stated, inter alia, that the company had never had sufficient capital to exploit its properties in Colombia properly, that during the 1939–45 War its position was difficult since it was cut off from its head office and that ultimately it was unable to pay a number of debts incurred in Colombia, with the result that the bankruptcy proceedings were taken against it in 1944. The petition further stated that the persons who were in control of the company at the date when its name was struck off the register were well aware of the fact that the registrar proposed to strike off its name but that the petitioners had no such knowledge, and that they first became aware that the company had been struck off "at the beginning "of the year 1959." The petition also stated that the petitioners believed that, if the company's name was restored to the register and certain arrangements were carried out, the company would be able to regain control of its properties and carry out operations thereon to the great advantage of its creditors and shareholders. The petition alleged that, at the time of its name being struck off, the company was carrying on business and in operation, that the petitioners felt aggrieved by the striking off and that it

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was just and equitable that the company's name should be restored to the register.

Kenneth Mackinnon Q.C. and *Raymond Walton* for the petitioners.

E. Blanshard Stamp for the registrar of companies.

No cases were cited in argument.

Buckley J. stated the facts and continued: I have to consider first of all whether the petitioners are persons who are entitled to petition the court for restoration of the company's name under section 353 (6) of the Companies Act, 1948; and, secondly, if they are, whether this is a case in which the court ought to exercise its discretion under that section to restore the name of the company to the register.

Section 353 provides machinery whereby the registrar of companies, if he has reasonable cause to believe that a company is not carrying on business or in operation, after making certain inquiries directed by the section, may strike the name of the company off the register, and when he does that the company thereupon becomes dissolved. Subsection (6) provides: "If a "company or any member or creditor thereof feels aggrieved by "the company having been struck off the register, the court on "an application made by the company or member or creditor "before the expiration of twenty years from the publication in "the Gazette of the notice aforesaid may, if satisfied that the "company was at the time of the striking off carrying on busi-"ness or in operation, or otherwise that it is just that the company "be restored to the register, order the name of the company "to be restored to the register. . . ." The subsection further provides that "upon an office copy of the order being delivered to "the registrar for registration the company shall be deemed to "have continued in existence as if its name had not been struck "off. . . ." The opening words of the subsection refer to a company or a member or creditor feeling aggrieved by the company having been struck off the register, which creates a somewhat artificial state of affairs in which it has to be assumed that the company or some member or creditor thereof can still be properly so described although the company has been struck off the register and consequently has become dissolved. It is one of the anomalies of company law that a company which has been dissolved can petition the court under this section to have its name restored to the register. The opening words of the subsection clearly relate to a date after the company has been struck off and, therefore, they necessarily involve some latitude in the construction of the reference to "a company or any member or creditor "thereof."

How ought those words properly to be construed? Mr. Mackinnon for the petitioners says that the subsection presupposes that there is a company and members or creditors in

existence notwithstanding that the company has been struck off and that there is no reason to restrict that language to persons who were members or creditors of the company at the date when it was struck off; but that it is legitimate and it would be sensible to construe the language so as to extend to persons who have become members or creditors of the company since the company has been struck off, in this sense, that if the company had not been struck off, having regard to the course of events which in fact occurred, the particular person would have been a member or would have been a creditor of the company. He says that the object of this subsection, where an order is made, is to abrogate the effect of the action of the registrar in striking the company off the register and to produce a position such as would have been the position if the company had always continued in existence and had never been struck off the register and, therefore, become dissolved. He says: imagine the case of a transfer of registered shares after the company has been struck off but at a time when nobody had appreciated the fact—the transfer duly registered by the officers of the company and everything done apparently with due regularity but for the fact that unknown to everyone the company had been struck off by the registrar. He says that the transferee ought to be entitled under this subsection to come to the court and petition to have the company put back on the register in order that he may have the benefit of the shares and the rights attached to them which he has acquired in good faith. He says, moreover, that the same position would apply in the case of bearer shares where bearer shares were transferred by delivery after the company was struck off in good faith and with every intention to constitute the transferee of those shares a member of the company in respect of his shares.

I think there is a good deal to be said in favour of that point of view when one considers the policy adopted in the subsection. On the other hand, Mr. Stamp, who has assisted me by presenting the argument on the other side, has said that no one can become a member of a company which no longer exists—that under section 26 of the Act, apart from subscribers to the memorandum, a person only becomes a member of a company if he has agreed to become a member of the company and his name has been entered on the register, and there cannot be any such agreement where the company is no longer in existence. He also says that such a person could never properly be put on the register as there would not be anybody qualified to put his name on the register. In the case of bearer shares, there would be no company of which the holder of the bearer shares could be deemed to be a member. It seems to me clear that nobody could become a creditor of a company after the company had ceased to exist; one cannot become a creditor of a non-existent debtor. But that is not the position of the creditors here, as I understand it, because they claim to be creditors

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as assignees of debts which accrued before the company was struck off. The position in this respect seems to be that the original creditor, although he might be a person who was a creditor within the meaning of this section, would still not in law be a creditor of the company when the company had become dissolved, and it is debatable whether he could assign the debt to anybody else.

It seems to me the subsection involves some degree of make-believe and the question is how far the make-believe ought to be carried. Should you treat as continuing to be members or creditors people who were at some time undoubtedly members, just as the company before its dissolution was a company which is to be treated as still in existence, or should the make-believe extend to include persons who purport to have become members or creditors after its dissolution? On the whole, I think that the right way to approach this sort of problem of construction is to adopt that interpretation which would give a working effect to the subsection without extending the operation of inference or imagination further than is necessary for that purpose. Although I think the point is a difficult one, I reach the conclusion that, in order to qualify to be a petitioner under this subsection, the petitioner must show that, at the date when the company was dissolved, he was a member or a creditor; and that anyone who, whether in ignorance of the dissolution of the company or otherwise, purports to become a member or creditor of the company afterwards is not a member or a creditor within the subsection.

If, however, I were wrong on that point, I should have to consider whether the petitioners here acquired the characters in which they purport to petition with or without knowledge of the fact that the company had been struck off the register. Mr. Mackinnon tells me that the first petitioner acquired his shares in September 1959, and that he and the other petitioner acquired their debts some time in 1960, and the petition as it stands alleges: "Your petitioners first "became aware that the company had been so struck "off at the beginning of the year 1959." If that were right, I see great force in the argument which Mr. Stamp has put forward that no one can say he is aggrieved by the company having been struck off the register if he subsequently acquired his shares or his debt with the knowledge that the company had been struck off the register. It seems to me it would be impossible for such a person to say that he was aggrieved. He would, in fact, be an officious interloper who, with knowledge of the fact that the company has been struck off, chooses to buy his shares or acquire the debt in the hope that he can get something out of it. Such a person, in my judgment, could not genuinely be said to be aggrieved by the company having been struck off the register.

However, I am told that the allegation in the petition that

the petitioners became aware that the company had been struck off in the beginning of 1959 is erroneous, and that, in fact, they did not become aware that the company had been struck off until after the first petitioner had acquired his shares, and possibly after he and the other petitioner had taken an assignment of the debts. So, it would be necessary for me, if I am wrong on my first ground of decision, to consider whether this is a proper case in which the court should exercise its discretion under section 353 (6) to restore the company to the register. This is a company which, so far as one can judge from the evidence, has never prospered, at any rate since the early years of its existence. It is the subject-matter of bankruptcy proceedings in the country in which all its assets exist; and the evidence before the court that some benefit would or might accrue as the result of the company being put back on the register and being able to try to turn its assets to account is not very forceful. Having regard to the period of five years which has elapsed since the company was struck off the register, the very long period since the year 1940 when there was last any effective control by directors, the fact that the register of the company has been destroyed and that, as I am told, the shareholders of the company consist in the main of a very large number of small shareholders residing in France, and that the latest records of their identity and their addresses is now over 20 years old, the court ought, in my judgment, to require more cogent evidence that some really substantial benefit would accrue to members and creditors of the company from the restoration of the company's name to the register than I have before me in the present case.

Therefore, even if I were wrong on my first ground in the present case, I should be inclined to regard this as a case in which I ought not to exercise my discretion under section 353 (6) to restore the company's name to the register. Accordingly, I take the view that this petition should be dismissed.

Petition dismissed with costs.

Solicitors: *Coward, Chance & Co.; Solicitor, Board of Trade.*

V. A. M.

[COURT OF APPEAL.]

C. A.

1961
Feb. 6, 7, 9.

Lord Evershed M.R., Upjohn and Pearson L.JJ.

In re M. (An Infant).

[1960 M. No. 2772.]

Children and Young Persons—Care of—Child received into care by local authority—Child boarded out under statutory agreement—Refusal of foster-mother to deliver up child to local authority—Child made a ward of court on summons issued by foster-mother—Jurisdiction of Chancery Division to consider welfare of child—Children Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *ss.* 1, 2, 13—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 100), *s.* 9.

Infant—Ward of court—Jurisdiction—Child in care of local authority—Whether jurisdiction over child—Law Reform (*Miscellaneous Provisions*) *Act,* 1949, *s.* 9.

Crown—Prerogative—Statute, application to—Crown as parens patriae—Wardship jurisdiction of Chancery Division—Whether restricted by Children Act, 1948.

On April 13, 1956, a local authority received an illegitimate child into their care under section 1 (1) of the Children Act, 1948,[1] and on the same day arranged for him to be boarded out with Mr. and Mrs. X, in whose care he had been for some two years. They signed an undertaking to return him to the local authority if requested. Mr. X died on April 1, 1957. In October, 1957, the local authority resolved under section 2 of the Act of 1948 that all the rights and powers of the mother be vested in them. In June, 1960, the local authority formed the view that the boarding out of the child with Mrs. X was not in his best interests and asked her to return the child to them. She refused to do so on the ground that she had always cared for him and that it was not in his best interests that he should be removed from her. On August 26, 1960, the local authority issued a summons for an order of habeas corpus originally returnable on October 3, 1960, but adjourned until October 19, 1960, to enable Mrs. X to apply for legal aid and to file evidence in answer. On October 14, 1960, Mrs. X issued a summons under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949,[2] as a result of which the child became a ward of court. On October 19 the habeas corpus application was adjourned generally.

[1] Children Act, 1948, s. 1: "(1) "Where it appears to a local authority with respect to a child in their "area appearing to them to be under "the age of seventeen—(*a*) that he "has neither parent nor guardian or "has been and remains abandoned by "his parents or guardian or is lost ". . . it shall be the duty of the "local authority to receive the child "into their care under this section. "(2) Where a local authority have "received a child into their care under "this section, it shall, subject to the "provisions of this Part of this Act, "be their duty to keep the child in "their care so long as the welfare of "the child appears to them to require "it. . . ."

S. 2 (1): "Subject to the provisions of this Part of this Act, a "local authority may resolve with "respect to any child in their care ". . . in whose case it appears to "them— . . . (*b*) that a parent or "guardian of his (hereinafter referred "to as the person on whose account "the resolution was passed) has "abandoned him . . . that . . . all "the rights and powers of the person "on whose account the resolution was "passed, shall vest in the local "authority."

[2] Law Reform (Miscellaneous Provisions) Act, 1949, s. 9: "(1) Subject "to the provisions of this section, "no infant shall be made a ward of "court except by virtue of an order

A summons was issued by the local authority on October 21, 1960, for an order that the child should cease to be a ward of court. On the hearing of that summons no attack was made on the propriety of anything which the local authority had done. It was suggested that the decision reached by the local authority on what appeared to them to be in the best interests of the child might, on review by the court, be held to be wrong:—

Held, that in the absence of any challenge as to the propriety of what the local authority or its officers had done as distinct from their wisdom, on the true construction of the Children Act, 1948, the matter of judging what was in the best interests of the child, in the circumstances, had been placed in the exclusive jurisdiction of the local authority and, accordingly, the child should cease to be a ward of court.

In re A.B. (*An Infant*) [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C. approved.

Per Lord Evershed M.R. The prerogative right of the Queen as parens patriae in relation to infants within the realm is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948; in particular, the power to make an infant a ward of court by invocation of section 9 of the Act of 1949 is unaffected.

But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and, in a case such as the present normally will, order that the child cease to be a ward of court. In many cases where infants are made wards of court, the directions of the court are sought only on particular matters, such, for example, as the place of education or to control the activities of the infant in relation to marriage or undesirable associations where a united parental control has failed; in such cases, the court makes no order as to the custody, care or maintenance, for that remains in the hands of unimpeachable parents and the court does not interfere in relation to such matters.

There remains the right (and duty) of the judge in whom the prerogative power is vested to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties (post, pp. 360, 361).

Decision of Cross J. [1960] 3 W.L.R. 1045; [1961] 3 All E.R. 201 affirmed.

Appeal from Cross J.[3]

An illegitimate child was born on July 10, 1952. In August, 1954, when he was about two years old, his mother brought him to the house of a Mr. and Mrs. X and asked Mrs. X if she knew where she could get lodgings. Mrs. X told the mother that, if

"to that effect made by the court. "(2) Where application is made for "such an order in respect of an "infant, the infant shall become a "ward of court on the making of the "application, but shall cease to be a "ward of court at the expiration of "such period as may be prescribed "by rules of court unless within that "period an order has been made in "accordance with the application. "(3) The court may, either upon an "application in that behalf or with-"out such an application, order that "any infant who is for the time being "a ward of court shall cease to be a "ward of court."

[3] [1960] 3 W.L.R. 1045; [1961] 3 All E.R. 201.

C. A.
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M. (An Infant), *In re.*

she cared to trust her, she would look after the child for her for a few days while she looked for a house where she and her child would be accepted. The mother said that she would do this and left her child with Mrs. X, who had a number of young children of her own. The mother never reclaimed her child from Mrs. X but visited him from time to time. Mrs. X last saw the mother in March, 1955, in the maternity ward of a hospital where she had had another child, and she had heard nothing of her since April, 1955, when she had a letter from her. In April, 1956, Mrs. X told the local authority that she was looking after a child who had been abandoned by his mother, and the local authority thereupon put the machinery of the Children Act, 1948, into operation with regard to him.

On April 13, 1956, the local authority received this child into their care under section 1 (1) of the Act on the ground that he had been abandoned by his mother, and, on the same day, in discharge of their duties under section 13 of the Act they arranged for him to be boarded out with Mr. and Mrs. X, with whom he had in fact been living for the past two years. Mr. and Mrs. X signed an undertaking, in the form provided by the regulations, to return him to the local authority on their request, and the local authority thereupon paid for the child's maintenance. On April 1, 1957, Mr. X died, but the child continued to be boarded out with Mrs. X. In October, 1957, the local authority passed a resolution under section 2 of the Act vesting all the rights and powers of the mother of the child in them. In June, 1960, the local authority formed the view that the boarding out of the child with Mrs. X was no longer in his best interests and asked Mrs. X to return the child to them. She refused to do so, notwithstanding the undertaking which she had signed, on the ground that she had always cared for him well and that it was not in his best interests that he should be removed from her charge.

Cross J. held that the Children Act, 1948, which made express provision for a child passing out of the care of a local authority in certain prescribed circumstances, by necessary implication restricted the prerogative of the Crown; that the jurisdiction of the Chancery Division to inquire into the welfare of a child, which, since the Judicature Acts, was no wider than that of a judge in habeas corpus proceedings, was not enlarged by the alteration in procedure made by the Law Reform (Miscellaneous Provisions) Act, 1949; and that, therefore, since the local authority had acted within the powers conferred on it by the Act of 1948, the court had no right to inquire into the wisdom of their decisions. Accordingly, the child should cease to be a ward of court. The foster-mother appealed.

John May for the appellant foster-mother.
F. P. Neill for the local authority.

The following cases, cited in argument, were not referred

to in the judgment: *Reg.* v. *Gyngall*[4]; *In re E. (An Infant)*[5]; *Province of Bombay* v. *Bombay City Corporation*[6]; *Ex parte Wier*[7]; *Billings* v. *Reed.*[8]

Lord Evershed M.R. This appeal raises an important question, namely, whether on the facts of the case the terms of the Children Act, 1948, are by necessary implication such as to restrict the ancient prerogative of the Crown as parens patriae as regards infants (now exercisable by way of ward of court procedure in the Chancery Division, the procedure invoked by the present summons), and so to justify the conclusion of Cross J. in declaring that the infant ceased to be a ward.

The facts of the case are as follows: the infant, an illegitimate boy, was born on July 10, 1952. About two years later the boy's mother rang the bell on the appellant's door and asked for information about lodgings for herself and the child. The appellant, who had never seen the mother before, out of the kindness of her heart, offered, while the lodgings were found, herself to look after the child—as she supposed, for a few days. But though there was some further information about the mother, for practical purposes she then disappeared altogether from the scene. In April, 1956, that is some year and a half or more afterwards, the appellant informed the Birmingham Corporation authorities of the presence with her of this child, and on the 13th of that month the child was, by virtue of the powers under the Act of 1948, formally taken into the care of the corporation and formally boarded out with the appellant. The appellant signed, in accordance with the appropriate regulations, an undertaking to return the child on demand to the corporation. The appellant was then married: her husband was living, and there were several children of the marriage. In April, 1957, the appellant's husband died. On October 25, 1957, the corporation took a further step by virtue of section 2 of the Act of 1948, that is to say, they appropriately resolved to assume in regard to the child parental rights; but its boarding out with the appellant continued as before. So we come to June, 1960, in which month the corporation requested, in accordance with the terms of the undertaking, that the appellant should return the child to the corporation. No reasons were given to the foster-mother by the corporation. In August, 1960, the foster-mother not having complied with that demand, application was made by the corporation to Buckley J., sitting as vacation judge, for leave to issue a habeas corpus summons and that leave was given, the hearing of the summons being later adjourned until October 19. Five days before that date, namely, on October 14, the foster-mother took out a summons in

[4] [1893] 2 Q.B. 232; 9 T.L.R. 471, C.A.
[5] [1956] Ch. 23; [1955] 3 W.L.R. 493; [1955] 3 All E.R. 174.
[6] [1947] A.C. 58; 62 T.L.R. 643, J.C.
[7] (1871) 6 Ch.App. 875.
[8] [1945] K.B. 11; 61 T.L.R. 27; [1944] 2 All E.R. 415, C.A.

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the Chancery Division of the High Court entitled in the Law Reform (Miscellaneous Provisions) Act, 1949, asking for an order that the infant be made a ward of court and for directions as to the custody, care and control of the infant.

The relevant terms of section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, are as follows: "(1) Subject to "the provisions of this section, no infant shall be made a ward "of court except by virtue of an order to that effect made by "the court." But subsection (2) provides: "Where application "is made for such an order in respect of an infant, the infant "shall become a ward of court on the making of the application, "but shall cease to be a ward of court" at the expiration of the time therein stated, a period inapplicable to the present case. Subsection (3): "The court may, either upon an application in "that behalf or without such an application, order that any "infant who is for the time being a ward of court shall cease to "be a ward of court." I, for my part, reject the argument of Mr. Neill that the section which I have read, being merely procedural, should be limited to apply only to some infants, a class which Mr. Neill did not attempt to define but which he said must be such as to exclude in any event infants in respect of whom the local authority has exercised its powers under the Children Act, 1948. It seems to me that section 9 of the Act of 1949 is quite general and clear in its terms, with the consequence that upon the issue of a summons as provided by the section, a child becomes a ward and so remains unless and until either: (a) the court sets aside the proceedings altogether—as it would in the case of an infant for whom his parent successfully claims diplomatic privilege: see *In re C. (An Infant)*,[1] or (b) at the expiration of the period indicated in subsection (2), which is not relevant for present purposes, or when the court makes an order, as was done in this case, that the infant ceases to be a ward.

The jurisdiction of the Chancery Division in regard to infants is ancient and has proved itself most salutary. It is a jurisdiction not from its nature and origin to be lightly cut down. On the other hand, there is no doubt that in recent years and in light of modern conditions, including the unhappy fact of there being between 20,000 and 30,000 divorces in every year, the many statutes passed by Parliament for the benefit of children are a recognition of the obligation of the State to take positive measures, and in many cases precisely formulated measures, for the care and upbringing of young children whose circumstances today may be unhappy but who will be the citizens of tomorrow. To a number of such statutes we have been referred, but, having already alluded to the Act of 1949, I shall now confine myself to the Act of 1948, with which we are particularly concerned.

The main part of Mr. May's argument was simple in its nature: it was that the ancient prerogative will not be held by

[1] [1959] Ch. 363; [1958] 3 W.L.R. 309; [1958] 2 All E.R. 656.

the courts to be ousted or restricted by any statute, unless the statute in question does so expressly or by clear implication of its terms. That general proposition I accept, for it is well established (see, for example, the language of Lindley L.J. in *Wheaton* v. *Maple & Co.*[2]). On the other hand, the necessary clear inference may be drawn when a statute deals with a matter subject to the exercise of the royal prerogative, and provides in precise terms a new means of securing the same result. In that connection I refer to the passage in the speech of Lord Sumner to which our attention was directed in argument. It was the speech in the case of *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*[3] "The appellant" said Lord Sumner, "further contended that all "that was done could be done, and was done, independently of "any statute, by virtue of the royal prerogative alone. I do not "think that the precise extent of the prerogative need now be "dealt with. The legislature, by appropriate enactment, can "deal with such a subject-matter as that now in question in "such a way as to abate such portions of the prerogative as apply "to it. It seems also to be obvious that enactments may have "this effect, provided they directly deal with the subject-matter, "even though they enact a modus operandi for securing the "desired result, which is not the same as that of the prerogative. "If a statute merely recorded existing inherent powers, nothing "would be gained by the enactment, for nothing would be added "to the existing law. There is no object in dealing by statute "with the same subject-matter as is already dealt with by the "prerogative, unless it be either to limit or at least to vary its "exercise, or to provide an additional mode of attaining the same "object."

What then is the effect of the relevant language of the Children Act, 1948? In all the circumstances of the present case and its importance, I shall be excused for making some substantial citations from it. Section 1 (1), being the first section of Part I of the Act with the cross-heading: "Duty of local "authorities to assume care of children," provides: "Where it "appears to a local authority with respect to a child in their "area . . . (*a*) that he has neither parent nor guardian or has "been and remains abandoned by his parents or guardian . . . "and (*c*) . . . that the intervention of the local authority under this "section is necessary in the interests of the welfare of the child, "it shall be the duty of the local authority to receive the child "into their care under this section." Subsection (2): "Where "a local authority have received a child into their care under "this section, it shall . . . be their duty to keep the child in their "care so long as the welfare of the child appears to them to "require it," etc. Section 2 (1) is, so far as relevant, thus: "Subject to the provisions of this Part of this Act, a local

[2] [1893] 3 Ch. 48, 64; 9 T.L.R. 559, C.A.

[3] [1920] A.C. 508, 561; 36 T.L.R. 600, H.L.

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"authority may resolve with respect to any child in their care "under the foregoing section in whose case it appears to them— "(b) that a parent or guardian of his (hereinafter referred to as "the person on whose account the resolution was passed) has "abandoned him . . . that all the rights and powers which . . . "the person on whose account the resolution was passed, "shall vest in the local authority." Section 3 (1) provides that while a resolution passed by virtue of paragraph (*b*) of subsection (1) of section 2 of the Act is in force with respect to a child, all rights and powers which the parent would have in respect of the child shall be vested in the local authority in accordance with the resolution.

I will pass over the remainder of Part I and come to the twelve sections of Part II, beginning with section 11, the cross-heading for that Part of the Act being: "Treatment of children in care "of local authorities." Section 12 (1) provides: "Where a child "is in the care of a local authority, it shall be the duty of that "authority to exercise their powers with respect to him so as to "further his best interests." Section 13 (1): "Subject to "the provisions of this section, a local authority shall discharge "their duty to provide accommodation and maintenance for a "child in their care—(*a*) by boarding him out on such terms as "to payment by the authority and otherwise as the authority "may, subject to the provisions of this Act and regulations there-"under, determine." Section 14 (1) states that: "The "Secretary of State" that is the Home Secretary, "may by "regulations make provision for the welfare of children boarded "out by local authorities under paragraph (*a*) of subsection (1) "of the last foregoing section," being the subsection I have just read. I pass to section 39 in order to note that by that section the local authority is bound to establish a children's committee for the purposes of exercising their functions under certain enactments including the Act with which we are now concerned. Section 42 (1) provides that local authorities are to exercise their functions under the enactments to which I have just alluded under the general guidance of the Secretary of State, and finally, section 60 (1) states that the transitional provisions set out in the Second Schedule shall have effect for the purposes of the Act. The Second Schedule by paragraph 4 provides that regulations in force immediately before the commencement of the Act are to have effect and to continue in force as there stated. I have made those last references because, although it may not generally be competent to expand the language of an Act by reference to regulations purporting to be made under it, it is to be noted that in this case the existing regulations, which are the Children and Young Persons (Boarding-Out) Rules, 1946, are, by section 60 and the Schedule, treated as re-enacted by the terms of the Act of 1948, Finally, I observe that the rules of 1946, which were in force and which are referred to in the Schedule, include in rule 8 (1) this: "A foster-parent shall, on receiving a foster-child

"to be boarded out with him, be required by the local authority "to sign in duplicate an agreement in the form set out in the "schedule to these rules"; and if you look at the schedule you find an agreement with an undertaking to return the child, which is in accordance with what was done in this case. The rules of 1946 were replaced by the Boarding-Out of Children Regulations, 1955, but regulation 20 (1) of the regulations of 1955 is a re-enactment or restatement of rule 8 in the rules of 1946.

What then is the effect of this statute to which I have made such references as occur to me to be necessary? I think the effect may be stated in two propositions. First, the enactment is such that, in a case like the present, there is in the Act a clear and comprehensive scheme laid down (what Lord Sumner called a modus operandi) involving positive duties imposed by Parliament on the local authority and a precise formulation of the way in which the consequent powers are to be exercised, and, secondly, that as regards these duties and powers the discretion is conferred upon the authority by the words (which have occurred in the citations I have made), "appears to them." The meaning of that phrase was expounded by Lord Goddard C.J. in *In re A.B. (An Infant)*[4] to which I shall return, as meaning "appears to the satisfaction "of the local authority," and that is a formula which, as the Lord Chief Justice pointed out, must be taken to confer an absolute discretion upon the person or authority concerned provided it is exercised bona fide, the Lord Chief Justice in that respect following the decisions of this court in the case of *Point of Ayr Collieries Ltd.* v. *Lloyd George*[5] and the later case of *Carltona* v. *Commissioners of Works.*[6] Mr. May has said that the relevant committee of this or any local authority is, after all, as he put it, only a conglomeration of persons who may perhaps act by a majority. It may be added also that since human beings are fallible, there may be cases in which a local authority, acting by its committee, may be moved by improper motives, for example, of personal hostility to some person concerned, so that the resolutions or decisions they arrived at can be impeached as not being bona fide exercises of their power. It may also be that a particular visitor might act from some similar motives not properly to be justified. But in the present case no such suggestions have been made and there is no attack whatever on the propriety of anything that the local authority has done or of the motives behind those actions. In the result, all that has been suggested and can be suggested, is that the decisions reached by the local authority or their officers on what appeared to them to be the best interests of the child are, or could, or might be held, on review by the court, to be wrong.

On those premises, that is to say in the absence of any

[4] [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C.

[5] [1943] 2 All E.R. 546, C.A.

[6] Ibid. 560, C.A.

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challenge as to the propriety of what the local authority or its officers have done, as distinct from their wisdom, I feel compelled by the clear indication of the language to which I have alluded in the statute, to conclude that this matter of judging the present best interests of the child in the circumstances of this case has been placed by Parliament in the exclusive jurisdiction of the local authority. Mr. May conceded that on the premises as I have stated them, the onus would be heavy upon him to persuade the Chancery Courts to override or disregard the conclusions of the local authority. But that argument and that concession appear to me to involve Mr. May in something of a dilemma. For the purposes of deciding the immediate questions which now have been raised, either the prerogative jurisdiction survives and exists, or it does not; and if it does survive and exist, then the decision as to what now is in the best interests of the child must rest not with the local authority but with the court. There seems to me to be no escape from that result. I think it also necessary to observe here the position of the foster-parent. The fact that she originally was kind enough to undertake to look after this child voluntarily is, in the present circumstances, in my view no longer relevant. And I am not, of course, to be taken as suggesting anything whatever adverse to her conduct in regard to the child. But her position is in truth equivalent to that of a nurse to whom the child has been temporarily committed by the local authority acting in loco parentis and upon the terms of the undertaking given in accordance with the statutory regulations—a state of affairs, as I think, within the express contemplation and precise formulation of the provisions of the statute.

Let me repeat that I wish in this case to adhere strictly to the facts before us. This is not a case in which application to make the child a ward of court has been made by some person altogether outside the scope of the scheme of the Act or in regard to something outside its contemplation, for example, the question of the marriage of the infant or having to do with its property. I must not be taken, therefore, to be laying down any general proposition intended to apply to other or imagined sets of circumstances which may or may not be held to be within the scope and intendment of the Act of 1948. These cases will be dealt with when the need so to deal with them arises. For it is notorious that, as was stated by Felix Frankfurter J., a distinguished American judge, in some Reflections on the Reading of Statutes (Sixth Annual Cardozo Lecture, 1947, p. 7), in regard to legislation, circumstances do from time to time occur which you might say were "not anticipated by "the most gifted legislative imagination." Nor am I saying that in other cases it might not be proper, as it would be competent, for the court to decide that a child should remain a ward of court even though the court did not then seek to interfere in any way with what the local authority had

decided should be done. I confine myself to saying that the state of affairs which is before us is one which is within the strict contemplation and comprehensive provisions of the Act of 1948, as I interpret it, and in the absence of any impeachment of the propriety of what has been done by the local authority or their representatives, the result in this case seems to me to be that the old prerogative jurisdiction must be treated as pro tanto restricted and the proper order to make is that which Cross J. made, namely, to declare that the infant should cease to be a ward of court.

I have referred earlier to the case of *In re A.B. (An Infant)*,[7] and it is proper that I should make some further references to it. That was also a case in which a child had been committed to a foster-mother on the terms of an agreement and undertaking entirely comparable to those in the present case, save that the agreement and undertaking were in accordance with the rules of 1946 instead of the present 1955 regulations. In that case the local authority, who had assumed care of the child, had required delivery of it to the local authority in order that the local authority might send it to another home. The foster-mother declined to deliver the child up, and the proceedings were not by way of ward of court proceedings but by way of habeas corpus proceedings before the Divisional Court of the Queen's Bench Division. It was the decision of the court that, in the circumstances of that case, the statute had comprehensively covered the case and that therefore any discretion in the court had been displaced by the discretion of the local authority. I read two passages from the judgment of Lord Goddard C.J. Having referred earlier to the argument put forward that the court should exercise the prerogative right which in this case is invoked in the Chancery Court and that there was nothing to restrict or oust that jurisdiction, the Lord Chief Justice said[8]: "The Act of 1948 not only enables, but "directs the local authority to act without an order of the court. "In the present case, having acted in accordance with the "statute, the local authority proceeded to take the steps "which Parliament by the combined effect of the Act and "the statutory rules and orders has directed them to take, "that is, to board the child out with foster-parents on the foster-"parents giving an undertaking to return the child if it is "required. I cannot see, under those circumstances, how this "court can step in and say that as between the local authority "and the foster-parents, and contrary to the wishes of the local "authority, we can order the child to remain with the foster-"parents. To do so would be to usurp the duties which are "laid on the local authority by the Act of Parliament, and we "should be substituting our own view as to what was right for "the child as against the view of the local authority. It would "be quite contrary to the whole tenor of Part I and Part II of

[7] [1954] 2 Q.B. 385. [8] Ibid. 396.

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"the Act of 1948 for this court to assume the duty of reviewing "the discretion of the local authority, and substituting their "own opinion as to what was for the benefit of the child." Then later he said[9]: "I put my judgment in this way: first, "as the child got into the possession of the foster-parents simply "by virtue of the machinery of the Children Act, 1948, and the "rules, one of the statutory provisions being that the child "is to be returned to the local authority if they demand it, "there is no answer to the claim by the local authority when "they say: 'Give us back the child.' Parliament did not con-"sider, nor will this court presume, that the local authority "are not proper persons to have the child back." I cite also one sentence from the judgment of Donovan J.,[10] as he then was, "Thus far, at any rate, Parliament has entrusted the "welfare of the child to the local authority, and to that extent "the prerogative right to secure the welfare of the child is, in "my view, by necessary implication, restricted."

Mr. May challenged the validity of that decision, but in my judgment it should be supported and was correct. Though the prerogative jurisdiction was referred to, the case was not one, as I have said, in which the child was a ward, but I find nothing in the judgment involving in its result that in all cases of children within the comprehension of the Act of 1948 it necessarily follows that the prerogative jurisdiction exercised by the Chancery Division is for all purposes ousted.

It may perhaps be useful for me to add by way of summary the following:

(1) The prerogative right of the Queen, as parens patriae in relation to infants within the realm, is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948: in particular the power to make an infant a ward of court by invocation of section 9 of the Act of 1949 is unaffected.

(2) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and in a case such as the present normally will, order that the child cease to be a ward of court. This result will occasion no surprise to those familiar with wardship proceedings, for in many cases where infants are made wards of court, the directions of the court are sought only on particular matters, such, for example, as the place of education or to control the activities of the infant in relation to marriage or undesirable associations where united parental control has failed; in such cases the court makes no order as to the custody, care or maintenance, for that remains in the hands of unimpeachable parents and the court does not interfere in relation to such matters.

[9] [1954] 2 Q.B. 385, 398. [10] Ibid. 401.

(3) There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties.

The present case is, in my judgment, not within the third proposition which I have stated. In this case there is no challenge made as to the propriety of the exercise of the powers by the local authority and, on the facts before us, there can be no object at this stage in maintaining the infant as a ward of court. The power to order that a ward should cease to be a ward has been frequently and usefully exercised since that power was conferred in 1949, and unless there is some real object to be achieved in maintaining the infant as a ward, there is, in my view, no ground for letting him continue so to be. It is much better to order that he cease to be a ward. If some incident should occur in the future which should make it desirable that he should again become a ward, steps to that end can be instantly taken.

For the reasons which I have tried to express, I think the judge rightly made the order appealed from and I would, therefore, dismiss the appeal.

Upjohn L.J. I agree and do not think I can usefully add anything.

Pearson L.J. I agree.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *Preston, Lane-Claypon & O'Kelly for Southall & Co., Birmingham; Sharpe, Pritchard & Co. for T. H. Parkinson, Birmingham.*

[queen's bench division.]

PAYNE and Others *v.* BRADLEY.

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Lord Parker C.J., Winn and Widgery J.J.

Gaming — Lottery — "Private gain" — Working men's club — Tombola sessions—Proceeds paid into general funds of club—Surplus of general funds not distributable among individual members—Whether proceeds applied for "purposes other than purposes of private "gain"—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *ss.* 23, 24—*Small Lotteries and Gaming Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 45), *ss.* 1, 4.

On various dates in April and May, 1960, sessions of tombola, found by the justices to be a lottery, were held in a working men's club. Sets of tickets were sold on the club premises, each ticket entitling the holder to take part in one session of tombola. The tombola sessions were conducted as an entertainment on their own

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and were not incidental to any other form of entertainment. The prizes were sums of money and the sale of tickets was not confined to members of the club. After deduction of the prize money the proceeds from the sessions were paid into the general funds of the club and appeared in the profit and loss account out of which the general expenses of the club were met. Under the rules of the club no surplus of the funds was divisible among the members individually.

The appellants, the trustees and directors of the club, were charged with, in connection with a lottery, using the club premises for purposes connected with the conduct of the lottery contrary to section 22 (1) of the Betting and Lotteries Act, 1934.[1] They relied on the exemption in section 4 of the Small Lotteries and Gaming Act, 1956,[2] but the justices convicted. On appeal, in which, it being conceded that tombola was a game, and that the playing of the game was an entertainment, the sole question was whether the money paid into the general funds of the club was applied for "purposes other than purposes of private gain" within section 4 of the Act of 1956:—

Held, that, under the scheme of the Acts of 1934 and 1956, and the various exemptions contained therein, the reference to "private "gain" in connection with the promotion of lotteries was a reference to private gain to the organisers of the lottery, or to those whom they represented; and, whether the appellants were treated as the club or as representing its members, it was impossible to contend that the club and the individual members did not receive such a private gain; that, since there was nothing in section 4 of the Act of 1956 which required the meaning of the words to be restricted to direct benefit or gain to an individual or individuals, the proceeds from the tombola sessions paid into the general funds of the club were applied for purposes of private gain; and that, therefore, the exemption in section 4 did not apply and the justices were right in convicting.

Case stated by Huddersfield justices.

Informations were preferred against the appellants, Harry Vincent Payne, and 19 others, that they on April 27 and 30, and May 4, 7, 14 and 18, 1960, in connection with a lottery promoted in Great Britain known as "Tombola," did use premises occupied by them, namely, the main hall of the Huddersfield Friendly and Trade Societies' Club, in Huddersfield, for purposes connected with the conduct of the lottery, contrary to section 22 (1) of the Betting and Lotteries Act, 1934.

The following facts were found by the justices. On the

[1] Betting and Lotteries Act, 1934, s. 21: "Subject to the provisions of "this Part of this Act, all lotteries "are unlawful."

[2] Small Lotteries and Gaming Act, 1956, s. 4: "(1) This section "applies to any entertainment pro-"moted in Great Britain for raising "money to be applied for purposes "other than purposes of private gain, "being an entertainment at which "games of chance or of chance and "skill combined are played in accord-"ance with the following conditions ". . . (c) the whole of the pro-"ceeds. . . are applied for purposes "other than purposes of private gain ". . . (3) A game played at an "entertainment to which this section "applies in accordance with the said "conditions shall not be deemed to "be an unlawful lottery; and nothing "in the Betting Acts, 1853 and 1874, "shall apply to anything done by "any person in connection with the "playing of games at such an enter-"tainment in accordance with those "conditions."

several dates set out in the informations the 20 appellants were either trustees or, by virtue of the rules and an election, directors of the Huddersfield Friendly and Trade Societies' Club and as such, subject to the powers of general meetings, had full power to superintend and conduct the business of the club. On each of those dates sets of tickets were sold on the club premises for 2s. 6d.; on weekdays a set consisted of eight tickets and on Saturdays, three tickets. Each ticket entitled the holder to take part in one session of an amusement or entertainment known as tombola on occasions when other entertainment was provided. On each date sessions of tombola were held in the main hall of the club under the control of servants or agents of the club. On each occasion a substantial number of persons, on certain dates estimated to be about 200, took part in the amusement.

Tombola was conducted as follows:—On each ticket was printed a series of numbers which varied from ticket to ticket. The person in charge of the proceedings drew out numbers from a bag and called out the numbers so drawn. The holder of a ticket on which any such number was printed then crossed it out. The first holder of a ticket who was able in that manner to cross out all the numbers on his ticket was entitled to a prize. Occasionally a prize was given to the person holding a ticket bearing only one line of cancelled numbers.

The tombola sessions were not promoted as an incident of any entertainment of the kind referred to in section 23 (3) of the Betting and Lotteries Act, 1934. The prizes were sums of money and the sale of tickets was not confined to members of the club.

After payment of the prizes the proceeds of the playing of tombola were paid into the general funds of the club and appeared in the profit and loss account, out of which the general expenses of the club were met. For the year 1959 such profits were shown in the accounts to be in the region of £900 while the membership fees amounted to £1,059. No certificate or other satisfactory evidence of registration by the local authority under section 1 of the Act of 1956 was produced although a witness stated that, in fact, the society was so registered. Returns under that Act were not made and the club did not purport to operate these sessions of tombola under the exemption of section 1.

According to the rules of the club, annexed to the case, "2. The objects of the society are to afford the members the "means of social intercourse, mutual helpfulness, mental and "moral improvement, and rational recreation. . . . 3. All "moneys received on account of contributions and donations, "admission fees, fines, or otherwise, shall be applied according "to the rules of the society, no surplus being divisible among "the members individually. . . . 4(A). The society shall consist "of an unlimited number of members. . . . The fee of 1s. per "member, per year, shall be charged for such membership. . . . "21. A member may personally introduce friends as his guests,

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"but no person shall be so introduced more than three times in "one quarter, and no member may introduce more than two "friends at any one time. . . . 24. The trustees of the society "having acquired a fully paid share or shares in the Working "Men's Club and Institute Union Ltd., each member may be "entitled to all the privileges of that association. . . . 25. "Whilst the society shall hold such a share. . . and so long only "as the society shall remain a member of the Working Men's "Club and Institute Ltd., associates of the said union shall be "associate members of the society. . . ."

It was contended by the appellants that tombola was a game within the meaning of section 4 of the Small Lotteries and Gaming Act, 1956; that the entertainment was promoted for raising money to be applied for purposes other than purposes of private gain; that on all the dates mentioned in the informations the game was played at an entertainment in accordance with the conditions set out in section 4 (1) of the Act of 1956, and that the entertainment was exempted under that section, in particular, that all the proceeds of the payments made by the persons participating in the game, after making the deductions lawfully permitted, were applied for purposes other than purposes of private gain; and that "private gain" meant gain for the benefit of people as separate individuals and for their personal benefit and not as members of a properly constituted society, club, or similar body of persons or in a collective capacity.

It was contended by the prosecutor that tombola was a lottery inasmuch as the prizes were awarded by pure chance and there was no element of skill, for the drawing of a series of numbers from a bag was the same as awarding prizes by lot; that section 21 of the Betting and Lotteries Act, 1934, provided that all lotteries were unlawful, subject to the exemptions set out in sections 23 and 24 of that Act and sections 1 and 4 of the Small Lotteries and Gaming Act, 1956; that the exemption of certain small lotteries prescribed by section 23 of the Act of 1934 did not apply in this case as the entertainment provided was not of the character set out in subsection (3) of that section, the net proceeds not being devoted to purposes other than private gain and money prizes in the lottery being given; that the exemption of certain private lotteries prescribed by section 24 did not apply because the sale of tickets or chances was not confined to the classes of persons referred to therein; that the exemption of certain small lotteries prescribed by section 1 of the Act of 1956 did not apply inasmuch as the whole of the proceeds of the lottery after making the permitted deductions therefrom was not devoted to purposes other than private gain, that returns to the local authority under section 3 of that Act had not been made and that the appellants did not purport to conduct the lottery in pursuance of the said exemption; that the exemption of small gaming parties prescribed by section 4 (3) of the Act of 1956 did not apply since (i) tombola was a lottery and was not a

game as the persons participating in the amusement did not take any active part in it but merely kept a record of numbers drawn by the person in charge of the activity; (ii) if it was a game, condition (*c*) as to the application of the proceeds for purposes other than purposes of private gain was not complied with in that the net proceeds were paid into the general funds of the club towards the payment of the expenses and the maintenance of the club premises, providing improvements to the amenities of the club and reducing membership fees and subscriptions; that if a purpose was not for "public gain" it must be for "private gain" and in this case benefit accrued to individuals who were members of the club and not to members of the general public; and that none of the statutory exemptions applied and, accordingly, the lottery was unlawful and the appellants were guilty of offences under section 22 of the Act of 1934.

The justices were of the opinion that tombola as played on the occasions set out in the informations was a game of pure chance without any element of skill; the drawing of numbers from a bag was equivalent to awarding prizes by lot and therefore tombola was a lottery; that sections 23 and 24 of the Act of 1934, and section 1 of the Act of 1956, did not prescribe exemption from the provisions of section 22 of the Betting and Lotteries Act, 1934, as conceded by the appellants; that the fact that tombola was a lottery did not prevent it from being a game or the holding of a tombola session from being a gaming party; and that the interpretation of the words "private gain" must determine whether that game was exempt by either section 1 or section 4 of the Small Lotteries and Gaming Act, 1956. Although they did not accept the contention that a purpose which was not for "public gain" was necessarily for "private gain," they were of opinion that in this case the proceeds of the payments made by the persons taking part in the game were not applied for purposes other than purposes of private gain for the following reasons:—(i) The profits from the playing of tombola were paid into the general funds of the club. (ii) The total for the last year, a sum in the region of £900, appeared in the profit and loss account for the year when the membership fees amounted to £1,059 and debited to that account were all the expenses of the club; thus the proceeds were used to meet the general expenses of the club. (iii) Although rule 3 of the club rules provided that no surplus of moneys received should be divisible among the members individually, the profits from the playing of tombola were used to finance all the amenities and social activities of the club in which the members shared and which they and any guests whom they might wish to introduce enjoyed. That was a gain and a private one because those advantages and privileges were only available to members of the club which was the property of the members. (iv) The profits were used to

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avoid a loss which would fall on the individual members of the club and the avoidance of such a loss was a private gain.

The justices held that the exemption prescribed by section 4 of the Act of 1956 did not apply, and accordingly they convicted the appellants of the several offences, made orders of absolute discharge in respect of each charge and ordered each appellant to pay the sum of 4s. for costs in respect of each conviction.

The appellants appealed.

P. M. O'Connor Q.C. and *Arthur Hutchinson* for the appellants.

M. Griffith-Jones for the prosecutor.

The following cases were referred to in argument: *Bishopbriggs and District Ratepayers' Association* v. *Lanark County Council*[3]; *Bow* v. *Heatly*[4]; *Tollet* v. *Thomas*[5]; *Blair* v. *Duncan*[6]; *Houston* v. *Burns*[7] and *Performing Rights Society Ltd.* v. *Bray Urban District Council.*[8]

Lord Parker C.J. The appellants appeal by way of case stated from the decision of the stipendiary magistrate and two justices for the County Borough of Huddersfield convicting them of offences against section 22 (1) of the Betting and Lotteries Act, 1934. The justices made orders of absolute discharge and ordered each appellant to pay 4s. costs in respect of each conviction.

The circumstances are as follows: the appellants are either trustees or directors of a club called the Huddersfield Friendly and Trade Societies' Club. Under the rules of the club it is provided that its objects are "to afford the members the means "of social intercourse, mutual helpfulness, mental and moral "improvement, and rational recreation"; and by rule 3 "All "moneys received on account of contributions and donations, "admission fees, fines, or otherwise, shall be applied according "to the rules of the society, no surplus being divisible among the "members individually." By rule 4 the membership "(A) shall "consist of an unlimited number of members. . . . The fee of 1s. "per member, per year, shall be charged for such membership," and "(B) if at any time it appears to the directors, that the society "is in such a position as to render it necessary to alter the fees "for membership, they shall call a special meeting of the "members, who shall have power by increasing or reducing the "same, to alter such fees subject to the registration of the appro-"priate amendment of rules."

[3] (1959) 75 S.L.R. (Sheriff Court Reports) 3.

[4] 1960 S.L.T. 311, Ct. of Session.

[5] (1871) L.R. 6 Q.B. 514.

[6] [1902] A.C. 37; 18 T.L.R. 194, H.L.

[7] [1918] A.C. 337; 34 T.L.R. 219, H.L.

[8] [1930] A.C. 377; 46 T.L.R. 359, P.C.

On a number of days the subject of the informations the appellants held sessions in the main hall of the club whereat tombola was played. On each of the days, sets of tickets were sold on the club premises for 2s. 6d., each ticket entitling the holder to take part in one session of tombola. These sessions were conducted as an entertainment on their own and were not incidental to any other form of entertainment. I find it unnecessary to describe the game; it is now only too well known. The prizes were sums of money and the sale of tickets was not confined to members of the club. Finally, after the payment of the prizes, the proceeds were all paid into the general funds of the club. Indeed, for the year 1959 the profits from these sessions were shown in the accounts to be in the region of £900, while the membership fees amounted to £1,059.

In order to decide this case it is necessary to look at the scheme of the Acts in question. The Betting and Lotteries Act, 1934, by section 21 provides that: "Subject to the provisions of "this Part of this Act, all lotteries are unlawful." It then provides by section 22 for "offences in connection with lotteries," and the relevant offence with which the appellants were charged was under subsection (1): "Subject to the provisions of this "section, every person who in connection with any lottery pro-"moted or proposed to be promoted either in Great Britain or "elsewhere . . . (*f*) uses any premises, or causes or knowingly "permits any premises to be used, for purposes connected with "the promotion or conduct of the lottery . . . shall be guilty of "an offence." That, be it observed, applies to all lotteries whether lawful under the subsequent provisions of the Act or unlawful under the general provisions of section 21.

But subsection (2) of section 22 goes on to provide that it shall be a defence to such a charge if it is proved that, to put it shortly, the lottery is exempted from illegality by the subsequent provisions of the Act. In fact there are four relevant exceptions, the first two to be found in this Act of 1934 and the other two to be found in the subsequent Act of 1956. Thus by section 23 of the Act of 1934 an exemption is provided in the case of lotteries promoted as an incident of an entertainment of a particular sort; and subsection (3) provides that the entertainments in question are "bazaars, sales of work, fêtes and other entertainments of a "similar character." If a lottery is promoted as an incident to such an entertainment, then subject to certain conditions set out in subsection (2) it is lawful, and one of the conditions in paragraph (*a*) is that the whole of the proceeds of the entertainment, including the proceeds of the lottery, after deducting expenses and matters of that sort, shall be devoted "to purposes other "than private gain." It is not suggested, that the appellants can claim the benefit of that exemption, because the tombola assuming it to be a lottery, was not promoted as an incident of any such entertainment, as indeed the justices specifically found.

The next exemption is provided by section 24 which deals with

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what are called private lotteries. The essence of that provision is that societies, which include clubs, institutions, organisations or other associations of persons may conduct private lotteries in which the sale of tickets or chances by the promoters is confined, broadly speaking, to members of the society, and provided that that is done, and certain other conditions are fulfilled, the private lottery is not to be deemed an unlawful lottery. In that case, be it observed, one of the conditions is that the whole of the proceeds after payment of expenses shall be devoted either to the provision of prizes or to purposes which are "purposes of the "society." In other words, provided the lottery is kept private, a club or society within the meaning of the section may devote the proceeds, after payment of expenses, to their own purposes. Accordingly, the appellants in my judgment, could have obtained the benefit of this exemption had they confined the sale of tickets to members.

Turning to the Small Lotteries and Gaming Act, 1956, section 1 provides that a lottery shall be deemed not to be an unlawful lottery if it is promoted by a society of much the same kind as those described in section 24 of the Act of 1934, which has been registered by a local authority, being a society established and conducted wholly or mainly for one or more of the following purposes, that is to say, (*a*) charitable purposes, (*b*) participation in or support of athletic sports or games or cultural activities, and finally "(*c*) purposes not described in the foregoing para-"graphs, and not being purposes of private gain or purposes of "any commercial undertaking," and, subject to certain conditions, the money raised is to be applied for "purposes of the "society." Finally, by subsection (2) (*d*) of section 1 it is made a condition that the whole proceeds, after deducting sums lawfully appropriated on account of expenses or for the provision of prizes, shall be applied to purposes of the society, "being pur-"poses described in paragraphs (*a*), (*b*) or (*c*) of subsection (1) ". . ." of section 1.

Accordingly, as I read it, a society, if it is of a particular kind, namely, established or conducted wholly or mainly for certain purposes, and which becomes registered by the local authority, can raise money which presumably will be paid over to the society in question, provided it is when so paid applied for one or other of the particular purposes. Pausing there, the appellants in this case cannot bring themselves within that exemption, in particular, because they were not registered by the local authority.

The final exemption, and the one which is relied on in this case, is to be found in section 4 of the Act of 1956. So far as it is relevant, it provides, by subsection (1) as follows: "This "section applies to any entertainment promoted in Great Britain "for raising money to be applied for purposes other than purposes "of private gain, being an entertainment at which games of "chance or of chance and skill combined are played in accordance

" with the following conditions, that is to say . . . (*c*) the whole " of the proceeds of such payments . . . after deducting sums " lawfully appropriated on account of expenses or for the provi- " sion of prizes or awards in respect of the games, are applied " for purposes other than purposes of private gain." Be it observed that that section is dealing with games, but by sub-section (3) if and in so far as a game played at an entertainment under this section is a lottery, it is not to be deemed an unlawful lottery.

It is conceded for the purposes of this case that tombola is a game; it is further conceded for the purposes of this case that the playing of the game was an entertainment. It is also clear that the game in question, as the justices found, is a lottery. But if the proceeds were applied for purposes other than purposes of private gain then that lottery would be a lawful lottery and there would be a defence under section 4 of the Act of 1956 to the charge. The sole question, therefore, in this case is whether the money which was paid into general funds of the club was or was not being applied for purposes other than purposes of private gain. I am quite satisfied that, looking at the various exemptions to which I have referred, the repeated reference there to private gain in connection with the promotion of lotteries is clearly a reference to private gain to the organisers of the lottery or those whom they represent. Looked at in that way, whether the appellants are treated as the society or as representing the members of the society, it seems to me impossible to contend that the society itself and the individual members did not by these means get a private gain. The real question is whether, that being the ordinary, as I would venture to think, interpretation, there is anything in this section which would require that " private gain " should be given some other and more constricted meaning.

Mr. O'Connor, as I understand, said that " private gain " in this connection only occurs when the money goes directly to the benefit or to the gain of an individual or individuals. In other words, he said that you must look beyond the society and see whether the money, having got into the coffers of the society, finds its way to individual members directly. He would add that since, under the rules, no surplus can be divided amongst the members, no member can directly get any pecuniary benefit from the sums so paid into the general funds of the society.

I am quite unable to give the words that meaning; I think that, in every sense of the words, this money was being paid to the " private gain " of the society, and of the individual members of the society. In these circumstances, I have come to the conclusion that the justices were right in convicting, and I would dismiss this appeal.

WINN J. I agree.

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Widgery J. I also agree.

Appeal dismissed with costs.

Feb. 24. On an application under section 1 of the Administration of Justice Act, 1960, the court certified that a point of law of general public importance was involved in the decision and gave the appellants leave to appeal to the House of Lords.

Solicitors: *Biddle, Thorne, Welsford & Barnes for G. E. Hutchinson & Co., Huddersfield; Sharpe, Pritchard & Co. for H. Bann, Huddersfield.*

J. F. L.

[COURT OF APPEAL.]

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Jan. 11, 12; *Feb.* 17.

Holroyd Pearce, Harman and Davies L.JJ.

BRITISH TRANSPORT COMMISSION *v.* HINGLEY (VALUATION OFFICER) AND ANOTHER.

[LVC/1109/1958.]
[LVC/1124/1958.]

Rating—Assessment—Rateable value—Profits basis—Docks undertaking forming part of one statutory undertaking—Docks run at a loss—Nil assessment—Deficit in part of undertaking made up from other sources—Whether evidence of special circumstances justifying departure from or modification of profits basis—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*b*)—*Transport Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 3 (4).

The British Transport Commission appealed to the Lands Tribunal against assessments of £6,177 and £70 net annual value in respect of hereditaments extending over two boroughs and constituting a docks undertaking, part of the commission's single nationalised business (which by section 3 (4) of the Transport Act, 1947, "shall form one undertaking"), but assessed by established rating practice as a separate undertaking. The docks had cost millions to construct and the commission conceded that it was unthinkable that they should be closed down; but their accounts showed that they had been run at a considerable loss for some years; and it was agreed that a valuation on the "profits basis" would result in the "nil" valuation for which the commission contended. The valuation officer and the rating authority claimed that there were special circumstances in this case which justified a departure from or modification of that basis, including the circumstances that the accounts were unreal, being largely an interdepartmental matter; that the docks traffic benefited the railways which paid no rates; and that any loss in running these docks was made good from other sources within the commission; and they put forward as a reasonable rent the proposed assessments of £6,177 and £70. No contemporary evidence or particulars were given to support those figures.

The Lands Tribunal, applying the profits basis, assessed the undertaking at "nil." On appeal by the valuation officer:—

Held, dismissing the appeal, that the profits basis was established on the authorities as the correct working hypothesis to apply to the valuation of a docks undertaking; that the valuation officer had failed to discharge the onus on him of showing that there were special circumstances in the case of part of a single nationalised undertaking run at a loss which justified a departure from or modification of that basis; and that the tribunal had correctly applied the profits basis and was entitled to assess this undertaking at "nil"; nor was there any material before the court which would entitle it to substitute any other assessment.

Appeal by case stated from the Lands Tribunal (Mr. Erskine Simes Q.C. and Mr. H. P. Hobbs). The decision of the Lands Tribunal was as follows: The British Transport Commission appealed from decisions of a Local Valuation Court for Lincolnshire confirming two assessments on the Grimsby Docks of the British Transport Commission, £61,177 net annual value and £1,562 rateable value in Grimsby County Borough and £70 net annual value, £11 rateable value in the adjoining Borough of Cleethorpes.

The hereditament had an area of some 700 acres including 77 acres of land covered with water outside and below high water mark, leaving a net area of 623 acres, of which 130 acres was separately assessed at the date of the proposal, July 16, 1956. The boundary was of irregular shape and certain sidings within the boundary were excluded as being used for railway as opposed to dock purposes, the division between dock and railway undertakings presumably having been made following and in the light of the decision in *Manchester Ship Canal Co.'s and Dock and Harbour Authorities Association's Applications.*[1]

The Royal Dock was constructed in 1852, the Alexandra Dock in 1879, Fish Dock No. 1 in 1856 and Fish Dock No. 2 in 1870, and were all railway-owned from the beginning; Fish Dock No. 3 was constructed by Grimsby Corporation in 1929 and then leased to the railway company and at the end of the lease that dock would vest in the British Transport Commission.

The trade of Grimsby Docks consisted of coal as to about 90 per cent. of the exports, and of the imports about one-third was fish and the balance general cargo.

Under the Railways (Valuation for Rating) Act, 1930, the docks were included as part of the railway undertaking and in the third valuation roll £6,000 net annual value was apportioned to Grimsby Docks. The Local Government Act, 1948, enacted, inter alia, that a railway hereditament should not be liable to be rated or be included in any valuation list and the assessment of £6,000 on Grimsby Dock became "frozen" until the coming into force of the new valuation list on April 1, 1956, save that there was an addition of £247 in net annual value in respect of a new export shed at the Royal Dock. The assessments totalling £6,247 net annual value were repeated in the new valuation list.

[1] [1927] 2 K.B. 154; 43 T.L.R. 301, C.A.

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The evidence put before the tribunal showed that Grimsby Docks had been run at a loss for many years past and the parties were agreed that a valuation on the profits basis produced a substantial deficit.

Evidence for the appellants was given by Mr. W. A. Barnes, F.R.I.C.S., the chief estate and rating surveyor of the British Transport Commission, by Mr. H. M. Mitton, the chief administrative officer, British Transport Docks, British Transport Commission, and by Mr. J. Hancock, the commercial officer of the Eastern Region of the British Railways.

Mr. Barnes put in evidence the accounts for Grimsby Docks Division, British Transport Commission, for each year 1951 to 1955, and a valuation on the profits basis showing a very substantial deficit, after charging for running expenses, maintenance and renewal, but before allowing for a "tenant's share," and in the light of that valuation he gave it as his firm view that the assessment should be nil. In cross-examination, he conceded that the prosperity of the town of Grimsby was bound up with the port, that it was unthinkable that the dock would be allowed to close down, and that if the commission did not operate it, somebody else would be required to do so. With regard to the financial loss of running the docks, he could only speak as the estates surveyor, but he thought that the commission regarded each of its activities or divisions as undertakings which ought to be run independently and to pay their own way, but if the direct local income was not enough to pay the expenses the balance must be found by the commission from some other source.

If Grimsby were to be closed down, he thought the commission possessed sufficient alternative facilities to enable it to absorb the Grimsby trade without serious dislocation. He agreed that properties on or near the docks, but so let out as to be capable of separate assessment, produced a rent of about £80,000, and while the prosperity of the businesses carried on therein was bound up with the dock, he did not think that the leases contained any specific covenant to keep the docks open. He conceded that he would not complain of the assessments totalling £6,247 if the strict profits basis were not applicable, but that that was not a view based on any matter of method or valuation, and involved the assumption that the loss at Grimsby was not brought into valuation.

Mr. Mitton said that until 1947 the docks were part of the London & North-Eastern Railway system. When the British Transport Commission came into being all their docks were managed by a Docks and Inland Waterways Executive under delegated powers, and about 1954 the executive was abolished and a separate dock management board set up as one of the divisions of the commission. He said that railways and docks were interdependent for traffic, and he gave details of the traffic at Grimsby.

Mr. Hancock thought that the volume of traffic depended on

the charge made and the quality of service given, and in that connection explained the necessity for the special fish train with wagons for different destinations even though those wagons were very partially filled. He also expressed the view that the railway traffic would not be affected if either Grimsby Docks were operated by somebody apart from the British Transport Commission, or even if the docks were closed down.

No evidence was given by either of the respondents.

For the appellants, Mr. Widgery submitted that on the authority of *Clayton* v. *British Transport Commission*[2] the profits basis must be applied in the absence of special circumstances and that recent cases showed that the profits basis was still to be applied strictly. *Peterborough Corporation* v. *Stamford Union*[3] and *Barking Rating Authority* v. *Central Electricity Board*[4] were authorities for saying that the fact that the profits basis gave a nil assessment was not in itself a ground for departing from it.

It was his contention that there were no special circumstances in this case justifying a departure from the profits basis, that nobody would be prepared to offer any rent even if, the hereditaments being vacant and to let, for social or other reasons the British Transport Commission or any other body consented to go in and run the undertaking. Further, while the appellants had put forward a valuation to justify their contention of nil, there was no evidence before the tribunal to justify the figures of the respondents.

For the respondent valuation officer the Solicitor-General argued that the suggestion of nil rent was an affront to both logic and common sense. The evidence showed that the closing down of the dock could not be envisaged and, in his submission, the occupation of a hereditament of this size and importance implied a payment of a rent, Mr. Barnes had accepted the figure of £6,247 if the profits basis were not to be strictly applied and so the reasonable rent was established.

The tribunal were bound by section 22 of the Rating and Valuation Act, 1925, but were not bound to apply the profits basis (*Metropolitan Water Board* v. *Hertford Corporation*[5]), the profits basis being no more than an aid to the ascertainment of the rent and in his submission having to be resorted to only with an undertaking where it was necessary to ensure that the values of the parts did not exceed the value of the whole.

The circumstances in the present case could be regarded as factors immediately relevant to the application of section 22 or as special circumstances rendering the application of the profits basis inapplicable. The Grimsby Docks, which only ran into two rating areas, were part of a large undertaking, the British Transport Commission, which operated as a single undertaking,

[2] [1955] 1 W.L.R. 504; [1955] 2 All E.R. 274, C.A.
[3] (1883) 31 W.R. 949.
[4] [1940] 2 K.B. 51; 56 T.L.R. 583; [1940] 2 All E.R. 341.
[5] [1953] 1 W.L.R. 622; [1953] 1 All E.R. 1047, C.A.

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but part thereof was not liable to be assessed to rates. There was a single rate of charge for the carriage of goods from the trader's premises to the dock-side, and the apportionment of the part of the charge relevant to docks was a private arrangement within the whole undertaking, and moreover, when a loss occurred on dock working, this was made up from other sources within the commission. The railways obviously obtained benefit from carrying dock traffic and the principle that contributory value should be disregarded (*Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* [6]) was irrelevant, where the railway benefit was not assessed.

Mr. Alan Orr, for the local authorities, adopted the arguments of the Solicitor-General and emphasised the repeated statements in the decided cases that circumstances might justify either the modification of, or departure from, the profits basis and that that basis was said to be no more than aid to the finding of a rent, it was not an inflexible formula. He also referred to the number of hereditaments so let out as to be separately rated and submitted that there would be a moral or legal duty on the commission to keep the dock open because of these hereditaments, a circumstance which he thought very relevant when considering the commission as a hypothetical tenant.

The decision stated that the question whether Grimsby Docks should be assessed as a separate dock undertaking or as being part only of a larger undertaking was not before the tribunal. The respondents had given no evidence concerning the basis of the figure of £6,247 and the appellants had valued the undertaking as a separate dock undertaking.

The tribunal adopted the language of Jenkins L.J. in *Metropolitan Water Board* v. *Hertford Corporation* [7] that "it must "be borne in mind that the 'profits basis' has no statutory "authority, and sets up no new standard of rateable value, the "one and only standard (so far as is here material) being the rent "at which the hereditament might reasonably be expected to "let from year to year on the terms stated in section 22 (1) (*b*) "of the Act of 1925. The 'profits basis' is no more than an aid "to the ascertainment of that rent in cases of a particular class. "It lays down no inflexible code; the manner of applying its "general principles no doubt admits of variation to suit the "peculiarities of individual cases, and no doubt there may be "cases in which there are special circumstances sufficing to justify "its total exclusion. Nevertheless, the 'profits basis' has behind "it the sanction of long practice and of judicial approval over "many years, and at the present time it may, I think, be said "that as a matter of law it is prima facie the right method to "apply in a case of this kind, the onus of showing special circum-"stances justifying a departure from it being upon those who "advocate such departure."

[6] [1916] 1 A.C. 23; 31 T.L.R. 608, H.L.

[7] [1953] 1 W.L.R. 622, 631–632.

The tribunal concluded that unless it was satisfied that there were special circumstances in the case justifying a departure from the profits basis, it found no unreality in deciding that a tenant might be found who, for moral, social or statutory reasons, would accept liability for running the docks but would not be prepared to pay any rent.

It had been argued that the boundaries of the docks were arbitrary; that the accounts were largely an interdepartmental matter; that the railways benefited from dock traffic; and that any loss in running Grimsby Docks was made up from other sources within the commission; but it seemed to the tribunal that all those and other similar matters would have received full consideration following the decision of the Court of Appeal in the *Manchester Ship Canal* case [8] and it did not think that they could be held to be special cricumstances such as to invalidate the use of the profits basis.

The tribunal thought that the British Transport Commission or possibly some other body viewing the docks vacant and to let would be willing to enter into a tenancy and when deciding on the rent would know that for many years the docks had been run at a loss; they would be aware that a profits valuation produced a substantial deficit before any allowance for tenants' share; they would know that part of the income arose from rents from properties so let out as to be capable of separate assessment and that the prosperity of the tenants of these properties depended largely on the docks; they would realise the size and importance of the docks; but they would also consider that the loss in operating was such that they would not be justified in offering anything as rent, and the tribunal believed that the landlord would accept such an offer knowing that the docks would be operated and kept in good order.

The tribunal accordingly allowed the appeal and held that the assessments be shown as nil. The valuation officer appealed.

Sir Jocelyn Simon Q.C., S.-G. and *Alan Orr* for the valuation officer.

Alan Orr for Grimsby Corporation.

Patrick Browne Q.C., Harold Marnham and *Charles Fay* for the commission.

Port of London Authority v. *Orsett Union Assessment Committee* [9] was referred to during the argument, in addition to the cases referred to in the judgment.

Cur. adv. vult.

Holroyd Pearce L.J. The judgment I am about to deliver is the judgment of the court.

This is an appeal by the valuation officer and the Grimsby

[8] [1927] 2 K.B. 154.

[9] [1920] A.C. 273; 36 T.L.R. 233, H.L.

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Corporation from a decision of the Lands Tribunal in respect of the assessments of two hereditaments comprising the Grimsby Docks which are part of the undertaking of the British Transport Commission.

It raises the question whether a profits basis of assessment should be applied to these hereditaments, and if so how it should be applied. If it is to be applied in the normal form, the result must be a nil assessment, for the docks have consistently made large losses for many years past, and the parties were agreed that a valuation on the normal profits basis produces a substantial deficit.

The local valuation court ordered the two hereditaments to be entered respectively at net annual value £6,177 (with rateable value £1,562) in the Grimsby County Borough and net annual value £70 (with rateable value £11) in the adjoining Borough of Cleethorpes. The local valuation officer had caused the hereditaments to be entered at those figures. No basis for those figures was put forward, and no evidence was given by the local valuation officer to support them.

The Lands Tribunal allowed the appeal from the decision of the local valuation court, and reduced the assessments to nil. The Solicitor-General, for the appellant, argues that such a decision cannot be right. These docks, he argues, are a large industrial enterprise. They have had some millions of capital spent on them; they extend over some hundreds of acres; they employ directly 1,000 persons, and have many others dependent on the enterprise. They must surely, he urged, make some contribution to the rates from which the enterprise draws, inter alia, the benefits of sewage and lighting, and education for the children of its employees.

It was admitted by the chief estate and rating surveyor for the British Transport Commission that the prosperity of the town is bound up with the port, that it was unthinkable that the docks would be allowed to close down, and that if the commission did not operate them somebody would be required to do so. The same witness said that he would not complain of the local valuation officer's assessments totalling £6,247 if the strict profits basis were not applicable, but that this was not a view based on any matter of method or, indeed, valuation, and involved the assumption that the loss at Grimsby was not brought into valuation.

The first of the docks was constructed in 1852, and the most recent in about 1930. The hereditaments have always been railway docks. Under the 1926 scheme they were grouped with London and North Eastern Railway, and they were nationalised in 1947.

Certain properties on or near the docks and within the hereditaments are let out by the commission at rents totalling about £80,000. Those properties are separately assessed, and have little relevance to this case save that it was argued before the

Lands Tribunal that their existence created a moral or legal duty on the commission to keep the docks open because of those lettings. But we cannot think that such a duty exists. It was not argued that these receipts ought to be set off against, or absorbed in, the losses of the rest of the dock undertaking.

It was conceded that the dock undertaking was properly treated as a separate undertaking, that being the method that the Revenue has applied to other docks. The dock is in fact a part of the undertaking of the British Transport Commission, which by section 3 (4) of the Transport Act, 1947, forms one undertaking. That one undertaking is to be so conducted "as "to secure that the revenue of the commission is not less than "sufficient for making provision for the meeting of charges "properly chargeable to revenue, taking one year with another." Any loss made by the commission was met, we are told, by loans first from the bank and latterly by the Exchequer. These loans at all material times were theoretically repayable by the commission (see Transport (Railway Finance) Act, 1957). It is not, therefore, strictly correct to say that any losses are made good by the taxpayer, though in the end the taxpayer will probably have to assume liability for the loans to the commission.

The commission has by section 25 (1) (*e*) of the Transport Act, 1953, a general duty to "provide . . . port facilities in such "places as may appear to them to be expedient . . . due regard "being had, as respects all the services and facilities . . . to "efficiency, economy and safety of operation and to the needs "of the public, agriculture, commerce and industry." It continues to maintain these docks, albeit at a loss, because no doubt in the light of the above-mentioned matters it appears to it expedient to do so.

The hereditaments were entered in the third quinquennial roll under the Railways (Valuation for Rating) Act, 1930, s. 3, at £6,000, and there was later an addition of £247 in respect of a new export shed at the docks. The figure of £6,000 does not, however, have any contemporary significance since it was apparently computed on a profits basis from the traffic receipts over the whole London and North Eastern Railway between 1936 and 1941 (see sections 4, 5 and 6), apportioned according to an apportionment scheme under sections 6 and 13. Moreover, it was not a valuation of the docks as a separate entity, but was an apportioned part of the value of the whole railway undertaking.

This value of £6,247 was apparently the sole foundation for the rating valuation officer's present figure of £6,247, divided between the two hereditaments into two sums of £6,177 and £70. No particulars or computations in support of such valuations were lodged under rule 10 (3) of the Lands Tribunal Rules, 1956 [S.I. 1956, No. 1734]. In the absence of evidence to support those figures they can claim no merit save that the commission's witness, while contending that they were wrong, conceded that he would not complain of them.

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The Lands Tribunal decided that there were no special circumstances justifying a departure from the profits basis. In accepting that basis it said: "We find no unreality in deciding "that a tenant might be found who either for moral, social or "statutory reasons would accept liability for running the docks, "but would not be prepared to pay any rent." And again it concluded: "It has been argued that the boundaries of the docks "are arbitrary; that the accounts are largely an inter-depart-"mental matter; that the railways benefit from dock traffic, and "that any loss in running Grimsby Docks is made up from other "sources within the commission, but it seems to us that all these "and other similar matters would have received full considera-"tion following the decision of the Court of Appeal in the "*Manchester Ship Canal* case [*Manchester Ship Canal Co.'s and "Docks and Harbour Authorities Association's Application*[1]], "and we do not think that they can be held to be special circum-"stances such as to invalidate the use of the profits basis.

"We think that the British Transport Commission or possibly "some other body viewing the docks vacant and to let would be "willing to enter into a tenancy, and when deciding upon the "rent would know that for many years the docks had been run "at a loss; they would be aware that a profits valuation produced "a substantial deficit before any allowance for tenants' share; "they would know that part of the income arose from rents from "properties so let out as to be capable of separate assessment, "and that the prosperity of the tenants of those properties "depended largely upon the docks; they would realise the size "and importance of the docks, but they would also consider that "the loss in operating was such that they would not be justified "in offering anything as rent, and we believe that the landlord "would accept such an offer knowing that the docks would be "operated and kept in good order."

That question of railway benefit from dock traffic was dealt with somewhat cursorily, no doubt for the following reason. Immediately after hearing the present case (and before giving their decision upon it) the same tribunal heard an appeal concerning the Immingham Docks which lie a few miles away from Grimsby Docks and are also part of the commission's undertaking. The Immingham Docks showed a profit on accounts drawn on a like principle as Grimsby, and the Revenue there put forward a valuation on a profits basis; and there was in that case an investigation of figures in relation to railway benefit from dock traffic. But in the present case the Solicitor-General did not investigate such figures in cross-examination, since the loss on these docks was so great that obviously no cross-examination on figures could turn the loss into a profit; this argument was directed to excluding the profits basis on principle.

[1] [1927] 2 K.B. 154; 43 T.L.R. 301, C.A.

The sole statutory authority for the valuation of a hereditament is contained in section 22 (1) (*b*) of the Rating and Valuation Act, 1925, which provides that the net annual value of a hereditament is an estimate of the rent at which it might reasonably be expected to let from year to year, the tenant paying rates, taxes, repairs, insurance and other expenses of maintenance. That formula dates from the Parochial Assessment Act, 1836, and from an early date, in order to ascertain the net annual value of premises where there was no letting as a guide to value, the courts were forced to adopt certain hypotheses of which the foremost were two: (a) the contractor's basis, which starts from a consideration of the cost of the construction of the hereditaments; and (b) the profits basis, which starts from a consideration of the accounts to find what are the receipts of the tenant.

The contractor's basis has been consistently applied to cases where, for instance, a local authority has to provide a sewage works that could not produce a revenue, or an educational institution whose object is not the collection of revenue. It is assumed that the authority which has to construct the works or the building would as a hypothetical tenant be prepared to pay as a rent a reasonable percentage on the cost of the works or building which it would otherwise have to construct (see *West Kent Main Sewerage Board* v. *Dartford Assessment Committee*, etc.[2]). It is conceded in this case that any assessment founded on the contractor's basis would produce far too high a figure owing to the very large cost of constructing these docks, and that the contractor's basis was inapplicable.

The profits basis is founded on the theory that a hypothetical tenant will take into account the receipts and be prepared, after deducting the expenses and a reasonable living for himself, to pay the balance as rent. That basis has been consistently applied to public utility undertakings (including docks) whose object is to collect a revenue. For the distinction between the two classes of case see *per* Lord Herschell in *London County Council* v. *Erith Parish and Churchwardens, etc. and Dartford Union Assessment Committee*.[3] In the present case not only the motive, but the statutory duty of the undertaking, is to collect a revenue and to cover its expenses.

As early as 1851 in *Regina* v. *Southampton Dock Co.*[4] the profits basis was taken as the correct basis in assessing docks, all of which were apparently in the same rating area. That basis became the accepted basis for valuing such undertakings. No case has been cited in which a dock undertaking has in this century ever been assessed upon any other than a profits basis.

In *Kingston Union Assessment Committee* v. *Metropolitan Water Board*[5] Lord Cave referred to the great difficulties

[2] [1911] A.C. 171, H.L.
[3] [1893] A.C. 562; 10 T.L.R. 1, H.L.
[4] (1851) 14 Q.B.D. 587.
[5] [1926] A.C. 331, 338; 42 T.L.R. 275, H.L.

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encountered in applying to certain classes of hereditaments the apparently simple principle of estimating the rent at which the premises might reasonably be expected to let from year to year. As a result "it was found necessary for rating experts and the "courts to have recourse to hypotheses of a more or less violent "character." "In particular," he continued, "there was "obvious difficulty in applying the general principle laid "down . . . to a water company or other body supplying "water in a number of different parishes." In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on a sum exceeding the aggregate yearly value of their undertaking. He came to the conclusion in that case, where, in fact, the water company carried on its undertaking over a widely diffused area, that the profits basis must be applied in view of the long practice of the courts in using it for such cases.[6] He conceded the force of the reasoning which led Atkin L.J. in the court below[7] to a conclusion that the contractor's basis was to be preferred, but he said[8]: "the contrary "view has prevailed for nearly eighty years, and I venture to "think that it is now too late for the courts to adopt a different "course." Later (in a passage on which the Solicitor-General relied) he said[9]: "By this I do not mean that in no case can "another method be adopted by a rating authority in assessing "waterworks for rating purposes; but in order to justify that "course it would be necessary that the authority should be "satisfied that there are special circumstances in the case "sufficient to make it necessary for them to exclude the recog-"nised formula of assessment and to resort to some other "principle, and in the case now under consideration no such "circumstances are found."

Lord Buckmaster said[10]: "It does not follow that it has ever "been laid down that such method is exclusive and must be "of universal application," and he added: "as regards a com-"pany which, either by reason of its special and peculiar "statutory restrictions or by reason of any other fact, cannot be "regarded in the same light as that of an ordinary water com-"pany, it is open to consider whether other methods of valuation "may not properly be adopted."

The House was there directing its mind largely to the difficulty raised particularly in the case of water boards through the undertaking being scattered over various parishes. Moreover, it was clear that the profits basis was enjoined merely as a hypothesis intended to solve an otherwise insoluble problem, that it was one of "certain empirical rules," to use the words of Lord Parker

[6] [1926] A.C. 331, 340.
[7] [1925] 2 K.B. 509, 564, C.A.
[8] [1926] A.C. 331, 344.
[9] Ibid. 345.
[10] Ibid. 352.

of Waddington in *Metropolitan Water Board* v. *Chertsey Assessment Committee*,[11] and that in cases for which the hypothesis was shown to be inept it should be discarded in favour of some more workable hypothesis. In *Barking Rating Authority* v. *Central Electricity Board*[12] both in the Divisional Court and in the Court of Appeal it was said that only where the basis was "impossible" was there justification for discarding it.

Later cases adhered to this standpoint. The profits basis continued to gain additional validity by the progress of time, but always with the rider that it could be discarded or modified if special circumstances justified a departure from it. This rider has never in any reported case been put into practice in the case of a public utility undertaking. There were cited to us, however, three cases before the Lands Tribunal in which the profits basis has been applied, with some modification based on other considerations, to concerns which were not strictly public utility undertakings. Jenkins L.J. put the matter clearly in *Metropolitan Water Board* v. *Hertford Corporation*[13] in a passage which the Lands Tribunal rightly adopted as a summary of the law on this point: "it must be borne in mind that the 'profits basis' "has no statutory authority, and sets up no new standard of "rateable value, the one and only standard (so far as is here "material) being the rent at which the hereditament might "reasonably be expected to let from year to year on the terms "stated in section 22 (1) (*b*) of the Act of 1925. The 'profits "'basis' is no more than an aid to the ascertainment of that "rent in cases of a particular class. It lays down no inflexible "code; the manner of applying its general principles no doubt "admits of variation to suit the pecularities of individual cases, "and no doubt there may be cases in which there are special "circumstances sufficing to justify its total exclusion. Neverthe-"less, the 'profits basis' has behind it the sanction of long "practice and of judicial approval over many years, and at the "present time it may, I think, be said that as a matter of law it "is prima facie the right method to apply in a case of this kind, "the onus of showing special circumstances justifying a depar-"ture from it being upon those who advocate such departure."

That passage was followed with approval by this court in *Clayton* (*Valuation Officer*) v. *British Transport Commission*.[14] The latter case does not bear on the present problem since it deals with the attempted excision of certain profitable hereditaments from a dock undertaking to which admittedly the profits basis was applicable. But Lord Evershed M.R.[15] emphasised the fact that a dock undertaking was admittedly an undertaking

[11] [1916] 1 A.C. 337, 360; 32 T.L.R. 168, H.L.

[12] [1940] 2 K.B. 51; 493 (C.A.); 56 T.L.R. 583, 928; [1940] 2 All E.R. 341; 3 All E.R. 477.

[13] [1953] 1 W.L.R. 622, 631–632; [1953] 1 All E.R. 1047.

[14] [1955] 1 W.L.R. 504; [1955] 2 All E.R. 274.

[15] [1955] 1 W.L.R. 504, 510.

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appropriate for assessment on a profits basis, and alluded to the sanctity that this method of assessment has acquired.

Lord Atkin in *St. James' and Pall Mall Electric Light Co. Ltd.* v. *Westminster Assessment Committee*[16] gave, as examples of the public utility undertakings to which the profits basis should be applied, mines, docks and harbours, sewage and drainage works, railways, water, gas and electric lighting works. That category is referred to as a class, with the omission of mines and the addition of lighthouses, in the First Schedule to the War Damage (Public Utility Undertakings) Act, 1949.

The question before us, therefore, is whether the Lands Tribunal was right in thinking that no such special circumstances had been made out as would justify the jettison of the profits basis. The mere fact that the profits basis produces a nil assessment for a large industrial concern is not a special circumstance which makes the profits basis inapplicable: *Barking Rating Authority* v. *Central Electricity Board*[17] in the Divisional Court and in the Court of Appeal. In that case one of the special circumstances alleged was (as here) that, in spite of the result of the accounts, a tenant would be prepared to pay a rent. Even if the profits basis produces anomalies, it has been found to be the best available method: see the speeches of Lord Radcliffe and of Lord Keith of Avonholm in *Mid-Northamptonshire Waterworks* v. *Lee*.[18]

The Solicitor-General contends that a departure from the profits basis is more easily justified where, as here, only two parishes are concerned, and the difficulties arising from diffusion are theoretical rather than real. But in *Reg.* v. *Southampton Dock Co.*,[19] *St. James' and Pall Mall Electricity Ltd.* v. *Westminster Assessment Committee*[20] and *Sculcoates Union* v. *Dock Company of Kingston-upon-Hull*,[21] although the undertakings were all contained in one parish, the profits basis was held to apply. Although the diffusion of an undertaking is a strong, if not a major, reason for the application of the profits basis, that basis has received so strong a sanction by use that, alike whether an undertaking be diffused over several rating areas or confined to one, very strong reasons must exist in order to justify any departure from it and the disturbance of so long a tradition of practice. On any hypothesis anomalies may be produced, but in order to avoid chaotic results it is desirable to adhere where possible to known principles. In the case of the Immingham Docks which made a profit it suited the Revenue to regard the profits, and to value on the profits basis. In the present case, where a loss is made, it suits it to disregard the loss (which must be partially paid out of the profits from Immingham) and discard the profits

[16] [1934] A.C. 33, 41; 50 T.L.R. 75, H.L.
[17] [1940] 2 K.B. 51, 60; 493, 495.
[18] [1958] A.C. 68, 88, 92; [1957] 2 W.L.R. 881; [1957] 2 All E.R. 143, H.L.
[19] (1851) 14 Q.B.D. 587.
[20] [1933] 1 K.B. 605, 636, C.A.; [1934] A.C. 33, H.L.
[21] [1895] A.C. 136, H.L.

basis. But prima facie the Revenue, like the commission, must take the rough with the smooth and set its gains against its losses.

Mr. Patrick Browne in argument conceded that he would have no objection to all the commission's dock undertakings being valued as a whole. If, however, the docks that make a profit are to be valued on a profits basis, and those that make a loss on a different basis, it would be inequitable and lead to one of the injustices which, as the *Kingston Union* case [22] shows, the profits basis was designed to avoid.

The Solicitor-General relies as a special reason for departure from the profits basis on the fact that the commission is not bound to adjust its charges so as to cover costs in any particular part of the undertaking. But no suggestion was made in cross-examination before the Lands Tribunal that any figures were misleading in this respect or that the large deficit could by any adjustment be converted into a profit.

Again, it is argued that a major part, namely, the railway part, of the commission's undertaking is not rated at all (Local Government Act, 1948, s. 85), and therefore it cannot be said that the profitable part of it will bear rates which the unprofitable part avoids. But the railway part of the undertaking does in fact make payments in lieu of rates: see Local Government Act, 1948, s. 93. These payments are allocated according to the respective rateable valuations (section 100 (3)), and are presumably on a profits basis. If so, this argument is a reason for rather than against the application of a profits basis to the parts of the undertaking not so covered.

The Solicitor-General also puts forward as a special reason the facts that the interest on the British Transport Stock issued to former owners of the railway stock, and that the payment of £50,000 per annum interest on the loan, which we are told was raised for the construction of the latest dock, form no part of the dock accounts before us. Anomalies like these import a certain unreality into the accounts, and the Solicitor-General seized on this fact as a foundation for an argument that "it was "impossible" to work out what is really the profit or loss on the docks. It is true that all the figures wear an air of unreality. That is inevitable where the unit of assessment is in fact only a part of a far larger undertaking, all by statute to be treated as one.

The British Transport Stock was issued in exchange for the London and North Eastern Railway Stock at the market value of that stock on a certain date. We find it impossible to say that any portion of that stock represents the value attributed by the market to the Grimsby Docks. We find it impossible to draw any inference from the payment of interest on the British Transport Stock, or to hold that it is a special circumstance.

[22] [1926] A.C. 331.

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The payment of interest was not referred to in the case stated, and we feel some doubt whether we would be entitled to hold that this was a determining factor. As to the Grimsby loan, no evidence was adduced, nor (as we understand it) was it ever mentioned at the hearing. Even if it be proper to consider it, it would be insufficient to overcome the very large annual deficit unless it can be established that that deficit as such is made good by some reimbursement.

The Solicitor-General argues that in the ultimate resort the taxpayer makes good the deficit, but it must be remembered that reimbursement only produces equilibrium in the accounts. It does not produce a profit. We have been referred to various cases relating to precepts. In the *Dewsbury* case [*Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union Assessment Committee* [23]] it was held that, in assessing a water board on the profits basis, account could be taken of the amount of water rate which could be levied to meet such expenses of maintaining the waterworks as the amount of water rents and payments for the supply of water should not be sufficient to discharge. In the *Merthyr Tydfil* case [*Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Union Assessment Committee* [24]] it was held that in such cases the true question was whether such sums were received by the water board so as to make it potentially available to them as an item of gross profit [25]: "It is so available if the money is received as the price of water "supplied, or as an unconditional aid augmenting the receipts "of the tenant; but it is not so received if the tenant received "the money on terms that he shall repay it, if he receives it in "short by way of loan. Now, do the appellants receive this "money as they would money raised by a rate in aid, as an "unconditional aid, or do they receive it by way of loan or other-"wise on terms which render it not an item of gross profit?"

Applying that question to the present case we are not satisfied that any making good of the deficit can be said to be unconditional aid to the dock undertaking. No investigation of the matter was made in the evidence, and we doubt if we are justified in drawing any inferences. If we were, it seems to us that the inferences point the other way. The deficit, it seems, accumulates, being financed by loans which, so far as they come from the taxpayer or the Exchequer, are repayable even though never in fact repaid. If, then, the commission be a hypothetical tenant, there is no reimbursement, but merely a facility to borrow.

The Solicitor-General further argued that the profits basis is only a means to the end of finding what the hypothetical tenant would pay, and that the tribunal failed to consider the real position of the hypothetical landlord in enforcing some payment

[23] (1885) 16 Q.B.D. 585.
[24] [1891] 1 Q.B. 186, D.C.
[25] Ibid. 193.

of rent as a return on his enormous capital outlay. He relies on the passage in the judgment of the court given by Denning L.J. in *Lee (Valuation Officer)* v. *Mid-Northamptonshire Water Board*[26]: "The hypothetical landlord who builds a waterworks "would reasonably expect to receive enough rent to enable him "to pay interest on the money he has borrowed and also to "put something aside for a sinking fund. It is true that the "question is what the hypothetical tenant can afford to pay, but "in these cases the tenant has the power to raise the additional "revenue required to enable him to pay the rent which the land-"lord would reasonably expect to receive." This might be an argument if the Revenue were contending for a "contractor's "basis," but from that common sense recoils, and it was not relied on. Against this, moreover, must be set the dictum of Lord Dunedin in *Great Central Railway* v. *Banbury Union*[27]: "Cost of construction is obviously an irrelevant consideration in "getting at the rent to be paid by a hypothetical tenant. It was "said to be so categorically by Blackburn J. in the *London and "North Western Railway* case" [*Reg.* v. *London and North Western Railway Co.*[28]]

Such considerations are but guides to a decision in each case. The tribunal, though applying the profits basis, has had in mind the aim of that hypothesis, which is to find what rent the tenant would pay. It has found specifically that the hypothetical tenant "would consider that the loss in operating was such that they "would not be justified in offering anything as rent, and we "believe that the landlord would accept such an offer knowing "that the docks would be operated and kept in good order." Although that finding is of necessity a finding on hypothetical facts, it is a finding of fact: see *per* Lord Halsbury L.C. in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee*.[29] Providing that there was material on which the court could properly so find, we could not in our judgment interfere with it, even if we ourselves would have found otherwise.

By the Lands Tribunal Act, 1949, s. 3 (4), the appeal to this court is on law only. In *London County Council* v. *Wilkins (Valuation Officer)*,[30] an appeal from the Lands Tribunal, Viscount Kilmuir L.C. said: "It must not, however, be forgotten "that, by virtue of the Lands Tribunal Act, 1949, a decision of "the tribunal is final; but a person aggrieved by such a decision, "as being erroneous on a point of law, is entitled to require the "tribunal to state a case for the decision of the Court of Appeal. "It is, in my view, particularly important in these days, when "juries in civil matters are seldom seen, that reserved fields of

[26] [1956] 2 Q.B. 55, 68; [1956] 2 W.L.R. 1012; [1956] 2 All E.R. 59, C.A.

[27] [1909] A.C. 78, 96; 25 T.L.R. 143, H.L.

[28] (1874) L.R. 9 Q.B. 134.

[29] [1901] A.C. 175, 180; 17 T.L.R. 444, H.L.

[30] [1957] A.C. 362, 371; [1956] 3 W.L.R. 505; [1958] 3 All E.R. 38, H.L.

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"fact should be inviolate and that appellate courts should not, "by the intrusion of their factual opinions, make more difficult "the correct decision on particular circumstances."

The Solicitor-General relies on the three decisions in the Lands Tribunal in which the profits basis has been adopted in principle, but its results have been somewhat modified in the resultant decision. He asks us to do likewise. Those cases, however, were not dealing with undertakings which come within the class of public utility undertakings. In the case of such other undertakings such modification seems to us a matter for the Lands Tribunal and not for this court. Those cases show that the tribunal is in such cases on occasion prepared to modify the figures resulting from a profits basis where it thinks that on the facts such a course is justified. In the present case, in our judgment, we are not entitled to do so in the absence of special circumstances that justify it. We find none here. Moreover, there is no material on which this court could so modify the nil valuation. If the profits basis is to be rejected or modified, something must be put in its place. Here there is nothing. The only figure put forward in opposition to the nil valuation is the Revenue's figure of £6,247, for which there is no justification or basis at all. It would not be possible for the tribunal to find that figure to be the amount which a hypothetical tenant would have been willing to pay as there was no evidence to justify it. The tribunal did not so find, and it is therefore clear that this court cannot either. In our judgment the appeal fails and must be dismissed.

Appeal dismissed with costs.
Leave to appeal to House of Lords.

Solicitors: *Solicitor, Inland Revenue; Town Clerk, Grimsby Corporation; M. H. B. Gilmour.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1961
Feb. 2.
Lord Parker C.J., Winn and Widgery JJ.

WORKMAN *v.* COWPER.

Animal—Dog—Killing—Lawful excuse—Test—Foxhound running wild on common land—Owner unknown—Possible future danger to sheep and lambs—No real or imminent danger—Shot by person not the owner of sheep and lambs—Whether shooting lawfully justified—Malicious Damage Act, 1861 (24 *&* 25 *Vict. c.* 97), *s.* 41.

The defendant, acting on the authority of the master of a local pack of hounds, shot a foxhound, the owner of which was at the material time unknown, which had been running wild on common land, all attempts to catch it having failed. The defendant came upon the hound while it was sleeping and, believing he could not catch it, deliberately shot and killed it. He was charged with

maliciously killing a dog, namely, the hound, contrary to section 41 of the Malicious Damage Act, 1861.[1] The justices found that the lambing season had started and a stray hound was likely to cause damage to livestock but that no actual damage was known to have been done by the hound. They were of opinion that the defendant had acted on the best authority he could obtain, and had acted reasonably, and dismissed the information. On appeal by the complainant:—

Held, that in deciding whether there was lawful excuse for killing a dog, the test was the same whether the shooting was done by an owner in defence of his own property or by a person in defence of the property of another; to justify the shooting there must be a real and imminent danger to other animals and as, on the facts of the present case, there was no real or imminent danger to other animals at the point of time when the shooting took place, no lawful excuse had been shown and the case must go back to the justices with a direction to convict.

Dictum of Scott L.J. in *Cresswell* v. *Sirl* [1948] 1 K.B. 241; 63 T.L.R. 620; [1947] 2 All E.R. 730 applied.

Dictum of Lord Goddard C.J. in *Goodway* v. *Belcher* [1951] 2 All E.R. 349, 350 explained.

CASE STATED by Oxford justices sitting at Henley-on-Thames.

On March 10, 1960, an information was preferred by the appellant, Bernard Workman, against the respondent, Cecil Featherstone Cowper, alleging that he, on February 28, 1960, at Peppard Common in the county of Oxford, did maliciously kill a certain dog, namely, a foxhound, the property of a person or persons unknown, contrary to section 41 of the Malicious Damage Act, 1861.

The justices heard the information on April 5, 1960, and found the following facts: A foxhound had been living wild in and around Peppard Common since about the end of December, 1959. Unsuccessful attempts to catch the hound had been made by, among others, officers of the National Canine Defence League. In December, 1959, the presence of the hound had been reported to Robert Douglas Norman Phillips, the master of the South Berkshire Hounds, which were hunted in the area of Peppard Common, but no hound was missing from his pack. The lambing season was approaching and a stray hound was likely to cause damage to livestock but there had been no damage which was known to have been done by this hound. It had been fed by various persons and was in very good condition. The master of the South Berkshire Hounds, as master of the pack hunting the area, considered himself responsible for any hound, whether or

[1] Malicious Damage Act, 1861, s. 41: "Whosoever shall unlawfully "and maliciously kill, maim, or "wound any dog, bird, beast, or "other animal, not being cattle, but "being either the subject of larceny "at common law, or being ordin-"arily kept in a state of confinement, "or for any domestic purpose, shall, "on conviction thereof before a jus-"tice of the peace, at the discretion "of the justice, either be committed "to the common gaol or house of "correction, there to be imprisoned ". . . for any term not exceeding "six months, or else shall forfeit and "pay, over and above the amount of "injury done, such sum of money "not exceeding £20 as to the justice "shall seem meet."

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not it came from his pack, and for all damage done by any hound in the area in which he hunted his pack. On a Sunday in February the master of the South Berkshire Hounds, armed with a shot gun, went with others, including a police constable, to try to find the hound, intending to shoot it if he was unable to catch it, but he failed to find it, and on that Sunday he authorised the respondent to kill the hound if he could not catch it. On February 22, 1960, one Robert James Horsfall informed the respondent that if he shot the hound he would be committing an offence. Robert James Horsfall was not the owner of the hound and was not acting on the authority of the owner, and the respondent knew he had no authority from any person purporting to be the owner of the hound. On February 28 the respondent found the hound asleep and, believing that he could not catch it, deliberately shot it dead. After it was dead the hound was found to have ear marks indicating that it came from the Craven Farmers' pack of hounds. A hound from that pack had been lost in November, 1959, but that was not known either to the respondent or to the master of the South Berkshire Hounds up to the time that the hound was killed. One of the joint masters of the Craven Farmers' pack, when informed of the action taken, approved it.

It was contended on behalf of the appellant that the onus of proof was on the respondent to justify killing the hound; that a justification for killing a hound might be that the hound was actually attacking or was about to attack or was likely to renew an attack on a person or that person's or his master's property; and that then the test was whether in shooting the hound the person was acting reasonably in regarding the shooting as necessary for the protection of the person or the property; and that none of those circumstances existed in the present case.

It was contended on behalf of the respondent that he acted reasonably, and that there was danger to livestock from such a hound living abroad, but that there might be a technical offence.

The justices were of the opinion that neither the appellant nor the master of the South Berkshire Hounds nor the respondent was the owner of the hound; that the owner could not reasonably have been ascertained while the hound was at large; that the respondent had acted on the best authority he could reasonably obtain, namely, that of the master of the pack of hounds which hunted in the district; that he had acted reasonably in all the circumstances; and they relied on the explanation of Lord Goddard C.J. in *Goodway* v. *Becher*,[2] that the word "maliciously" in section 41 of the Act of 1861 must be given some meaning and if in all the circumstances the respondent acted reasonably he could not be said to have acted maliciously in killing the hound and, accordingly, they dismissed the information. The appellant appealed.

[2] [1951] 2 All E.R. 349, D.C.

E. D. Sutcliffe Q.C. and *Henry Newman* for the appellant.
John Wood for the respondent.

The following cases (other than those referred to in the judgment) were cited in argument: *Reg.* v. *Cunningham* [3]; *Reg.* v. *Clemens* [4]; *Gott* v. *Measures* [5]; *Reg.* v. *Twose* [6]; *Reg.* v. *Day.* [7]

LORD PARKER C.J. This is an appeal by way of a case stated by justices for the county of Oxford sitting at Henley-on-Thames, before whom an information was preferred by the appellant against the respondent that he on February 28, 1960, did maliciously kill a certain dog, namely, a foxhound, contrary to section 41 of the Malicious Damage Act, 1861. The justices dismissed the information, and the question for this court is whether they came to a correct determination and decision in point of law. [His Lordship stated the facts and continued:]

Dismissing the information, the justices said this: "We "were of the opinion that neither the complainant nor Robert "Douglas Norman Phillips nor the the respondent (the defen- "dant) was the owner of the said hound; that the owner could "not reasonably have been ascertained while the hound was at "large; that the defendant acted on the best authority he could "reasonably obtain, namely, that of the master of the pack of "hounds which hunted in the district, the said Robert Douglas "Norman Phillips; that the respondent (the defendant) acted "reasonably in all the circumstances," and they go on: "and "we relied on the explanation of Lord Goddard C.J. in the "case of *Goodway* v. *Becher*,[1] that the word 'maliciously' in "the section must be given some meaning and if in all the "circumstances the respondent (the defendant) acted reasonably "he could not be said to have acted maliciously in killing the "hound and accordingly we dismissed the information."

The law in regard to the right of a man to shoot a dog for the protection of his own property has been settled by *Cresswell* v. *Sirl.*[2] There had been a number of old cases dealing with the matter, but this was the first time for more than 100 years that the matter had come up for decision of the courts, and in this case, the Court of Appeal. Scott L.J. said [3]: "After a con- "sideration of all the authorities above mentioned (to many of "which, as already stated, the attention of the court below "was not directed), we come to the conclusion that the law "applicable to the facts of the present case is less narrow than "the county court judge holds in his judgment. Chasing by

[3] [1957] 2 Q.B. 396; [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412, C.C.A.
[4] [1898] 1 Q.B. 556; 14 T.L.R. 273.
[5] [1948] 1 K.B. 234; 63 T.L.R. 555; [1947] 2 All E.R. 609, D.C.
[6] (1879) 14 Cox C.C. 327.
[7] (1844) 8 J.P. 186.
[1] [1951] 2 All E.R. 349, 350.
[2] [1948] 1 K.B. 241; 63 T.L.R. 620; [1947] 2 All E.R. 730.
[3] [1948] 1 K.B. 241, 249.

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"dogs which causes any real and present danger of serious harm "to the animals chased constitutes an 'attack' which entitles "the owner to take effective measures of prevention. We think "the relevant rules of law may be thus stated: (1) The onus of "proof is on the defendant to justify the preventive measure of "shooting the attacking dogs. (2) He has, by proof, to establish "two propositions, but each proposition may be established in "either of two ways: *Proposition No. 1*: That at the time of "shooting, the dog was either (*a*) actually (in the above sense) "attacking the animals in question, or (*b*) if left at large would "renew the attack so that the animals would be left presently "subject to real and imminent danger unless renewal was pre-"vented. *Proposition No. 2*: That either (*a*) there was in fact "no practical means, other than shooting, of stopping the "present attack or preventing such renewal, or (*b*) that the "defendant, having regard to all the circumstances in which he "found himself, acted reasonably in regarding the shooting as "necessary for the protection of the animals against attack or "renewed attack."

That is now settled law, and it is accepted by Mr. Wood, for whose argument the court is indebted, that in a case where an owner shoots a dog in protection of his property, he would only be acting lawfully and with lawful excuse if it were shown that proposition No. 1 and proposition No. 2 in Scott L.J.'s judgment in *Cresswell* v. *Sirl*[3] were complied with. Of course, the present case is different, because here the man who shot the dog was not purporting to do so in defence of his own property. At the highest he was doing it to protect other people's property, and it is suggested that in such a case some other test than that laid down by Scott L.J.[3] should be applied. As far as I know, there is no decided case in which this point has arisen, but logically I can seen no difference between the case of a man shooting a dog to protect his own property, and a man shooting a dog to protect his neighbour's property. It seems to me that the test must be the same in both cases.

Applying the test laid down to the circumstances of the present case, it is clear that this hound presented no real and present danger to sheep or lambs, or any other animals. The most that can be said is that it might in the future chase sheep which were in lamb, or attack the lambs when born. But there was no indication at that point of time when the dog was shot that there was any real or imminent danger of that occurring. Accordingly, applying the test in *Cresswell* v. *Sirl*[3] to the facts of this case, no lawful excuse has been shown.

Mr. Wood, however, sought to say that there must be many cases other than the protection of property which would raise lawful excuses for the killing of a dog. He instances a

[3] [1948] 1 K.B. 241, 249.

number of such cases: a dog is run over and in mercy it is killed; a dog is killed because it is thought to be mad, although it is not attacking any other animal or person. There are a number of other illustrations, and it was suggested, therefore, that there must be some overriding test, a necessary element of which would be a reasonableness that would cover all the cases.

I find it quite unnecessary to consider the wider proposition. It seems to me that in the present case the only possible excuse put forward is the protection of property. It is true, as the justices recite, that the defendant got the best authority he could, namely, from the master of the South Berkshire Hounds, but it is quite clear that there was no-one who could give him lawful authority to shoot this dog. Accordingly, in the present case, I find it unnecessary to consider any wider proposition.

I would only add this, that in the passage that I have recited at the conclusion of the justices' opinion, they relied on what Lord Goddard C.J. said in *Goodway* v. *Becher*[4] and particularly on the passage in which Lord Goddard C.J. was referring to a man acting reasonably in all the circumstances. It is enough to say that reference to that case shows perfectly clearly that Lord Goddard's reference to reasonableness was directed, and directed solely, to the second proposition laid down by Scott L.J. in *Cresswell* v. *Sirl*,[5] and that Lord Goddard's remarks in no way affect the test laid down by Scott L.J. in proposition No. 1.

In these circumstances, though having every sympathy with the defendant in this case, I have come to the conclusion that an offence was committed; indeed, in the contentions set out in the case, it is stated that the defendant admitted "that there might be a technical offence." The justices may well consider that this is a very trivial and technical offence and impose a sentence which reflects that view.

The case must, however, go back to the justices with a direction that they should convict.

WINN J. I agree, and desire only expressly to guard against being supposed to say that defence of property, whether one's own or the property of another, is the only justification which could be raised in answer to such a charge as this. Whether any such justification of another kind, such as my Lord referred to, would be relevant to the issue whether the act done was unlawful, or relevant to the issue whether it was done maliciously, or to the cumulative effect of the double phrase as used in section 41 of the Act, I would desire to consider if and when that problem again presents itself.

[4] [1951] 2 All E.R. 349, 350. [5] [1948] 1 K.B. 241, 249.

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Widgery J. I also agree.

Appeal allowed with costs.
Case remitted to magistrates with direction to convict.

Solicitors: *Hyde Mahon and Pascall for Knight & Maudsley, Maidenhead; Simpson, North, Harley & Co., for Collins, Dryland & Thorowgood, Henley-on-Thames.*

E. M. W.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1961 *Jan.* 23.

Hilbery, Stevenson and Veale JJ.

Feb. 13.

Lord Parker C.J., Winn and Widgery JJ.

REGINA *v.* SYKES.

Crime — Misprision of felony — Offence — Whether it now exists — Whether active concealment necessary ingredient.

Crime—Common law misdemeanour—Sentence—Misprision of felony—Receiving—Limitation of sentence—Statute of Westminster I (3 *Edw.* 1, *c.* 9).

The appellant was convicted of misprision of felony in that, knowing that others had received stolen firearms, he unlawfully concealed the commission of the offence and he was sentenced to five years' imprisonment. He appealed against conviction on the grounds that the offence of misprision did not now exist, and that the concealment necessary to constitute the offence, if it existed, involved or implied some positive act on the part of the accused:—

Held, (1) that the offence of misprision existed.

Rex v. *Aberg* [1948] 2 K.B. 173; 64 T.L.R. 215; [1948] 1 All E.R. 601, C.C.A. and *Reg.* v. *Wilde* [1960] Crim.L.R. 116 considered.

(2) That the active concealment necessary to constitute the offence did not involve a positive act and a mere omission to inform the appropriate authorities of a felony, of which the appellant knew, was sufficient to justify the appellant's conviction, and, accordingly, his appeal against conviction should be dismissed.

The appellant's application for leave to appeal against his sentence of five years' imprisonment was granted. Had the appellant been convicted of being an accessory after the fact to receiving, his maximum sentence would have been two years' imprisonment; by the Statute of Westminster I the maximum sentence for misprision of felony by a sheriff was one year's imprisonment. On appeal against sentence only:—

Held, (1) that on the assumption that the offence of misprision of felony existed, it was a common law misdemeanour and as such there was no limit to the sentence of imprisonment save that in no case could an inordinate sentence be passed.

Rex v. *Morris* [1951] 1 K.B. 394; 66 T.L.R. (Pt. 2) 1050; [1950] 2 All E.R. 965, C.C.A. and *Rex* v. *Higgs* [1952] 1 K.B. 7; [1951] 2 T.L.R. 855; [195'] 2 All E.R. 758, C.C.A. considered.

(2) That it would be impossible to give a sentence of more than two years' imprisonment for misprision of felony. In the present case the appellant, having been in custody for over 10 months, had served an appropriate sentence and would be released.

APPEAL against conviction and APPLICATIONS for leave to appeal against conviction and sentence.

The appellant, Basil Landon Sykes, was convicted on indictment at the Crown Court, Manchester, before Sir Basil Nield Q.C. with misprision of felony in that knowing that others had received stolen firearms he unlawfully concealed the commission of the offence, and he was sentenced to five years' imprisonment.

The firearms were stolen from a United States Air Force station in Norfolk, brought to Manchester and arrangements for their sale made. Before the examining magistrates the appellant was charged with being an accessory after the fact to receiving, but that charge was not included in the indictment, a charge of receiving having been substituted therein, which was quashed before arraignment. Four other men were charged on the same indictment with the appellant with receiving the stolen firearms; one was also charged with misprision of felony, and two of them and the appellant were also charged with attempting to sell the firearms. Those four men pleaded guilty. The jury found the appellant guilty of misprision of felony and not guilty of attempting to sell the firearms.

The appellant appealed against his conviction on the points of law, that the offence of misprision of felony no longer existed and that, if it did, some active concealment was necessary to constitute the offence. He also applied for leave to appeal against convictions on grounds of mixed law and fact and for leave to appeal against sentence.

John Hugill for the appellant.

STEVENSON J. This is an appeal against conviction on two points of law and there are applications for leave to appeal against conviction and sentence. As to the appeal against conviction, it has been said on behalf of the applicant that the offence of misprision of felony does not still exist. As to that, it is quite clear that in 1948 when this court had to consider such a case in *Rex* v. *Aberg*,[1] that the court was quite satisfied that it did exist. The matter was considered only last year by Slade J. at the Leeds Assizes in *Reg.* v. *Wilde*,[2] where he had to deal with the question of whether an agreement to do an unlawful act, namely, concealment of a felony, did constitute a criminal conspiracy, and therefore had to consider the contention that is now before this court. It is enough for me to say for the moment that it is quite plain that the offence of misprision of felony does exist and that there are circumstances—or may be circumstances—in which it is essential in the public interest that a prosecution for it should be launched. I emphasise that mainly because our attention has been drawn to a work * in which a contrary view has been suggested without any authority being cited in support of it.

[1] [1948] 2 K.B. 173; 64 T.L.R. 215; [1948] 1 All E.R. 601.
[2] [1960] Crim.L.R. 116.

* Criminal Prosecution in England, by Devlin L.J.

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[His Lordship then considered, in connection with the leave to appeal against conviction, the question whether or not the element of hoping for, or securing, some benefit or advantage by the accused was an essential ingredient of the offence, which was left open by the Court of Criminal Appeal in *Aberg's* case.[3] It was not possible to examine that point in the present case because it was assumed that the element of profit or advantage or benefit to the accused was indeed an ingredient of the offence, and to that extent the summing-up was favourable to the accused and he could not complain of it. It was, therefore, not open to the court to consider whether that direction was well-founded in law, but this court was not to be understood as approving or lending any weight to the view that the element of benefit to the accused was in fact a necessary ingredient of the offence. His Lordship continued:] Thirdly, it has been said that the concealment necessary to constitute this offence involves or implies some positive act on the part of the accused. We are satisfied that it does nothing of the kind and mere omission to inform the appropriate authorities of a felony of which the accused person knows is quite sufficient to justify prosecution or conviction of this offence. [His Lordship considered a further ground of mixed law and fact and continued:] In all those circumstances, we are satisfied that the appeal against conviction should be dismissed and the application for leave to appeal against conviction should be refused.

As to the application for leave to appeal against sentence, certain citations have been put before us of some antiquity, which might on one view of them suggest that there are limitations on the sentence that can be imposed in respect of this offence, namely, a limitation of one year. That is a matter which we think merits examination, and for that reason we give leave to appeal against sentence only.

Appeal against conviction dismissed.
Leave to appeal against conviction refused.
Leave to appeal against sentence granted.

Appeal against sentence.

The relevant facts are set out in the judgment.

John Hugill for the appellant.
W. D. T. Hodgson for the Crown.

Rex v. *Casserley*,[4] *Reg.* v. *Wilde*[5] and *Rex* v. *Aberg*[6] were cited in argument.

Lord Parker C.J. This is an appeal by the appellant against a sentence of five years' imprisonment imposed upon him by the

[3] [1948] 2 K.B. 173.
[4] The Times, May 28, 1938.
[5] [1960] Crim.L.R. 116.
[6] [1948] 2 K.B. 173.

recorder at the Crown Court, Manchester, for misprision of felony. There was an appeal against his conviction [7] on grounds of law, first, that the offence of misprision of felony no longer existed and, secondly, that at any rate some active concealment was necessary to constitute the offence; he also applied for leave to appeal against his conviction on other grounds of mixed law and fact. His application and appeal in regard to conviction have been respectively refused and dismissed, but the court on that occasion gave leave to appeal against sentence, amongst other things desiring argument as to whether there was any express limitation by statute or otherwise on the length of the sentence that could be imposed.

It is unnecessary to refer to the full facts of the case. Suffice it to say that a number of people were involved in stealing firearms from a United States Air Force station in Norfolk, bringing them to Manchester and arranging for their sale, the suggestion being that they were going to the I.R.A. This appellant played some part as a contact man. He was charged before the justices with being an accessory after the fact, it being sought to prove that he had taken part in the resale of the goods. At the Crown Court, however, that was not persisted in and he was charged with misprision of felony in that knowing that others had received these firearms he failed to give any information about it.

Mr. Hugill, who is in the embarrassing position of having as his main argument that there is no such offence, has, nevertheless, sought to persuade us that if there is, the sentence is limited in point of time. I find it unnecessary to go through the old authorities to which he has referred us, from Staundford's Pleas of the Crown in 1557, down to Chitty's Criminal Law in 1826. It is sufficient, I think, to read a passage from Blackstone (vol. 4, p. 132), where the law is stated thus: "Misprision of felony is "also the concealment of a felony which a man knows, but "never assented to; for if he assented, this makes him either "principal or accessory. And the punishment of this, in a public "officer, by the Statute of Westminster, 1, 3 Edward I, Chapter "9, is imprisonment for a year and a day; in a common person, "imprisonment for a less discretionary time; and, in both, fine "and ransom at the King's pleasure."

Accordingly, Mr. Hugill contends that the maximum imprisonment is one year. The court is of the opinion, however, that on the assumption that the offence of misprision of felony exists, it is a common law misdemeanour. As such there is in law no limit to the number of years' imprisonment that can be given, save only of course this, that in no case must an inordinate sentence be passed. That has been decided in this court in *Rex* v. *Morris* [8] and in *Rex* v. *Higgs*.[9]

[7] Ante, p. 393.

[8] [1951] 1 K.B. 394; 66 T.L.R. (Pt. 2) 1050; [1950] 2 All E.R. 965.

[9] [1952] 1 K.B. 7; [1951] 2 T.L.R. 855; [1951] 2 All E.R. 758.

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In judging what the limit of the sentence should be, in other words, when the sentence would become an inordinate sentence, there are, of course, a number of criteria. Thus, in the case of the common law misdemeanour of conspiracy to do acts which if done would constitute a single specific offence, the limit would seem to be what could be given for the substantive offence. So, here, it seems to this court that a limit is to be found by at any rate two considerations: first, if, as might have happened here if the evidence had been a little stronger, he had been charged with being an accessory after the fact, the limit would have been two years' imprisonment; further, by the Statute of Westminster in the case of a sheriff, where one would think the offence would be more serious, the maximum sentence laid down by the statute was one year and a day. Of course, times have changed since the passing of that statute, and there may be cases, of which it is said this is one, where the nature of the misprision is very serious; but at any rate it seems to the court that it would be impossible to give more than two years. It is, however, unnecessary to say in this case whether more than one year was possible, since, on the facts, it seems to the court that this man, who has been in custody since March 29, 1960, has now served an appropriate sentence. Accordingly, the court proposes to set aside the sentence of five years and to substitute such a period of imprisonment as will allow him to be discharged tomorrow.

Sentence varied accordingly.

The court later considered the appellants' application for leave to appeal to the House of Lords against his conviction.

Lord Parker C.J. I think that the court will certify that the two points, first, whether there is an offence of misprision of felony, and secondly, whether active concealment is an essential ingredient, are of general public importance, and are points on which there had been a decision in an appeal. The court will grant the appellant leave to appeal limited to those two points.

Leave to appeal to the House of Lords.
Legal aid, solicitor and counsel.

Solicitors: *Church, Adams for Corbett, Wheeler & Corbett, Manchester; Director of Public Prosecutions.*

C. J. E.

[COURT OF APPEAL.]

BUTLER *v.* BUTLER.

C. A.

1961
Feb. 13.

Holroyd Pearce, Harman and Davies L.JJ.

Husband and Wife — Maintenance — Divorce — "£200 per annum less "tax"—Wife owing debt to husband—Order that debt be set off by instalments not exceeding such amount as may be agreed or awarded to wife by way of maintenance—Maintenance order for "£200 a year "less tax"—Tax deduction certificates for £85 supplied annually by husband to wife—Wife entitled only to set off annual instalments of £115—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 169 (1) (*d*).

Revenue—Income tax—"Free of tax" payments—"£200 a year less "tax" — Maintenance — Effect of order — Income Tax Act, 1952, *s.* 169 (1) (*d*).

In 1955 a wife's proceedings concerning a house, under the Married Women's Property Act, 1882, were stayed on terms embodied in a master's order that the wife should buy the property for £610, paying the husband £150 within 28 days, the remainder of £460 "to be set off by instalments not exceeding such amount "as may be agreed or awarded" to the wife "by way of alimony "and/or maintenance." The wife paid the £150 within 28 days. Later she obtained a divorce and an order for maintenance at the rate of "£200 a year less tax." Thereafter, the husband gave the wife tax deduction certificates for £85 each year (that being the tax on £200 at the standard rate) and credited her with £115 a year against the debt of £460. The wife used the certificates to obtain reimbursements of tax. In March, 1960, the wife claimed arrears of maintenance from the husband, contending that the amount to be set off against her debt was £200 a year and that, on that basis, she had discharged it. The husband contended that the amount to be credited to her was only £115 a year, namely, "£200 a "year less tax." The trial judge held that the wife was entitled to a set-off of £200 a year, and gave judgment for her for the arrears of maintenance. The husband did not pay, and on a summons by the wife for his committal for contempt, the judge made an order for his committal, but suspended it, giving him leave to appeal. On appeal by the husband:—

Held, that "the amount awarded to the wife" in the master's order incorporating the parties' bargain meant the amount which the husband would have to pay in cash each year to the wife, and under a maintenance order for "£200 less tax" that amount was, by virtue of section 169 (1) (*d*) of the Income Tax Act, 1952,[1] £115, so that on payment of £115 to the wife and the balance of £85 to the Revenue, the husband was thereby acquitted and discharged of the £85 representing the deduction. Accordingly, the wife could only set off against her debt the sum of £115 each year; there were no arrears of maintenance owing; and the suspended order for committal against the husband must be discharged.

[1] Income Tax Act, 1952, s. 169 (1): "Where any yearly interest of "money, annuity or other annual "payment is payable wholly out of "profits or gains brought into charge "to tax— . . . (*d*) the person to "whom the payment is made shall "allow the deduction on receipt of "the residue of the payment, and "the person making the deduction "shall be acquitted and discharged "of so much money as is represented "by the deduction, as if that sum "had been actually paid."

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Taylor v. *Taylor* [1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571, C.A. distinguished.

Decision of Collingwood J. reversed.

Appeal from Collingwood J.

In 1953 a wife started proceedings against her husband (who had left her in 1952) under section 17 of the Married Women's Property Act, 1882, in respect of a house, the matrimonial home. In June, 1955, those proceedings were stayed on terms incorporated in a master's order that the wife should purchase the husband's interest in the property for £610 to be paid as to £150 within 28 days and as to the balance of £460 to be set off by instalments not exceeding such amount as might be agreed or awarded to the wife by way of alimony and/or maintenance. The £150 was duly paid to the wife within the time specified, leaving a balance of £460 due to the husband. On March 20, 1956 (three years after the husband had deserted her), the wife filed a petition in divorce and on May 15 a decree nisi was granted and that was made absolute on July 3, 1956. On July 3, 1957, an order for maintenance was made in her favour for £200 per annum less tax payable monthly.

Thereafter the husband made no payments to the wife under the order for maintenance but he supplied her each year with tax deduction certificates which showed that £85 had been deducted from his income, representing tax at the current standard rate on £200. The wife used those certificates to obtain reimbursements of almost the whole amount.

In March, 1960, the wife took out a summons under the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932, claiming arrears of maintenance under the order of July, 1957. It was contended on her behalf that under the order she was entitled to credit at the rate of £200 a year against the debt of £460 and that accordingly she had discharged her liability and there was owing by the husband the sum of £241 7s. 5d. arrears of maintenance. For the husband it was contended that only £115 per annum should be credited, namely, £200 less £85 tax, and that the result of that was that the debt of £460 had not yet been paid.

Collingwood J. on March 28, 1960, gave judgment for the wife. He said: "The order is for £200 a year, and whether "the order is less tax or silent as to tax the result is the same. "The husband is entitled, in making the payment, to deduct "from it the amount representing the tax thereon at the standard "rate for the year and he is entitled to be acquitted and dis-"charged of so much money as is represented by the deduction "as if that sum had actually been paid. The husband is merely "acting as agent for the Inland Revenue in making this deduc-"tion. The amount awarded to the applicant by way of main-"tenance is therefore £200 per annum and that is the amount

"which is to be credited against the balance of £460 due from "the wife."

The husband did not pay the arrears, and on the wife's summons that he should be committed to prison for contempt Collingwood J., on July 18, 1960, made an order for committal, but suspended it, giving leave to the husband to appeal. The husband appealed.

Leonard F. W. White for the husband.
J. B. Gardner for the wife.

HOLROYD PEARCE L.J. stated the facts set out above and continued: The question here is: Can the wife each year set off against the debt she owes £200, or only £115, being so much of the £200 as would be paid to her after the deduction by the husband of £85 tax each year? The husband duly supplied the wife with tax deduction certificates showing that £85 had been deducted, and the wife used those certificates in order to obtain a reimbursement of tax.

The situation under the Income Tax Act, 1952, with regard to deductions of tax is this. By section 169 (1): "Where any yearly "interest of money, annuity or other annual payment is payable "wholly out of profits or gains brought into charge to tax . . . "(*d*) the person to whom the payment is made shall allow the "deduction on receipt of the residue of the payment, and the per-"son making the deduction shall be acquitted and discharged of so "much money as is represented by the deduction, as if that sum "had been actually paid." Therefore each year out of the £200, which was to be paid to the wife, the wife had to allow the husband £85 deduction, and the husband was discharged of the liability to her in respect of the £85 so deducted.

Section 221 reads: "A claimant shall not be entitled to relief "under the preceding provisions of this Part of this Act in respect "of any income the tax on which he is entitled to charge against "any other person, or to deduct, retain or satisfy out of any "payment which he is liable to make to any other person." That section shows that whatever the tax position of the husband, he cannot get any benefit from the £85 which he deducts.

Now as the husband duly gave the tax certificates purporting to make the tax deductions at the time when the money would (apart from the set-off) have been due, no such difficulty arises in his way as arose in *Taylor* v. *Taylor*.[1] The judge held the view that the contentions of the wife were correct, and that she was entitled each year to have a set-off of £200 under this order. He said: "In my opinion the contention on the part of the wife "is the correct one. The order is for £200 a year, and whether "the order is less tax or is silent as to tax the result is the "same; the husband is entitled, in making the payment, to "deduct from it the amount representing the tax thereon at the

[1] [1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571, C.A.

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"standard rate for the year and he is entitled to be acquitted "and discharged of so much money as is represented by the "deduction as if that sum had actually been paid. The husband "is merely acting as agent for the Inland Revenue in making "this deduction. The amount awarded to the applicant by way "of maintenance is therefore £200 per annum and that is the "amount which is to be credited against the balance of £460 due "from the wife."

With all respect to the judge I find myself unable to take that view of the matter. In interpreting the words of the maintenance order for this purpose—"£200 less tax" one must read it as saying that the liability of the husband in respect of actual payments to the wife in any year was limited to £115. The balance of £85 he had to pay to the revenue. So long as he did not fail to pay the wife sums amounting in the year to £115 he could not be brought up before the court, nor could it be suggested that he was failing to comply with this order. It is impossible in my view to arrive at the judge's conclusion without ignoring the words "less tax" which occur in the order. The annual payment less tax is £115. One cannot ignore the provision of section 169, the effect of which is that an annual order of £200 less tax is discharged by paying only £115 to the wife and £85 to the revenue. Moreover, I think that the only reasonable construction of clause 3 in the master's order is that the words "amount awarded to the wife" mean the amount which under any order the husband will have to pay in cash to the wife, and do not include any deductions which he must pay to the revenue. So read, the bargain made between the parties on which the order is founded is sensible and just and in accordance with the Income Tax Acts. In my view the wife is not entitled to any larger set-off than the annual amount of £115 under this order. The result of that is that there are no arrears of maintenance, and the committal order must be discharged.

Harman L.J. I agree. The amount payable by the husband to the wife under the Divorce Court order is not in doubt. The only doubt arises from the fact that the wife is his debtor, and the question is how much she is entitled to be released from her debt by reason of the Divorce Court order. When one works it out it seems clear that she cannot be relieved of her debt at the rate of £200 a year when in fact her husband does not owe her that sum. He owes her £115, and £85 to the revenue. She is no worse off, because, owing to the rate of her income, she gets back practically the whole of the £85 from the Inland Revenue. I do not see why she should be entitled in that way to obtain credit against the sum which she owes to her husband, and then move to commit him when she still owes him money. In my judgment the confusion here has risen because of the odd kind of set-off which exists

under the order of the Queen's Bench Division. My Lord has put the position clearly, and I agree with him.

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DAVIES L.J. I also agree.

Appeal allowed. Committal order discharged.
No order as to costs.

Solicitors: *Gamlen, Bowerman & Forward* for *Lovegrove and Durant, Windsor; Cartwright, Cunningham* for *T. W. Stuchbery & Son, Windsor.*

M. M. H.

[HOUSE OF LORDS.]

COLLCO DEALINGS LTD. . . . . APPELLANT;
AND
INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)*
1961
Feb. 8, 9; *Mar.* 2.

[APPEAL IN INLAND REVENUE COMMISSIONERS *v.* COLLCO DEALINGS LTD.]

Revenue—Income tax—Double taxation relief—Residents in Eire—Irish company resident in Eire—Transfer of share capital of English companies to Irish company—Payment to Irish company of dividend on shares of English companies paid wholly out of profits accumulated before transfer—Deduction of British income tax—Whether Irish company entitled to repayment of British income tax—"Dividend "stripping"—Whether Irish company "a person entitled under "any enactment to an exemption from income tax"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 349 (1) (2) (3) (4); *Sch.* 18—*Finance* (*No.* 2) *Act,* 1955 (4 *&* 5 *Eliz.* 2, *c.* 17), *s.* 4 (1) (2).

Statute—Construction—Treaty—Conflict with—Double taxation relief.

Statute — Construction — Extradition effect — Tax Act — Effect on resident of Eire.

International Law—Treaty—Implied term—Tax agreement—Not preventing State from protecting own revenue law from gross abuse.

On October 31, 1957, a company resident in the United Kingdom sold to an Irish company, incorporated in Eire in 1957 and never resident in the United Kingdom, the whole of the issued share capital in two English companies. Subsequently there were paid to the Irish company interim dividends on the shares in both companies amounting respectively to £174,500 and £104,000, and paid wholly out of profits accumulated before the Irish company acquired the shares. The Irish company claimed exemption from British income tax by virtue of section 349 and paragraph 1 (*a*) of

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE and LORD GUEST.

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Schedule 18 to the Income Tax Act, 1952.[1] The Crown refused exemption, contending that section 4 (2) of the Finance (No. 2) Act, 1955, applied, and deducted from the respective amount income tax of £74,162 10s. and £44,200. The Irish company appealed, contending that the words "a person entitled under any enactment "to an exemption from income tax" in section 4 (2) of the Act of 1955 should be limited and controlled so as to exclude residents of Eire who were excluded from the ambit of British income tax by the agreement of April, 1926, with the Government of Eire, on the ground that not so to do would create a breach of the 1926

[1] Income Tax Act, 1952, s. 349: "(1) The confirmation, by section 23 "of the Finance Act, 1926, section 21 "of the Finance Act, 1928, and section "37 of the Finance Act, 1948, of the "agreements in force at the passing of "this Act between the United King-"dom and the Republic of Ireland "which are set out in Part I of the "Eighteenth Schedule to this Act is "not affected by the repeal, by this "Act, of the said sections 23, 21 "and 37. (2) Accordingly the first "of the said agreements, as modi-"fied by the second and third of the "said agreements, shall, for any year "of assessment for which, under the "law of the Republic of Ireland, it has "effect with respect to exemption and "relief from Republic of Ireland tax, "have effect with respect to exemption "or relief to be granted from United "Kingdom tax, and the references in "the said agreements to enactments "repealed by this Act shall be taken "for that purpose to be references to "the corresponding provisions of this "Act . . . (3) For the purpose "of giving effect to the said agree-"ments, this Act, in relation to—(*a*) "persons resident in the United King-"dom, whether or not also resident "in the Republic of Ireland; and (*b*) "persons entrusted with payment to "persons so resident; and (*c*) claims "by persons resident in the Republic "of Ireland, shall, for any year for "which the said agreements are in "force, have effect subject to the "modifications set out in Part III of "the said Eighteenth Schedule. (4) "The deduction to be given to an "individual under section 220 of this "Act (which relates to the relief "known as the reduced rate relief) "shall not, where relief is given under "section 27 of the Finance Act, 1920, "as set out in Part II of the said "Eighteenth Schedule, be less than "it would have been if that relief had "not been given. (5) The power con-"ferred by subsection (7) of section 27 "of the Finance Act, 1920, as set out "in Part II of the said Eighteenth "Schedule, to make regulations shall "be deemed for the purposes of sec-"tion 1 of the Statutory Instruments "Act, 1946, to be a power conferred "by an Act passed after the com-"mencement of that Act, and shall be "exercisable by statutory instrument."

Sch. 18: "Agreements, etc., for "avoidance of double taxation in the "case of the Republic of Ireland. "Part I. Text of Agreements. Agree-"ment made April 14, 1926, between "the British Government and the "Government of the Irish Free State "in respect of Double Income Tax. "The British Government and the "Government of the Irish Free State, "being desirous of concluding an "Agreement for the reciprocal exemp-"tion from income tax and super-tax "of persons who are resident in Great "Britain (including Northern Ireland) "or in the Irish Free State but are "not resident in both countries and "for the reciprocal granting of relief "from double taxation in respect of "income tax (including super-tax) to "persons who are resident in both "countries, and being desirous of "making such supplemental conse-"quential and incidental provisions as "appear necessary or proper for the "purposes of such Agreement, have "agreed as follows:—1.—(*a*) Any per-"son who proves to the satisfaction "of the Commissioners of Inland "Revenue that for any year he is "resident in the Irish Free State and "is not resident in Great Britain or "Northern Ireland shall be entitled "to exemption from British income "tax for that year in respect of all "property situate and all profits or "gains arising in Great Britain or "Northern Ireland and to exemption "from British super-tax for that "year."

Finance (No. 2) Act, 1955, s. 4: "(1) Where a person engaged in carry-"ing on a trade which consists of or "comprises dealings in shares or other "investments becomes entitled to "receive a dividend on a holding of "shares of any class to which this sec-"tion applies, being shares sold or "issued to him or otherwise acquired

and following agreements, and would be inconsistent with the comity of nations and the established rules of international law:—

Held, that the claim to exemption arose under the Act which confirmed the agreement; that the exemption relied on, contained in section 349 of the Income Tax Act, 1952, had been modified by section 4 (2) of the Finance (No. 2) Act, 1955, in plain and unambiguous terms which could not on the true construction be limited so as to leave unaffected the rights of Irish residents. Accordingly, the provisions of section 4 (2) must be followed, whether or not they were contrary to international law.

Per Viscount Simonds. Neither comity of nations nor rule of international law can be invoked to prevent a sovereign State from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear (post, p. 410).

Decision of the Court of Appeal [1960] Ch. 502; [1960] 2 W.L.R. 848; [1960] 2 All E.R. 44, C.A. affirmed.

"by him after October 26, 1955, and "not more than six years before the "date on which the dividend becomes "payable, and the dividend is to any "extent paid out of profits accumu-"lated before the date on which the "shares were so acquired, then, if "those shares, or those shares together "with—(*a*) any other shares the divi-"dend on which is payable to that per-"son and which were sold or issued to "him or otherwise acquired by him "after the said October 26 and not "more than six years before the date "on which the dividend becomes pay-"able, and (*b*) in a case where the "trade is under the same control as "another trade which consists of or "comprises dealings in shares or other "investments, any shares the dividend "on which is payable to the person en-"gaged in carrying on that other trade "and which were sold or issued to "him or otherwise acquired by him "after the said October 26 and not "more than six years before the date "on which the dividend becomes pay-"able, and (*c*) any such shares as are "to be brought into account under "subsection (3) of this section, amount "to ten per cent. or more of the "issued shares of that class, the net "amount of the dividend received on "the shares in the holding shall, to "the said extent to which it was paid "out of profits accumulated before "the shares were acquired, be brought "into account in computing the profits "or gains or losses of the trade as if "it were a trading receipt which had "not borne tax. (2) Where a person "entitled under any enactment to an "exemption from income tax which "extends to dividends on shares be-"comes entitled to receive a dividend "on a holding of shares of any class "to which the section applies, being "shares sold or issued to him or other-"wise acquired by him after the said "October 26 and not more than six "years before the date on which the "dividend becomes payable, and the "dividend is to any extent paid out of "profits accumulated before the date "on which the shares were so ac-"quired, then, if those shares, or those "shares together with—(*a*) any other "shares the dividend on which is pay-"able to that person and which were "sold or issued to him or otherwise "acquired by him after the said Octo-"ber 26 and not more than six years "before the date on which the divi-"dend becomes payable, and (*b*) any "such shares as are to be brought "into account under subsection (3) of "this section, amount to ten per cent. "or more of the issued shares of that "class, the exemption shall, to an "extent proportionate to the said ex-"tent to which the dividend is paid "out of profits accumulated before "the date on which the shares were "acquired, not apply to the dividend: "Provided that if any annual payment "is payable by that person out of the "dividend, that annual payment shall "be deemed as to the whole thereof "to be paid out of profits or gains "not brought into charge to tax and "section 170 of the Income Tax Act, "1952, shall apply accordingly."

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Inland Revenue Comrs. v. Collco Dealings Ltd.

Appeal from the Court of Appeal (Lord Evershed M.R., Pearce and Upjohn L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 10, 1960, dismissing an appeal by the appellant, Collco Dealings Ltd., from an order of the High Court (Vaisey J.) dated July 24, 1959, whereby an appeal by the respondents, the Commissioners of Inland Revenue, upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and the determination of those commissioners was reversed.

The matter arose upon a claim by the appellant to exemption from United Kingdom income tax in respect of certain dividends received by the appellant from English companies. The appellant claimed such exemption by virtue of section 349 and paragraph 1 (*a*) of Part I of Schedule 18 to the Income Tax Act, 1952, on the ground that the appellant was at all material times resident in the Republic of Ireland and not resident in the United Kingdom. The respondents' refusal of such claim was based on the provisions of section 4 (2) of the Finance (No. 2) Act, 1955, which was directed against certain operations commonly known as "dividend stripping" and which provides that "where a "person entitled under any enactment to an exemption from "income tax which extends to dividends on shares" becomes entitled to receive a dividend, the exemption shall not, in the circumstances and to the extent provided by that subsection, apply to such dividend.

The question at issue in the appeal was whether the appellant did or did not fall, for the purposes of section 4 (2) of the Act of 1955, within the words "a person entitled under any enactment "to an exemption from income tax which extends to dividends "on shares."

According to the case stated the following facts were agreed:

(a) The appellant was incorporated in the Republic of Ireland on May 29, 1957, and was at all material times resident in the Republic of Ireland and not in the United Kingdom. (b) On October 31, 1957, 1,000 ordinary shares of £1 each, fully paid, in Carpets and Textiles (Wholesale) Ltd. (being the whole of the issued share capital of that company), were sold by Matrim Finance Ltd. to, and acquired by, the appellant. (c) On November 1, 1957, an interim dividend of £174 10s. per share, subject to deduction of income tax, was declared by Carpets and Textiles (Wholesale) Ltd., and became payable, as a result of which the appellant received a gross dividend of £174,500 from which United Kingdom income tax of £74,162 10s. had been deducted. (d) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the appellant. (e) Carpets and Textiles (Wholesale) Ltd. was a company incorporated on April 1, 1950, under the Companies Act, 1948, and was throughout resident in the United

Kingdom. (f) The ordinary shares in Carpets and Textiles (Wholesale) Ltd. acquired as aforesaid were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection (8) (*c*) thereof.

(g) Also on October 31, 1957, 2,000 ordinary shares of £1 each, fully paid in a company then known as Afco Agencies Ltd. and subsequently as A. F. Finance Ltd., and hereinafter called "Afco" (being the whole of the issued share capital of that company) were sold by Matrim Finance Ltd. to, and acquired by, the appellant. (h) On November 1, 1957, an interim dividend of £52 per share, subject to deduction of income tax, was declared by "Afco" and became payable, as a result of which the appellant received a gross dividend of £104,000 from which United Kingdom income tax of £44,200 had been deducted. (i) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the appellant. (j) "Afco" was a company incorporated on March 1, 1951, under the Companies Act, 1948, and was throughout resident in the United Kingdom. (k) The ordinary shares in "Afco," acquired as aforesaid, were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection (8) (*c*) thereof.

It was also admitted by counsel for the Crown during the hearing that repayments of income tax at the full standard rate had been made by the Crown to Irish residents between 1945 and 1948 on dividends from which income tax had been deducted when payment was made by companies resident in the United Kingdom which had received double taxation relief. Counsel for the appellant did not contend that it would be liable to pay Irish tax in respect of the dividends in question.

It was contended on behalf of the appellant that the wide words of section 4 (2) were to be limited and controlled on well-known principles so as to exclude residents of Eire who were by treaty excluded from the ambit of British income tax.

It was contended on behalf of the Inland Revenue Commissioners that section 4 (2) applied to the appellant, notwithstanding that it was a resident of Eire and that it was not entitled to the exemption claimed.

The special commissioners gave their decision in writing as follows: "1. The question for our decision is whether the words "'a person entitled under any enactment to an exemption' in "section 4 (2) of the Finance (No. 2) Act, 1955, apply to persons "resident in Eire and not in the United Kingdom to whom "exemption from British tax was granted by the various sections "re-enacted by section 349 of the Income Tax Act, 1952. It is "clear that the general words quoted are wide enough to cover "Eire residents so entitled to exemption, but the very wideness "and generality of the words lets in the argument that they are "to be controlled and limited in their application under certain "well-recognised principles of construction.

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"2. We are unable to accept the argument that the general "policy of the income tax legislation compels us to impose the "limitation asked for. We have, however, come to the conclu- "sion that Eire residents have to be excluded from the wide "application of the words of section 4 (2) by reason of two "principles of construction which have found expression in the "decided cases. In the first place it appears to be settled law "that if possible a construction is not to be given to general words "in a statute which would have the effect of imposing the will "of Parliament upon persons not within its jurisdiction: see "*Colquhoun* v. *Heddon*[2]; *Ex parte Blain*[3]; and we consider that "Parliament, by entering into the treaty of April, 1926, with "the Government of Eire, in effect relinquished jurisdiction in "matters of income tax over residents of Eire who are not also "residents of the United Kingdom. That this is so is, we con- "sider, emphasised by paragraph 7 of the treaty. In the second "place, if the inroad contained in section 4 (2) upon the exemp- "tion to tax is effective against residents of Eire, it would in "our opinion be a breach of the treaty which afforded absolute "exemption from British tax to such residents, and it appears to "be a recognised principle of English law that words in an Act "of Parliament are not to be construed in a sense which would "create a breach of a treaty between this country and another "unless such words are so explicit as to allow of no other inter- "pretation. The principal authority for this view appears to be "the case of *Reg.* v. *Wilson*[4]; and, although the actual decision "in that case can be explained on the ground that the Order in "Council itself imposed limitations upon the extradition powers "in accordance with section 2 of the Extradition Act, 1870, "Cockburn C.J., in his judgment, used words which seem to us "to recognise such a principle as axiomatic.

"3. The view we have taken of the proper construction of "section 4 (2) appears to us to receive strong confirmation from "the course of legislation with regard to the liability of Eire "residents prior to the Act of 1955. The Finance (No. 2) Act, "1945, uses words in section 52 which have on their face the "widest application and would in their natural meaning apply to "Eire residents. But when the treaty of July 21, 1947, was "subsequently concluded, by which the two countries mutually "agreed that the limitation upon repayments set out in section 52 "was to be applied to Eire residents, it was thought necessary "to give effect to that treaty so far as English taxation was "concerned by section 37 of the Finance Act, 1948. This seems "to us an indication that section 52 was not considered by the "legislature, despite its wide terms, to apply to Eire residents.

"4. In our opinion, therefore, section 4 (2) of the Finance "(No. 2) Act, 1955, has no application to the appellant company

[2] (1890) 25 Q.B.D. 129, 134; 6 T.L.R. 331, C.A.

[3] (1879) 12 Ch.D. 522, C.A.

[4] (1877) L.R. 3 Q.B.D. 42, D.C.

"and it is entitled to repayment of tax deducted from the "dividends in question. We accordingly make an order for "repayment of the sum agreed upon between the parties, namely, "£118,362 10s. 0d."

On appeal, Vaisey J. reversed the decision of the commissioners, holding that the appellant was within section 4 (2) of the Act of 1955 and, accordingly, was not entitled to the exemption claimed. The Court of Appeal affirmed his decision.

Sir Andrew Clark Q.C., *John Foster Q.C.* and *R. Buchanan-Dunlop* for the appellant.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, *E. Blanshard Stamp* and *Alan Orr* for the Crown.

The following cases were cited in argument: *Reg.* v. *Wilson* [5]; *Colquhoun* v. *Heddon* [6]; *Ostime* v. *Australian Mutual Provident Society* [7]; *In re Californian Fig Syrup Company's Trademark* [8]; *Seward* v. "*Vera Cruz*" [9]; *Kutner* v. *Phillips* [10]; *In re Chance* [11]; *In re Berrey* [12]; *Astor* v. *Perry* [13]; *Reg.* v. *Manchester Justices* [14]; *The Le Louis* [15]; *The Annapolis* [16]; *Cope* v. *Doherty* [17]; *Attorney-General of Hong Kong* v. *Kwok-a-Sing* [18]; *Cull* v. *Inland Revenue Commissioners* [19]; *Theophile* v. *Solicitor-General.* [20]

Their Lordships took time for consideration.

March 2. VISCOUNT SIMONDS. My Lords, this is, in my opinion, a very clear case, and I am so well satisfied with the judgments of Vaisey J. and of the Master of the Rolls (Lord Evershed) and his colleagues in the Court of Appeal that I propose to deal with it at no great length.

The appellant company was incorporated in the Republic of Ireland on May 29, 1957, and has at all material times been resident there and not in the United Kingdom. On October 31, 1957, it acquired 1,000 ordinary shares of £1 each in a company called Carpets and Textiles (Wholesale) Ltd., which on the next day, declared an interim dividend of £174 10s. per share subject to deduction of income tax. It accordingly received a sum of £100,337 10s., £174,500 less income tax £74,162 10s. The dividend was wholly paid out of profits accumulated before the

[5] (1877) L.R. 3 Q.B.D. 42, D.C.
[6] (1890) 25 Q.B.D. 129, 134; 6 T.L.R. 331, C.A.
[7] [1960] A.C. 459; [1959] 3 W.L.R. 410; [1959] 3 All E.R. 245, H.L.
[8] (1888) 40 Ch.D. 620, 627; 5 T.L.R. 120.
[9] (1884) 10 App.Cas. 59, 68, H.L.
[10] [1891] 2 Q.B. 267, 271, 272; 7 T.L.R. 441, D.C.
[11] [1936] Ch. 266.
[12] [1936] Ch. 274.
[13] [1935] A.C. 398; 51 T.L.R. 325; 19 T.C. 255, H.L.
[14] (1855) 5 E. & B. 702.
[15] (1817) 2 Dods. 210.
[16] (1861) 1 Lush. 295.
[17] (1858) 4 K. & J. 367.
[18] (1873) L.R. 5 P.C. 179, P.C.
[19] [1940] A.C. 51; [1939] 3 All E.R. 761; 55 T.L.R. 1049; 22 T.C. 603, H.L.
[20] [1950] A.C. 186; 66 T.L.R. (Pt. 1) 441; [1950] 1 All E.R. 405, H.L.

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shares were acquired by the appellant company. On the same day, October 31, it acquired 2,000 ordinary shares of £1 each in a company called Afco Agencies Ltd., which company, in its turn, on the next day declared an interim dividend of £52 per share subject to deduction of tax. The appellant company accordingly received a net dividend of £59,800, £104,000 less income tax £44,200. This dividend also was wholly paid out of profits accumulated before the shares were acquired by the appellant company.

These transactions, which might seem strange to those unversed in the devious ways of tax avoidance, had their natural sequel in a claim for repayment of the tax that had been deducted. It was this claim and its rejection that led to these proceedings.

Upon what, then, was the claimed based and upon what its rejection?

By a series of agreements made by the British Government, first with the Government of the Irish Free State and afterwards with the Government of the Republic of Ireland, provision was made (inter alia) for the reciprocal exemption from income tax and supertax, later, surtax, of persons resident in Great Britain (including Northern Ireland) or in the Irish Free State (or Republic of Ireland) but not resident in both countries. Each of such agreements, of which the first was dated April 14, 1926, and the last that is material for our present purpose was dated July 21, 1947, provided that it should be subject to confirmation by legislation both by the United Kingdom Parliament and by the Irish legislature, and should have effect only if and so long as that legislation was in force. Each agreement was duly confirmed by appropriate legislation in both countries. It is necessary only to refer to section 349 of the Income Tax Act, 1952, which confirmed and gave statutory force to them, thereby giving to persons residing only in the Republic of Ireland the statutory right to exemption from United Kingdom income tax and surtax. The Act further provided by clause 4 of the Eighteenth Schedule that any claim for exemption from tax on the ground that the claimant was resident in the Republic of Ireland and was not resident in the United Kingdom should be made to the Commissioners of Inland Revenue in such form as they might prescribe, and the commissioners should, on proof of the facts to their satisfaction, allow the claim accordingly.

On the basis of this Act the appellant company claimed the return of the several sums of tax which had been deducted from the dividends that I have mentioned. I do not doubt that the claim must have been allowed but for the Act to which I now refer. In the meantime, however, the United Kingdom Government had become aware of the practice compendiously, if not felicitously, called "dividend stripping," of which the transactions that I have already mentioned were conspicuous examples. Not only residents in Ireland but certain other corporations or bodies, to which exemption from tax had been conceded, were

using the concession in a manner that could not have been contemplated when it was made. Accordingly, by the Finance (No. 2) Act, 1955, it was provided by section 4 (2):

"(2) Where a person entitled under any enactment to an "exemption from income tax which extends to dividends on "shares becomes entitled to receive a dividend on a holding "of shares of any class to which this section applies, being shares "sold or issued to him or otherwise acquired by him after the "said twenty-sixth day of October and not more than six years "before the date on which the dividend becomes payable, and "the dividend is to any extent paid out of profits accumulated "before the date on which the shares were so acquired, then, if "those shares, or those shares together with [other shares there-"in specified] amount to ten per cent. or more of the issued "shares of that class, the exemption shall, to an extent propor-"tionate to the said extent to which the dividend is paid out of "profits accumulated before the date on which the shares were "acquired, not apply to the dividend: . . ."

The shares, in respect of which the dividends in question were received by the appellant company, were "shares of a class to "which the section applies."

Here, then, was the answer to the claim for return of tax and the Commissioners of Inland Revenue rejected it accordingly. The company appealed from the rejection to the Commissioners for the Special Purposes of the Income Tax who allowed the appeal. But when the matter was brought before the High Court on case stated their determination was reversed by Vaisey J., whose decision was unanimously upheld by the Court of Appeal. Your Lordships are now asked to restore the determination of the special commissioners, and declare that the appellant company are entitled to exemption from tax in respect of the dividends in question.

My Lords, the argument in favour of the appeal was not lacking in vigour or ingenuity, but, in my opinion, it was not well founded. The words of the relevant subsection are very clear. The single question is whether the appellant company is "a "person entitled under any enactment to an exemption from "income tax. . . ." At least it claims to be so entitled in the present case: that is the foundation of these proceedings. But it is said in the first place that it is not entitled under an enactment but under an agreement (which the appellant company, to add weight to the argument, prefers to call a treaty). But this contention cannot be accepted. The company has no rights under any agreement. Its rights arise under the Act of Parliament which confirms the agreement and gives it the force of law. It was said that its rights then arose not "under" the enactment but "by virtue of it." This distinction appears to me too tenuous to form the basis of a serious argument: but, if I had to make a choice, I should say that the rights arose "under" rather than "by virtue of."

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Then it was said that the words of the subsection are wide and general. The maxim "generalia specialibus non derogant" was invoked. But this contention fell by the way when it was pointed out that every case in which exemption had been granted was a special case, and that this contention would lead to the subsection having no application at all.

It had been urged that the general words of the subsection should be so construed as not to have the effect of imposing or appearing to impose the will of Parliament upon persons not within its jurisdiction. This argument, which had influenced the special commissioners, was not advanced before this House. A somewhat similar argument was, however, pressed upon your Lordships and was perhaps more strongly than any other relied on by the appellant company. It was to the effect that to apply section 4 (2) to the appellant company would create a breach of the 1926 and following agreements, and would be inconsistent with the comity of nations and the established rules of international law: the subsection must, accordingly, be so construed as to avoid this result.

My Lords, the language that I have used is taken from a passage at p. 148 of the 10th edition of "Maxwell on the Interpretation of Statutes" which ends with the sentence: "But if "the statute is unambiguous, its provisions must be followed even "if they are contrary to international law." It would not, I think, be possible to state in clearer language and with less ambiguity the determination of the legislature to put an end in all and every case to a practice which was a gross misuse of a concession. What, after all, is involved? It is nothing else than that, when Parliament said "under any enactment," it meant "any enactment except . . ." But it was not found easy to state precisely the terms of the exception. The best that I could get was "except an enactment which is part of a reciprocal arrange-"ment with a sovereign foreign state." It is said that the plain words of the statute are to be disregarded and these words arbitrarily inserted in order to observe the comity of nations and the established rules of international law. I am not sure upon which of these high-sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear.

I am well aware that there are cases—many were cited to your Lordships—in which the principle stated in Maxwell has been applied, though less often, I think, upon an appeal to comity of nations than to rules of international law. But each case must be judged in its own context, and I know of no case in which at

the same time the words of a statute were unambiguously clear and it was sought to vary them upon grounds which could not be justified by broad considerations of justice or expediency, nor could be supposed to commend themselves to that sovereign power whose citizens relied on them.

For these reasons, and for the reasons given in the courts below, with which, as I have said, I agree, I am of opinion that this appeal should be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, the question arising for decision on this appeal is whether the appellant company is or is not "a person entitled under any enactment to an exemp-"tion from income tax," within the meaning of section 4 (2) of the Finance (No. 2) Act, 1955. There is no doubt that at the time when this subsection came into force the company was "entitled to an exemption from income tax," and if it was so entitled "under any enactment" the subsection applies to the company and deprives it of exemption from tax in respect of certain very large dividends declared by two English companies and paid to the appellant company.

Counsel for the appellant company submitted first that it was entitled to exemption under an agreement made on April 14, 1926, between the British Government and the Government of the Irish Free State, as amended by subsequent agreements, and not under any enactment. The effect of these agreements, stated shortly, was that a person who could prove that for any year he was resident in the Republic of Ireland and was not also resident in Great Britain or Northern Ireland was to be "entitled "to exemption" of British income tax for that year in respect of all property situate and all profits or gains arising in Great Britain or Northern Ireland. Similar relief from Irish income tax was given to persons resident only in the United Kingdom in respect of Irish income tax.

The appellant company was able to prove that it was resident only in the Republic of Ireland, but it is clear, to my mind, that it did not become "entitled" to any exemption from British income tax under these agreements. Nothing but a British statute could confer any such exemption and this was recognised by clause 8 of the agreement of 1926, which was repeated in the subsequent agreements and was as follows: "This agreement shall be subject to confirmation by the British "Parliament and by the Oireachtas of the Irish Free State and "shall have effect only if and so long as legislation confirming "the Agreement is in force both in Great Britain and Northern "Ireland and in the Irish Free State."

The 1926 agreement and the subsequent agreements which modified it were all confirmed by statutes of each country, and the British confirming statute which was operative when section 4 (2) of the Finance (No. 2) Act, 1955, came into force was the Income Tax Act, 1952, the relevant section being section 349.

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If the words "entitled under any enactment" are to be given their ordinary meaning it is clear that in 1955 the appellant company was entitled to an exemption from income tax "under" the statute of 1952 and not under any of the agreements already mentioned.

Counsel for the company, however, submitted that section 4 (2) of the Act of 1955 should be given a narrow construction, because otherwise it would infringe the comity of nations by unilaterally depriving Irish residents of the benefits conferred on them by the agreements and confirmed by statute. They invited your Lordships to hold either (a) that the words "person "entitled" in the subsection mean a person who is entitled solely and exclusively under an enactment, and do not extend to include a person who is entitled under an agreement with a foreign state by virtue of its incorporation in the municipal law of England by an English statute, or (b) that the words "any "enactment" mean "any enactment standing alone and not "being part of a reciprocal arrangement with a foreign state." In support of the second construction they pointed out that the words such as "any" or "all" or "every" have been given a narrow meaning in many cases, some of which were cited to your Lordships.

My Lords, I am unable to give either of the suggested meanings to the very plain words of section 4 (2) of the Act of 1955. I accept the statement in "Maxwell on the Interpretation of Statutes," 10th edition, at p. 149—"If the statute is unambiguous its provisions must be followed." I can see no ambiguity in section 4 (2), and I do not think that its provisions give rise to any breach of international comity. Both parties to the agreements recognised that they might at any moment be brought to an end by the legislature of either country revoking the statutory confirmation thereof; see clause 8 of the agreement of 1926, already quoted. Moreover, in the cases where wide words have been given a narrower meaning there has always been some reason to think that the legislature could not have intended the wide words to have their full effect. I find no such reason in the present case, and I agree with the observations of Vaisey J.[1] that "The plain object of section 4 (2) was to prevent what is "colloquially called 'dividend-stripping,' and if the decision of "the special commissioners stands, residents in Ireland can do "what their fellow-taxpayers in this country are prohibited from "doing. If that is the law, so be it, but the consequence is not "one which commends itself to me on general principles of "justice and fairness."

I would dismiss the appeal.

Lord Reid. My Lords, I agree with my noble and learned friends that this appeal should be dismissed but I should prefer to rely on rather different reasons. I am not satisfied that it

[1] [1959] 1 W.L.R. 995, 1004; [1959] 3 All E.R. 351.

would be wrong in any circumstances to attach a limited meaning to the words of section 4 (2) of the 1955 Act. In some of the authorities cited to your Lordships words, to my mind equally unambiguous, have been so limited, and if the result of holding that these words cannot be given a limited meaning were that Parliament must be held to have created a jurisdiction wider than anything consistent with the broad principles of international law, I would at least hesitate. But there is no question of that kind in this case. The most that can be said is that, unless a limitation is implied, the subsection enacts something inconsistent with the provisions of a treaty, and even that is hardly accurate. It appears to me that there is by no means so strong a presumption against Parliament having done that.

Although the infringement of a treaty may cause loss to individuals, the only person properly entitled to complain of such infringement is the other party to the treaty. No doubt if that other party is aggrieved the infringement is a breach of the comity of nations, and there is a presumption that Parliament did not intend to act contrary to the comity of nations. But I do not think that there is necessarily a presumption that every infringement of a treaty is a breach of the comity of nations. After a treaty has been made circumstances may alter and it may be reasonable to take unilateral action in the expectation that the other party to the treaty will not object. Indeed, the other party may have been consulted and have raised no objection. We do not know what happened in this case. But we do know that on a previous occasion unilateral action was taken by section 52 of the Finance (No. 2) Act, 1945, and this was followed by an alteration of the treaty in 1947 which altered the scope of the original tax exemption to correspond with the provisions of the 1945 Act.

And there is another reason against inferring any limitation of the scope of section 4 (2). We were furnished with a list of statutory exemptions from income tax and it appears that there were three main methods by which tax could be avoided in the way in which section 4 (2) is designed to prevent. It could be done with the co-operation of charities, of the trustees of certain superannuation funds or of Irish residents. Clearly, it would have been of little value to prevent two of these methods and leave the third untouched, and I cannot attribute to Parliament an intention to limit the scope of section 4 (2) so as to produce that result. Accordingly it appears to me that there is no substance in the appellant's case.

LORD RADCLIFFE. My Lords, I agree that this appeal ought to be dismissed for the reasons which have been given by my noble and learned friend on the Woolsack.

The only one of the appellant's contentions that appeared to me to have any plausibility was that which sought to restrict the apparent range of section 4 (2) of the Finance (No. 2) Act,

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1955, by the argument that, if applied to persons enjoying exemption as being resident in Eire but not also in the United Kingdom, it would contradict the provisions of the inter-governmental agreements about double taxation between the two countries. It is no doubt true that statutory words apparently unlimited in scope may be given a restricted field of application if there is admissible ground for importing such a restriction: and the consideration that, if not construed in some unlimited sense, they would amount to a breach of international law is well recognised as such a ground. But a supposed intention not to depart from observance of the comity of nations is a much vaguer criterion by which to determine the range of a statute; and when the departure consists in no more than a provision inconsistent with an inter-governmental agreement about taxation, which by its own terms is subordinated to the approval of the respective legislatures of the countries concerned and persists only so long as its terms are maintained in force by those legislatures, I think that there is no useful aid at all to be obtained from this principle of interpretation. The principle depends wholly on the supposition of a particular intention in the legislature, and I do not think that in the case before us there is any reason to make the supposition which is suggested.

Lord Guest. My Lords, in order to succeed in this appeal the appellants have to show that they do not come within the terms of section 4 (2) of the Finance (No. 2) Act, 1955, as "a "person entitled under any enactment to an exemption from "income tax." The claim made by the appellants for exemption from income tax was made in accordance with paragraph 4 (1) of Part III of the Eighteenth Schedule to the Income Tax Act, 1952. Their claim for exemption is founded on section 349 of the Income Tax Act, 1952. Under subsection (1) of that section the agreements between the United Kingdom and the Republic of Ireland in regard to relief from double taxation are confirmed, but it is only by virtue of subsection (2) that the agreements have the effect of exempting persons entitled under the agreements from liability to United Kingdom income tax. The only limitation upon the right to exemption is that the law of the Republic of Ireland must grant relief during the relevant year of assessment. The appellants' argument that the exemption is not "under" section 349, but is "in virtue" of that section to my mind discloses a distinction without a difference. As the income tax is imposed by a United Kingdom enactment, relief from its imposition could only be granted by a similar enactment. The appellants cannot approbate and reprobate the Income Tax Acts. In order to claim exemption from United Kingdom income tax they must appeal to a United Kingdom enactment, namely, section 349 of the Income Tax Act, 1952. At the same time they are repudiating section 4 (2) of the Act of 1955, which refers to the same class of persons who benefited under the Act

of 1952. In my opinion it is impossible to put the limitation sought by the appellants on section 4 (2). It refers to a limited class of persons readily identifiable and the appellants come within that class. Assuming that section 4 (2) involves a breach of a treaty with the Republic of Ireland, as to which I have some doubt, it must be given effect to, notwithstanding its effect on international agreements, if its language admits of no doubt ("Maxwell on the Interpretation of Statutes" (10th edition), page 154). The language of section 4 (2) is unambiguous and applies, in my view, to the appellants.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *R. M. Bull & Co.; Solicitor of Inland Revenue.*

J. A. G.

[CHANCERY DIVISION.]

In re COLLARD'S WILL TRUSTS.

LLOYDS BANK LTD. *v.* REES AND OTHERS.

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Feb. 23.
Buckley J.

[1960 C. No. 2412.]

Trusts—Power of advancement—Exercise of power—Statutory power—Whether power to advance land—Power of advancement excluded for purposes connected with business—Tenant of farm carrying on business of farmer—Proposed conveyance of farm to tenant for purpose of minimising death duties—Whether power to convey farm by way of advancement—Whether for purpose connected with business—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Circuity of Action—Avoiding—Equity—Power of advancement—Power to advance cash—Advancement of land approved.

Section 32 (1) of the Trustee Act, 1925, provides that "Trustees "may at any time or times pay or apply any capital money subject "to a trust, for the advancement or benefit, in such manner as they "may, in their absolute discretion, think fit, of any person entitled "to the capital of the trust property or of any share thereof, "whether absolutely or contingently . . . and whether in possession "or in remainder or reversion."

By his will a testator settled half his residuary estate on trust for his elder daughter for life on protective trusts, and subject thereto on trust for her children as should attain 21 or previously marry. Clause 7 of the will provided that "the statutory power "of advancement of capital given to my trustees by section 32 of "the Trustee Act, 1925, shall apply to the trusts hereof as if "incorporated herein save that no such advancement shall be made "to or on behalf of any beneficiary . . . for any purposes connected "with business." The testator's elder daughter, who was past the age of child-bearing, had one son who was of full age. Since 1952, a farm, belonging to the estate which had been appropriated to the

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elder daughter's settled share, had been occupied by her son as tenant under two tenancy agreements. The son farmed the agricultural land there by way of business and as a full-time occupation. The farm was valued at £20,000.

On a summons by the independent trustee of the will to determine whether the trustees could convey the farm to the son by way of advancement, it being deposed by the elder daughter and the son that the purpose of the proposed advancement of the farm was to minimise the estate duty prospectively payable on the elder daughter's death and that the advance would have no effect on the son's business of farmer:—

Held, (1) that the court would not insist on circuity of action if the same result could be achieved by direct action which legitimately could be achieved by more circuitous action and that, since the trustees would have had power, under the statutory power of advancement, to advance £20,000 in cash to the son and subsequently to sell the farm to him for that sum, they had power to convey the farm to the son direct and to treat that conveyance as an advancement to him of its market value.

Dictum of Neville J. in *Sprange* v. *Lee* [1908] 1 Ch. 424, 430, C.A. applied.

(2) That, on the evidence, the purpose of the advancement was the avoidance of estate duty, which was not a purpose connected with the son's business, and that the advancement was not, therefore, an advancement of the kind excluded from the trustees' power of advancement by clause 7 of the will and, accordingly, the proposed transaction was one which the trustees had power to carry out.

Adjourned Summons.

By his will, dated February 2, 1941, the testator, Fred Collard, appointed the plaintiff, Lloyds Bank Ltd., his wife, Caroline Gertrude Collard, his son-in-law, Eric Vivian Rees, and his elder daughter, Margaret Rees, executors and trustees thereof. After giving various legacies and annuities, the testator, by clause 5 of his will, gave his residuary estate to his trustees on trust for sale and directed them to hold his residuary estate for the benefit of his wife for life on protective trusts and subject thereto to divide his residuary estate into two equal half parts. He directed that as to one such part, referred to as his elder daughter's trust fund, the trustees should hold the income of the fund for the benefit of his elder daughter during her life on protective trusts as defined by section 33 of the Trustee Act, 1925, and subject thereto that the capital and income of the fund should be held on trust for such of the children of his elder daughter as should be living at the date of his death or as should be born subsequently and should attain the age of twenty-one years or previously marry and if more than one in equal shares absolutely. The will then provided for certain eventualities which did not or, in the events which happened, could not, happen and declared the trusts on which the other moiety of his residuary estate was to be held.

Clause 7 of the will provided: "I declare that the statutory "power of advancement of capital given to my trustees by section "32 of the Trustee Act, 1925, shall apply to the trusts hereof

"as if incorporated herein save that no such advancement shall "be made to or on behalf of any beneficiary for the purpose of "acquiring a share or interest in or setting the said beneficiary "up in any business or for any purposes connected with business "excepting that my trustees may if necessary make such advance-"ment for the purpose paying any fees or premium required for "business education or apprenticeship."

The testator died on June 25, 1952, and probate of his will was granted on September 18, 1952, to the executors named therein, with the exception of the testator's wife who had predeceased him, dying on February 12, 1951.

The testator's elder daughter, having been born on January 5, 1900, was, at the date of the hearing, past the age of child-bearing. She had one son, John Collard Rees, who was born on February 11, 1924.

By a deed of family arrangement dated December 16, 1954, it was provided, inter alia, that a farm known as Upper Townhill Farm, Southampton, purchased by the testator shortly before his death for £12,040, should be appropriated to the elder daughter's share at that price. Since March 25, 1952, the farm had been occupied by the elder daughter's son as tenant under two tenancy agreements dated October 21, 1952, at a total rent of £156 per annum; and he farmed the agricultural land there by way of business as his full-time occupation.

The value of the personalty and realty appropriated to the elder daughter's share was about £32,112 and the trustees also held realty to the approximate value of £84,000, half of which formed part of the elder daughter's fund. On February 28, 1958, investments of the aggregate value of £9,788 0s. 3d. were transferred to the elder daughter's son by way of advancement.

The trustees being desirous of vesting the freehold of the farm in the elder daughter's son if they had power to do so, the bank issued a summons on July 6, 1960, asking, inter alia, whether on the true construction of the will and in the events which had happened, clause 7 of the will authorised the trustees to convey the farm to the son in fee simple or not.

According to an affidavit sworn by the elder daughter and her son their purpose in desiring that the farm should be transferred to the son was to reduce the amount of estate duty prospectively exigible on the death of the testator's elder daughter. By paragraph 2 of the affidavit the son deposed: "I pay all rates, taxes, "occupier's drainage rates and other outgoings of an annual and "recurring nature payable in respect of the farm except land-"lord's property tax, land tax, owner's drainage rates and tithe "redemption annuities and any other landlord's outgoings. The "only immediate effect of the advancement so far as I am con-"cerned will be the cesser of my obligation to pay a total of "£156 per annum in rent and the assumption of the liability for "all landlord's repairs the burden of which has been entirely "borne by me for the past six years in order to relieve my mother

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" . . . ; I shall also become responsible for fire insurance premiums " amounting to about £36 per annum; there are no other out- " goings affecting the farm apart from the rates which have been " paid by me as tenant and the usual liability for income tax on " the annual value of the farm or the rent paid for the farm. " These changes will have no material effect upon my business. " I have not in mind any business transaction to which the " transfer to me of the freehold reversion of the farm has any " relevance."

At the date of the hearing the farm was of a value of £20,000.

P. S. A. Rossdale for the plaintiff, Lloyds Bank Ltd.

O. M. W. Swingland for the defendants, the testator's eldest daughter, her husband, and their son.

The following cases, not referred to in the judgment, were cited in argument: *I. T. P. (London) Ltd.* v. *Winstanley* [1]; *In re Shaw's Settlement.* [2]

Buckley J. stated the facts and continued: The first question to be considered is whether, under the statutory powers of advancement, the trustees can convey the land to the beneficiary. That power is contained in section 32 of the Trustee Act, 1925, which, so far as material, provides that " (1) Trustees " may at any time or times pay or apply any capital money sub- " ject to a trust, for the advancement or benefit, in such manner " as they may, in their absolute discretion, think fit, of any person " entitled to the capital of the trust property or of any share " thereof, whether absolutely or contingently . . . or subject to " a gift over . . . and whether in possession or in remainder or re- " version." Subsection (2) provides: " This section applies only " where the trust property consists of money or securities or of " property held upon trust for sale . . . or the proceeds of such " sale calling in and conversion are not by statute or in equity " considered as land, or applicable as capital money for the pur- " poses of the Settled Land Act, 1925."

The first thing to notice is that what subsection (1) authorises is that the trustees may make payments or apply capital moneys in certain ways and that primarily the power is a power to deal with cash. But it is said that a court of equity will never insist on circuity of action and that, if the trustees could properly make an advancement of cash and having done so could properly sell some part of the trust property to the beneficiary for that sum of cash, so also they can exercise the power of advancement by merely transferring property to the beneficiary without going through the process of making the cash advancement and a sale. There is no doubt that trustees constantly exercise the statutory power

[1] [1947] K.B. 422; 63 T.L.R. 70; [1947] 1 All E.R. 177, D.C.

[2] [1951] Ch. 833; [1951] 1 T.L.R. 470; [1951] 1 All E.R. 656.

of advancement by transferring to beneficiaries Stock Exchange investments by way of advancement. Is there any distinction to be drawn in this respect between land and Stock Exchange investments? It is true that Stock Exchange investments are a form of property of which it is much easier to ascertain the value with accuracy than land. On the other hand, it may equally be said that Stock Exchange investments, by and large, are much more likely to fluctuate in value than land. But those are considerations which I do not think really go to the principle involved. The principle is that the court will not insist on circuity of action if the same result can be achieved by direct action which legitimately could be achieved by more circuitous action. I have been referred in this connection to an observation of Neville J. in *Sprange* v. *Lee*.[1] The facts of that case are far removed from those which I have to consider in this case and I do not propose to refer to them. But what Neville J. said is [1]: "I have thought whether I could deal with the transaction as being equivalent to payment by the husband and repayment by the wife. If that could be done, it is a principle of equity that the court does not require unnecessary formalities to be gone through. Consequently, where we find on one side a debt immediately payable and on the other (say) a sale of property for a price equal to the amount of debt, it is not necessary that cheques should be exchanged in order that there may be a discharge of the debt by a transfer of the property. But in those cases there is always a legal obligation on either side. I cannot introduce any such notional payment here, for this reason (among others) that the husband had a good reason for not paying this amount to his wife. Whether if he had paid it she would have repaid it we do not know. But he had obtained a covenant by his wife that she would not sue, under which, if she sued him, she might be liable in damages." In that passage the judge does recognise that the court will not insist on unnecessary formalities where the result which it is proposed to achieve could be achieved more simply or directly. In such a case the court will allow the process to be short-circuited. In the present case, the farm has been recently valued by qualified valuers at £20,000, and an advance of £20,000 would be within the financial limit of the power of advancement which the trustees at present have, having regard to the value of the elder daughter's settled share. So far as I can see, there would be nothing wrong in the trustees making an advance in cash to her son of £20,000 and subsequently selling the farm to him for £20,000. In those circumstances, it seems to me that the court need not insist on that process having gone through; and that the right view is that the trustees have power to convey the farm to the son and treat that conveyance as an advancement to him of its market value.

However, a further question arises as a result of the terms

[1] [1908] 1 Ch. 424, 430.

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of clause 7 of the testator's will because the son is at present engaged in farming activities on the farm. Since March, 1952, he has occupied the farm as a tenant of the trustees under two tenancy agreements dated October 21, 1952, at a rental of £156 per annum, and he farms agricultural land there by way of business. It is a full-time occupation.

He and his mother have sworn an affidavit in which they depose to the fact that their purpose in desiring that the farm should be transferred to the son is to reduce the estate duty prospectively payable on the death of the testator's elder daughter. With that end in view, they naturally want the conveyance to the son to be made at the earliest possible date so that the statutory period by which they may achieve exemption from death duties shall start to run as soon as possible. [His Lordship referred to paragraph 2 of the affidavit and continued:] The question I have to consider in this respect is whether, if the farm is conveyed to the son, it can be said that the advancement would be for any purpose connected with his business within the meaning of clause 7 of the testator's will. I felt a little doubt about this in the course of argument because it seems to me that if the son were buying the freehold reversion of his farm from some stranger to the trust, and the trustees were advancing him the necessary purchase-money, it would be difficult to say that the purchase was not one that he was making for a purpose connected with his business. But I have to look at the matter in the light of the facts of this particular case. He is the tenant of the farm paying what is clearly a very low rental. He has, at present, under the Agricultural Holdings Act, 1948, security of tenure so long as he farms the farm satisfactorily. The purchase of the freehold reversion will not, I think, really advantage him as a farmer at all. Indeed, looking at the matter purely from the point of view of his position as a farmer, it seems to me that financially he is better off as a tenant under the tenancy agreements than he would be as a freeholder acquiring the freehold at the price of £20,000.

I think that I am justified in taking the view that the purpose of this advancement is the avoidance of estate duty which it is proposed to achieve. That is not a purpose connected with the son's business. Consequently, I reach the conclusion that this is not an advancement of a kind which is excluded from the trustees' powers by the express terms of clause 7 of the will, and I think that this transaction is one which the trustees have power to carry out.

Declaration accordingly.

Plaintiffs' costs on the trustee basis and defendants' costs on the common fund basis to be paid out of the elder daughter's settled share of residue.

Solicitors: *Tarry, Sherlock & King* for *Townsends, Swindon.*

V. A. M.

[CHANCERY DIVISION.]

In re PARAGON HOLDINGS LTD.

1961
Feb. 27.

Buckley J.

[No. 00385 of 1958.]

Company — Winding up — Contributories — List of — Dispensing with — Surplus assets — Large number of widely held shares — Schedule prepared by liquidator—Whether sufficient evidence of contributories—Whether court should dispense with settlement of list—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 257 (1)—*Companies (Winding-Up) Rules,* 1949 (*S.I.* 1949, *No.* 330 (*L.* 4)).

In the compulsory winding up of a company under the order of the court there remained, after payment of all the debts, a surplus of £857,654 available for distribution among the members. A sum of £813,322 was required to satisfy the rights on a winding up of the holders of the company's 1,311,810 issued cumulative participating preference shares. At the date of the commencement of the winding up transfers of 213,000 of the preference shares had been executed but not registered, and the registered holders of those shares authorised the liquidator to make payment to the transferees. The liquidator prepared a schedule stating the name and address of each preference shareholder, the number of shares of which that person was either the registered holder or transferee, the amounts payable on repayment of capital and on arrears of dividend and finally the total sum which was to be paid to each person. All the issued share capital of the company was fully paid up.

On a summons by the liquidator for an order under section 257 of the Companies Act, 1948,[1] dispensing with the settlement of a list of contributories and authorising him to make a first payment by way of return of assets available for distribution among the members at the rate of 10s. per share together with all arrears of dividend down to the date of payment on the 1,311,810 preference shares by paying to the persons named in the schedule the total amounts against their names:—

Held, that since it was not a case in which any calls or adjustment of the rights of contributories had to be made the court had jurisdiction in its discretion under section 257 (1) of the Act of 1948 to dispense with the settlement of a list of contributories; but that it should not do so in the case of a large company whose shares were widely held in small quantities for in such a case the court could not be satisfied that only the persons whose names were set out in the schedule were the proper recipients unless the proper formalities and the settlement of a list in accordance with rules 80 to 85 of the Companies (Winding-Up) Rules, 1949,

[1] Companies Act, 1948, s. 257 (1): "As soon as may be after making "a winding-up order, the court shall "settle a list of contributories, with "power to rectify the register of members in all cases where rectification "is required in pursuance of this Act, "and shall cause the assets of the "company to be collected, and applied "in discharge of its liabilities: Provided that, where it appears to the "court that it will not be necessary "to make calls on or adjust the "rights of contributories, the court "may dispense with the settlement of "a list of contributories."

S. 265: "The court shall adjust the "rights of the contributories among "themselves and distribute any surplus among the persons entitled "thereto."

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which procedure was designed for that purpose, were carried out; and that, therefore, the court could not dispense with the settlement of a list and the liquidation must proceed in accordance with the rules.

In re Phoenix Oil & Transport Co. Ltd. (No. 2) [1958] Ch. 565; [1958] 2 W.L.R. 126; [1958] 1 All E.R. 158 applied.

Per Buckley J. An application for an order under section 265 of the Act of 1948 should be supported by evidence founded on the settling of the list of contributories and proving any facts necessary to bring the position up to date and to justify any variation between the list of contributories and the schedule to the order.

Adjourned summons.

On May 19, 1958, an order was made for the compulsory winding up of a company, Paragon Holdings Ltd., on the ground of its insolvency. When all the debts had been paid, however, the liquidator had in hand a sum of £857,654 available for distribution among the members of the company. The capital of the company included a class of preference shares of the nominal value of 10s. each which conferred on the holders, while the company was a going concern, the right to a cumulative preferential dividend at the rate of 7½ per cent. and also further participating rights, and, on a winding up, the right to the return of capital in preference to any repayment of capital on the ordinary shares, together with the arrears of the fixed cumulative preferential dividend down to the date of the return of capital. Some 1,311,810 preference shares had been issued and £813,322 4s. was required to repay the capital with arrears of dividend calculated down to March 14, 1961. The dividend would accrue at the rate of £4,099 8s. a month thereafter if payment were not made on March 14, 1961.

At the commencement of the winding up transfers had been executed but not registered of 213,000 preference shares, and the registered holders of those shares by writing authorised the liquidator to make any payments to the transferees. The liquidator prepared a schedule stating the name and address of each preference shareholder to whom it was proposed that payment should be made and the number of shares of which he was the registered holder, or, in the case of a transferee of shares under a transfer which had not been registered, the number of shares of which he claimed to be transferee. It also showed the amounts payable to each person on the shares for repayment of capital, and for the arrears of fixed cumulative preferential dividend and the total amount so payable. All the issued share capital of the company was fully paid up.

The liquidator took out a summons for an order under section 257 of the Companies Act, 1948, dispensing with the settlement of a list of contributories of the company and authorising him to make a first payment by way of return of assets available for distribution among the members at the rate of 10s. per share together with all arrears of dividend calculated due to the date of payment in respect of the 1,311,810 issued cumulative participating preference

shares by paying to the persons named in the schedule the total amounts against their names. The Registrar of the Companies Court adjourned the summons into court.

R. B. S. Instone for the liquidator.
E. Blanshard Stamp as amicus curiae.

The following case, in addition to the cases referred to in the judgment, was cited in argument: *Welton* v. *Saffery.**

BUCKLEY J. stated the facts substantially as set out above and continued: The question is whether, in the circumstances, the court should dispense with the settlement of the list of contributories under the proviso to section 257 (1) of the Companies Act, 1948. That subsection provides: "As soon as may be "after making a winding-up order, the court shall settle a list "of contributories, with power to rectify the register of members "in all cases where rectification is required in pursuance of this "Act, and shall cause the assets of the company to be collected, "and applied in discharge of its liabilities: Provided that, where "it appears to the court that it will not be necessary to make "calls on or adjust the rights of contributories, the court may "dispense with the settlement of a list of contributories."

This is not a case in which there can be any question of making any calls, for all the issued share capital of the company is fully paid. Nor, having regard to the decision of Roxburgh J. in *In re Phoenix Oil and Transport Co. Ltd.*,[1] is it a case in which any adjustment of the rights of the contributories falls to be made. Consequently, the court has jurisdiction, if in its discretion it seems right, to dispense with the settlement of a list. The settlement of a list of contributories is carried out in the manner directed by rules 80 to 85 of the Companies (Winding-Up) Rules, 1949, and it involves the sending of two lots of notices to all the contributories whose names it is proposed to put on the list. No doubt this is an onerous and fairly expensive process to carry out. To determine whether or not it is right in any particular case for the court to dispense with the settlement of the list, I think that it is necessary to consider what subsequent steps have to be taken in a winding up.

In that connection I refer to section 265 of the Act, which provides: "The court shall adjust the rights of the contributories "among themselves and distribute any surplus among the persons "entitled thereto." In *In re Phoenix Oil and Transport Co. Ltd. (No. 2)*,[2] a decision consequent on the order made by Roxburgh J. in the earlier proceedings, where he dispensed with the settlement of the list of contributories, Wynn-Parry J. held that section 265

* [1897] A.C. 299; 13 T.L.R. 340, H.L.

[1] [1958] Ch. 560; [1957] 3 W.L.R. 633; [1957] 3 All E.R. 218.

[2] [1958] Ch. 565; [1958] 2 W.L.R. 126; [1958] 1 All E.R. 158.

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required an order of the court before the liquidator of a company in compulsory liquidation was entitled to distribute the assets, whether or not any adjustment had to be made amongst the contributories, and that, although the court might, under rule 120 of the Companies (Winding-Up) Rules, 1949, in a suitable case dispense with certain requirements, the case before him was not one in which the liquidator could properly be authorised to make a return of capital before he had made inquiry as to the persons entitled; the liquidator had to do this at some stage before he was able to ascertain among whom the surplus should be distributed. In a winding up by the court, therefore, the order of the court is required in every case to authorise the liquidator to distribute any surplus assets which fall to be distributed amongst the persons entitled to participate in the surplus assets of the company. Rule 120 of the Companies (Winding-Up) Rules, 1949, provides that: "Every order by which the liquidator in a winding "up by the court is authorised to make a return to contributories "of the company shall, unless the court shall otherwise direct, "contain or have appended thereto a schedule or list (which the "liquidator shall prepare) setting out in a tabular form the full "names and addresses of the persons to whom the return is to "be paid, and the amount of money payable to each person, and "particulars of the transfers of shares (if any) which have been "made or the variations in the list of contributories which have "arisen since the date of the settlement of the list of contribu-"tories and such other information as may be requisite to enable "the return to be made. The schedule or list shall be in the "form 70 in the appendix with such variations as circumstances "shall require, and the liquidator shall send a notice of return "to each contributory."

That rule does not lay down any regulations about the evidence which is to support the liquidator's application to the court for an order under section 265. It merely prescribes the form which the order shall take unless the court otherwise directs. I apprehend that the court, when considering an application for an order under section 265, would always require to be furnished with evidence satisfying it that the persons whose names were set out in the schedule referred to in rule 120 were in fact the proper recipients of the money to be distributed. Thus, where a winding-up order has been made, the Act contemplates that normally the list of contributories will be settled in the way indicated in the rules, and that, when the liquidation has been worked out, in due course an application will be made under section 265 for an order setting out in its schedule the details of the persons to whom any funds are to be distributed. The application for that order should be supported by evidence founded on the settling of the list of contributories and proving any facts which might need to be proved to bring that position up to date and to justify any variation between the list of contributories and the schedule to the order.

In the present case the class of shares in respect of which the liquidator is anxious to make distribution is large and there appear to have been a large number of shareholders holding quite a small quantity of shares. Some of those shares have been the subject-matter of transfers which have been executed before the commencement of the winding up but have not been registered. The liquidator said that he had obtained information about these shares, but as the evidence stands at the moment I do not think that the court should be satisfied that only those persons whose names are set out in the exhibited schedule are the right persons to receive any moneys which fall to be distributed.

It is perfectly true, I think, that rules 80 to 85 indicate that the matter which was primarily in the mind of the draftsman was that, where partly paid shares were concerned, there would be persons anxious to ensure that their names should not appear in the list of contributories because they would be anxious to avoid being called upon to contribute to the assets of the company. But it has long been recognised that for the purposes of settling the list of contributories it is not only the partly paid shareholders who are contributories but all the persons who are entitled to participate in the winding up, and of course shareholders who have parted with their shares may, in some circumstances, be put on the list of contributories. I think that the court ought not to be very ready to dispense with the settlement of a list because, even where all the shares are fully paid up, there are quite a number of possible circumstances which might come to the notice of the liquidator in the course of settling the list which had not previously been drawn to his attention. For instance, it is not impossible in a case such as the present, where as many as 213,000 shares were the subject-matter of transfers executed but not registered before the commencement of the winding up, that on investigating the position when notice has been given to all the shareholders in the manner required by the rules the liquidator might find that there were some other shares that had been similarly dealt with of which he had been ignorant. Or he might find, for example, that someone was anxious to say that the register had not been properly kept. That may not be very likely, but it is not impossible that when the list is being settled some information may come to light of which the liquidator was formerly ignorant. If there were a very simple case of a very small number of shareholders where it was possible to establish that the position was perfectly clear without going through the formalities prescribed by the rules relating to the settlement of the list of contributories, that would be the sort of case in which the court could properly dispense with the settlement of the list under section 257 (1), but it should not do so, in my view, in the case of a company with a large number of shares held widely by a large number of shareholders. Indeed, one of the things which

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the liquidator might discover when settling the list of contributories would be that a number of those shareholders were dead so that he would have to discover who were their personal representatives before he could satisfy the court to whom he should make payment. Those are the kind of matters which the settlement of the list of contributories is calculated among other things to elucidate.

Accordingly, I think that this is not a case in which the court should dispense with the settlement of the list, and the matter should proceed in accordance with the rules.

No order on the summons save that the liquidator's costs be costs in the winding up.

Solicitors: *Allen & Overy; Solicitor, Board of Trade.*

M. G. T.

[COURT OF APPEAL.]

C. A.

1960 *Oct.* 12, 13; *Nov.* 18.

Sellers and Devlin L.JJ. and Slade J.

ALDER *v.* MOORE.

Contract—Penalty clause—Insurance—Payment of sum to footballer for injury—Undertaking that if he plays football again he will be subject to penalty of that sum—Whether insurers can recover sum on breach of undertaking.

By a policy of insurance taken out on behalf of their members by the Association Football Players' and Trainers' Union with Lloyd's, it was provided that if a member of the union, who was registered as a player, sustained permanent total disablement he would be paid £500. The defendant, a professional footballer and a member of the union, received an injury in the course of a match which caused damage to his right eye. Having been certified as totally disabled, the underwriters paid the defendant the agreed sum, having first obtained from him a declaration pursuant to the terms of the policy as follows: "In consideration of the above "payment I hereby declare and agree that I will take no part as "a playing member of any form of professional football in the "future and that in the event of infringement of this condition I "will be subject to a penalty of the amount stated above."

Within four months of receiving the money, and without any improvement to his eye, the defendant began to play professional football again. The underwriters claimed the return of the £500. The defendant contended that the payment claimed was a penalty:—

Held (Devlin L.J. dissenting) that, notwithstanding the word "penalty" used in the declaration, the obligation imposed on the defendant was to reimburse the underwriters what they had paid on a basis proved to be false by events; the payment was neither an imposition of a fine or a penal payment and, accordingly, was recoverable from the defendant.

In re Apex Supply Co. Ltd. [1942] Ch. 108; [1941] 3 All E.R. 473 applied.

Cooden Engineering Co. Ltd. v. *Stanford* [1953] 1 Q.B. 86; [1956] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A. distinguished.

APPEAL from Paull J.

The plaintiff, Kenneth Frederick Alder, suing on behalf of himself and others named as underwriters to a Lloyd's policy of insurance made between the underwriters and the Association Football Players' and Trainers' Union, claimed from the defendant, Brian Magowan Moore, a professional footballer and a member of the union, the sum of £500, which the underwriters had paid to the defendant in respect of "permanent total disablement" as a result of an injury to his right eye, received on December 26, 1955, while playing football. Clause 8 of the policy provided: "No claim shall be paid hereunder for permanent total disablement unless the claimant shall have given the underwriters a signed declaration to the effect that he will take no part as a playing member of any form of professional football in the future and that in the event of infringement of this condition he will be subject to a penalty of the amount paid him in settlement of his claim." The defendant signed the undertaking and on August 31, 1956, duly received £500 in settlement. In December, 1956, notwithstanding his injury, the defendant resumed employment as a professional footballer. The plaintiff claimed the return of the £500. Paull J., although of the opinion that the sum claimed was not a penalty, held that the contra proferentem rule should be applied in construing the agreement, and gave judgment for the defendant. The plaintiff appealed and the defendant by counter-notice claimed that the plaintiff's claim was for the enforcement of a penalty.

Anthony Cripps Q.C. and *Edward Grayson* for the plaintiff.
David Hunter for the defendant.

The following cases, in addition to those referred to in the judgment, were cited: *Public Works Commissioner* v. *Hills* [1]; *Law* v. *Redditch Local Board* [2]; *Lamdon Trust Ltd.* v. *Hurrell* [3]; *Houghton* v. *Trafalgar Insurance Co.* [4]

Cur. adv. vult.

Nov. 18. The following judgments were read:

SELLERS L.J. This is an appeal from a decision of Paull J. The judge appears to have taken a preliminary view of the case

[1] [1906] A.C. 368, P.C.
[2] [1892] 1 Q.B. 127; 8 T.L.R. 90, C.A.
[3] [1955] 1 W.L.R. 391; [1955] 1 All E.R. 839.
[4] [1954] 1 Q.B. 247; [1953] 3 W.L.R. 985; [1953] 2 All E.R. 1409, C.A.

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which I think was right and with respect is to be preferred to that on which he gave judgment for the defendant.

The plaintiff sues as a representative underwriter and the claim arises under or as a consequence of a Lloyd's policy of insurance entered into between the subscribing underwriters and the Association Football Players' and Trainers' Union. The policy expressly provided that it and all benefits payable under it should be held by the union in trust for the respective members and the union should have no beneficial interest thereunder. It was current from August 1, 1955, to July 31, 1956. At the commencement of this period the defendant was a member of the union and was a professional footballer with the West Ham United Football Club, which was a club in the first division of the Football League. On December 26, 1955, in the course of a match, the defendant received an injury which caused damage to his right eye with the result that its visibility is permanently reduced to no more than 10 per cent. of full vision, and it was thought by those advising the underwriters, and it would seem by the defendant himself, that such a disability would preclude him from further participation in professional football.

The policy of insurance provided that if at any time during the period of the policy a member of the union should sustain any bodily injury caused by accidental violent external and visible means the subscribing underwriters would pay to the union or its nominee certain sums in the circumstances stated. The first and relevant benefit is as follows: "In respect of a member "registered as a player with the Football League and who has "not reached the age of 31 at inception of this policy: £500 in "the event of injury which shall solely and independently of any "other cause occasion his death or permanent total disablement "(as hereinafter defined) or such lesser sum as may be mutually "agreed (see General Condition 9) but payment to be in any case "within seven days after the total claim being substantiated "under this policy."

The defendant was 21 at the time of his accident and was registered as a player with the Football Association, which I understand controls the Football League, and there is no dispute that it was the registration intended and he became entitled to the benefit of £500 in accordance with the insurance cover given by provision 1 and applying definition 4, which is: "'Permanent "'Total Disablement' shall be deemed to have arisen in relation "to a member if the member shall have been disabled from "playing association football for six consecutive months and has "become so permanently incapacitated as to make it impossible "for him ever to resume employment as a professional player "of association football, as the result of sustaining accidental "personal injury occasioned directly by violent external and "visible means which solely and independently of any other "cause results in death or permanent total disablement."

Under the general conditions of the policy, by clause 4, payment of the permanent total disablement benefit was made conditional upon such disablement being established to the satisfaction of the underwriters within 12 months after the accident in respect of which a claim is made.

Under clause 2 the claimant was required to submit himself to reasonable medical examination, and before making a payment in this case the underwriters were provided with medical opinion. But the policy contained a further important provision, as follows. Clause 8: "No claim shall be paid hereunder for permanent total "disablement unless the claimant shall have given to under-"writers a signed declaration to the effect that he will take no "part as a playing member of any form of professional football "in the future and that in the event of infringement of this "condition he will be subject to a penalty of the amount paid "him in settlement of his claim." In purported pursuance of this clause the underwriters took an undertaking from the defendant dated August 25, 1956, and on August 31, 1956, the union received £500 which was forthwith passed on without deduction to the defendant in settlement of the claim under the policy.

The policy itself appears to be ill-written or inaccurate in several places (for example, "Football League" for "Football "Association"), and it is further accepted that the document which the defendant signed was not an appropriate document under clause 8 and was less favourable to the defendant in his present resistance to this claim against him than the appropriate document would be. It was therefore properly agreed without more formal consideration of rectification that the undertaking given on August 25, 1956, should be treated as being as follows: "I, Brian Magowan Moore of 7 Roman Road, East Ham, E.6, "agree to accept from Lloyd's underwriters (*per* L. Hammond "& Co. Ltd.) the sum of £500 in full satisfaction and discharge "of all claims under the Association Football Players' Accident "Insurance Scheme 1954/55, in respect of my injury which "occurred on or about December 26 last. In consideration of "the above payment I hereby declare and agree that I will take "no part as a playing member of any form of professional foot-"ball in the future and that in the event of infringement of this "condition I will be subject to a penalty of the amount stated "above. (Signed) Brian Moore. Date August 25, 1956."

By this policy of insurance the union, which was concerned with the interests of players and trainers in professional football, was making provision for those members who in the circumstances stated were disabled from playing professional football and so earning a livelihood thereby. It was not a policy compensating merely for loss of faculties but for the effect of such on a member's capacity to earn money at football.

This case illustrates that a view, medical or otherwise, of total incapacity for football, however carefully and genuinely assessed, may be belied by events. Young and energetic footballers are

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perhaps a tough breed. Under economic pressure the defendant, without any improvement or alteration in the condition of his right eye and no doubt with skill, courage and good fortune, resumed employment as a professional player of association football with Cambridge United Football Club in December, 1956, that is, within four months of receiving the £500 benefit, on the basis that he was so permanently incapacitated as to make it impossible for him ever to resume such employment.

It may well be a difficulty or even a hardship for a lump sum to be refunded in such circumstances. The money may have been expended to bridge a period of unemployment, but before the defendant received the money he signed the undertaking, which I think must have brought to his mind the obligation to refund the money if he played professional association football again. He, I think, would recognise that the union was concerned with the capacity of a member to earn money as a professional footballer rather than with physical injury to a member in itself.

Clause 8 has the effect of making a payment for permanent total disablement conditional and not final. This was conceded in the argument for the defendant if the defendant at the time when he was asked to pay back the £500 he had received had been a member of the union, but subject to the defence that the plaintiff was seeking to enforce a penalty which the court would not sanction.

Apparently when the defendant commenced to play professional football again in December, 1956, he was not then a member of the union; the club for which he played was not in the Football League and was not a club of the highest class. The defendant played first for payment of a sum for each match, and when he had established himself he was engaged on a weekly but part-time basis. The defendant had, however, declared and agreed in consideration of the payment to him of the £500 as follows: "I will take no part as a playing member of any form "of professional football in the future," which I read as meaning "I will take no part in any form of professional football in the "future as a playing member" (or more briefly, "as a player"). So read I do not find it doubtful or ambiguous. The stipulation with regard to partaking in any form of professional football is as a playing member (or player) not as a spectator, or trainer or referee, manager, or in any other capacity. I cannot read it as referring in any way to the defendant's membership of the union.

There are many references in the policy to "member," both with a large "M" and a small "m" apparently indiscriminately, and the definition of "member" as a person of the male sex who is registered with the union as a member of the union, and the union by its title, would appear to include both players and trainers. But the words "playing member" are not together in the policy except in clause 8 and in that setting, as I read them, clearly have no reference to membership of the union.

I can see no ground for invoking the "contra proferentem"

rule of construction, which cannot defeat the clear meaning of the words. (See *Love* v. *Pares*[1]; *Lindus* v. *Melrose*.[2]) It was suggested that if a man who had been compensated under this policy recovered and played again and remained a member of or rejoined the union the underwriters would not wish to insure him a second time and that that is the purpose of the clause. If further insurance was not desired it could have been quite clearly and simply stated or effected by the union.

The declaration and agreement continues: "and in the event "of infringement of this condition I will be subject to a penalty "of the amount stated above." The defendant has filed a counter-notice of appeal alleging that the plaintiff's claim herein is for the enforcement of a penalty. Paull J., rejecting this submission, held that "a penalty" meant a return or refund of the money paid on a certain event occurring or, alternatively, that the parties had reasonably fixed a sum by way of damages for breach of the undertaking.

Despite the unsuitability of the words and phrasing, the sense of the obligation the defendant entered into is that if he played professional football again he would refund the sum he had received on the basis that he could not so do. One isolated trial which served to show his unfitness for professional football would not, I think, have been held an infringement of the condition, if that had been the case. It would have served to show how right the decision was on which payment had been made, and as far as infringement was concerned it would be de minimis. The provision is not a technical but a practical one.

The requirement of repayment in this case does not appear to me to be unreasonable or unjust and, like the judge, I can see no reason why the court should not enforce it. Far from being extravagant or unconscionable it is the precise sum which the defendant had received from the underwriters and which he would not have received at all if the future could have been foreseen only four months ahead. If the sum claimed is to be regarded as damages it is, in effect, an agreed and fair pre-estimate of the loss which the underwriters have suffered. However, that way of putting it does not seem to me to be quite appropriate. Neither do I think the obligation is in any way in the nature of a threat held over the defendant in terrorem. The underwriters had no concern or desire to preclude the defendant from playing football for reward. They wished if he did so to be reimbursed that which they had paid on a basis proved to be false by events and no more.

In *In re Apex Supply Co. Ltd.*[3] there was an agreement for the payment of a sum of money on a certain event which it was submitted was neither a sum claimed by way of liquidated

[1] (1810) 13 East 80.
[2] (1868) 3 H. & N. 177.
[3] [1942] Ch. 108; [1941] 3 All E.R. 473.

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damages or penalty. Simonds J., after reviewing several authorities, came to the conclusion that no question of penalty versus liquidated damages arose but that there was a contract for the payment of a certain sum in a certain event, and that event having happened the sum was payable. That decision would fit the present case, for neither in that case nor this is there anything unconscionable or unjust and therefore unenforceable to be found.

In *Cooden Engineering Co. Ltd.* v. *Stanford*[4] this court by a majority took a different view and considered whether, applying the principles laid down in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*[5] the payment in dispute was a penalty.

The defendant's argument here has the advantage that the underwriters have chosen to call the payment they wish to recover a "penalty." Why they did so I cannot understand, but whilst they run a risk of being taken at their word the law looks at the substance of the matter and not at the words used, whether "penalty" or "liquidated damages." I would regard it, as the judge did, as a repayment of a sum in circumstances which are entirely equitable. It is in no way an imposition of a fine or penal payment, and if it has to be made to fall under one head or the other, it is to be regarded as a payment by way of damages for breach of an undertaking which is not unfair or unconscionable and therefore not a penalty.

I have not thought it necessary to go through the cases. The law on this subject has from time to time been extensively reviewed. It was the subject of an elaborate exposition by Jessel M.R. in *Wallis* v. *Smith*,[6] and of a shorter statement of Kay L.J. in *Law* v. *Redditch Local Board*,[7] and somewhat more recently it was considered in the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*[8]

I regret to find myself at variance with the views of Devlin L.J., whose judgment I have read, but I find nothing in the authorities which precludes Paull J. and me in my turn from holding, as I have already expressed, that the provision for repayment "of the "amount stated above," that is the amount received and no more, is not in any way penal or punitive and therefore unenforceable in whole or in part. The underwriters' loss is £500, for that is the sum they paid on the basis of an incapacity which, if the facts could have been foreseen, did not exist, and they made provision for that possibility concurrently with the payment. This aspect alone differentiates *Cooden Engineering Co. Ltd.* v. *Stanford*,[9] in which all the members of the court regarded the sum claimed as being oppressive and penal in point of amount, in which view I would respectfully concur.

[4] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A.

[5] [1915] A.C. 79; 30 T.L.R. 625, H.L.

[6] (1882) 21 Ch.D. 243, C.A.

[7] [1892] 1 Q.B. 127; 8 T.L.R. 90.

[8] [1915] A.C. 79.

[9] [1953] 1 Q.B. 86.

There is another defence adumbrated in the counter-notice to the effect that the policy sought to impose restrictive conditions upon the defendant greater than are reasonably necessary for the protection of the underwriters or in the interest of the public, and therefore the conditions were invalid and unenforceable. No argument was advanced to this effect and nothing was said in the judgment about it. I do not know why it was raised even on paper.

I would allow the appeal and enter judgment for the plaintiff for £500.

DEVLIN L.J. The defendant, Brian Moore, is or was a football player of some distinction and in 1955 he was playing as a full-time professional for West Ham, a well-known club. On December 26, 1955, he suffered an accident which injured his right eye. As a member of a body, referred to in this case as the union, he was insured under a policy against permanent total disablement. The sum of £500 was payable to him, (i) if within 12 months after the relevant accident it was established to the satisfaction of the underwriters (a) that he had been disabled from playing association football for six consecutive months, and (b) had become so permanently incapacitated as to make it impossible for him ever to resume employment as a professional player of association football; and (2) he signed a declaration to the effect that he would take no part as a playing member of any form of professional football in the future and that, in the event of infringement of this condition, he would be subject to a penalty of the amount paid to him in settlement of his claim.

The defendant did not play professional football in the six months following his accident and towards the end of the period he was examined by doctors on his own behalf and on behalf of the underwriters. It was found that he had a 90 per cent. loss of vision in his right eye and that this loss was permanent. On May 15, 1956, the underwriters' doctor reported to them that he agreed with the defendant's doctor that the defendant "is "permanently and totally disabled from taking any further part "in professional football." This last statement goes beyond the medical province. Underwriters had to consider whether the loss of an eye—for they accepted it as that—made it impossible for the defendant ever to resume employment as a professional player. They appear to have had in mind a case of a player who played very well for Chelsea with one eye, and of another who played for England. Clearly, as indeed events in this case showed, it is not impossible to play professional football with one eye only; but it may very well be dangerous and unwise to do so. If the claim had been resisted, it would have been necessary to determine just what is meant by "impossible." But the underwriters took the liberal view and on August 25, 1956, they paid up. They obtained, of course, the signed declaration which, after rectification as agreed, follows the words I have set out.

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In these circumstances one can understand that underwriters felt strongly about it when four months later they heard that the defendant was playing professional football again. The defendant says that when he took the money he intended to give up football. But he spent all the money and then found that it was difficult to get another job. There are always minor clubs keen to have as part-time players stars or distinguished players who are no longer fit enough for first-class football. Cambridge United is a minor club, and in December, 1956, they got in touch with the defendant and offered to find a job for him if he played on a part-time basis. At first the defendant only got a fee for the match but now he is employed at £16 per week. He says that he regarded his undertaking as one which required him to pay the money back if he became a full-time professional in a league club as opposed to a part-time professional in a non-league club.

So the underwriters now sue under the signed declaration to recover the £500 and in this appeal we have to consider two points upon the construction of that document. The material words are: "I hereby declare and agree that I will take no part "as a playing member of any form of professional football in the "future and that in the event of infringement of this condition "I will be subject to a penalty of the amount stated above"—that is, £500.

The first point is what is meant by taking "no part as a "playing member of any form of professional football." The second point is whether "the amount stated above" is correctly described in the document as a penalty for the infringement of the undertaking. If it is, it is conceded that the underwriters cannot enforce it. But it is argued that it is either money payable on an event or upon the true construction of the document a sum agreed as liquidated damages.

On the first point, everyone is agreed that the term "a "playing member of any form of professional football" is ungrammatical, ill-chosen and obscure. In the opinion of the judge, apart from any special rule of construction, the phrase is best interpreted as "a member of a team playing professional "football"; and on that interpretation the undertaking has been broken. I agree that that is the most sensible interpretation to give the words, and I do not on this point wish to add anything to that which has been said by Sellers L.J. The judge has, however, held that the application of the contra proferentem rule leads to a different construction which exonerates the defendant. I am not prepared to say that in this the judge is wrong, though, if I were to go into the point, I should want to invoke a rule of construction rather wider than the contra proferentem. This undertaking and the clause from which it springs are most unusual impositions to put upon an assured. Insurance policies are concerned with events; insurers either pay or do not pay the sum assured according to whether or not the event has happened;

they do not normally exact undertakings from the assured about his future behaviour once he has got the money. The money that they pay out under a policy of this sort is obviously intended to be spent as soon as the assured gets it, it will be his only support while he is looking for another means of livelihood. I think that it can be strongly argued that if underwriters want to get the money back again on the happening of a certain event, they must define the event in clear and unambiguous terms so that the assured can know exactly what he can and cannot do. If they do not do that, they cannot rely upon the promise at all, just as they could not rely upon an exception in their favour unless they express it in clear and unambiguous terms. They must phrase it, as Romer L.J. said in *Houghton* v. *Trafalgar Insurance Co. Ltd.*,[10] so that "the motorist knows exactly where he stands." But I prefer to decide this case upon the other point of construction on which I have arrived at a clear view in the defendant's favour. Although the view is clear in my own mind, I express it with considerable diffidence since I am differing not only from my brethren in this court but also from the judge below.

In the contract which we have to consider, underwriters have asked for a penalty for breach of contract. So the onus is on them to satisfy the court that they did not mean what they said. That is the ordinary rule; and in particular it has been held to be applicable to one who wishes to say that by penalty he meant damages: see *Willson* v. *Love*[11] (*per* Lord Esher M.R.) and *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co. Ltd.*,[12] *per* Lord Dunedin. It is argued in the first place that they must have meant that the money should be a sum payable on an event.

If a man says: "If I play football again, I will pay you £500," his only promise is a contingent promise to pay. If he says: "I will not pay football again and, if I do, I will pay you £500," the practical result may in the end be much the same, but he is making two promises instead of one, the main promise absolute and a supplementary promise contingent as before. In the former case, if he plays football again, he breaks no promise. In the latter case he does. In the latter case the promisee could in suitable circumstances obtain an injunction to enforce the promise; in the former case there is no promise, except that of payment to be enforced. Apart from legal consequences and sanctions there is a difference which honourable men observe; in the one case he has pledged his word and in the other case he has retained full liberty of action.

The two cases are therefore quite different with different consequences, and I know of no way in which the difference between them can be recognised except by looking at the language the parties themselves have used. The language of this contract is

[10] [1954] 1 Q.B. 247, 250; [1953] 3 W.L.R. 985; [1953] 2 All E.R. 1409, C.A.

[11] [1896] 1 Q.B. 626, 630, C.A.

[12] [1915] A.C. 79, 86, 89.

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as plain as a pikestaff. It is said with truth that the underwriters cannot really care whether the defendant plays football again or not, and that they could get all that they really want by providing for the payment of money on an event. If so, why did they ask for and obtain a promise? If words are not rectified, the parties' rights must depend upon the language they actually use and not upon that which they might have used if they had realised that there was a simpler and better way of achieving what they really wanted. It is well settled that if there are two ways of making an arrangement—one clumsy and complicated which avoids a penal statute and the other simple and elegant which falls within it—the clumsy and complicated transaction cannot be brought within the statute by means of an argument that the other way would have been simpler and better. The reverse must also be true. If there are two legal ways of achieving the same result, the parties themselves must choose the way they want and signify their choice by the form they use. The court will not then re-form the contract they have made either to their advantage or to their disadvantage.

For these reasons, this contract cannot, in my judgment, be rewritten as a contingent promise to pay on the event of the defendant's playing professional football. It is argued in the alternative that on the language the parties have used the money is payable on an event, the event being the infringement of the condition. This argument cannot be sound. If it were, every penalty clause would have been enforceable from the beginning of time. In *Cooden Engineering Co. Ltd.* v. *Stanford* [13] it was held by this court that where money was expressed as being payable on an event and that event was also a breach of contract, if the sum was penal in amount it could not be recovered. That was a decision of the majority of the court, Jenkins L.J. dissenting, and there had previously been a difference of judicial opinion on the point. The facts in the present case are stronger against the plaintiff's contention than those in *Cooden Engineering Co. Ltd.* v. *Stanford* in two respects. First, in the present case, the sum is expressed as a penalty. Secondly, in the present case, the breach is the only event upon which the sum is payable, while in *Cooden Engineering Co. Ltd.* v. *Stanford* the sum was payable in a number of events of which one was also a breach. The second respect alone is sufficient to show that the plaintiff's contention gets no support even from the minority view. Jenkins L.J. said [14]: "It remains to consider the first and "more difficult question whether (being, as I have held, penal in "point of amount) the sum payable on determination of the "hiring under clause 11 is a penalty in the relevant sense at all. "In order to be such, the sum in question must, as I understand "the law, be (as I have already described it) a sum which the hirer "undertakes to pay to the owners in the event of, and in respect

[13] [1953] 1 Q.B. 86. [14] Ibid. 109.

"of, some breach by the hirer of the terms of the hire-purchase "agreement. If the agreement contains a provision of that "description, and a breach on the part of the hirer ensues, and "the owners sue for payment of the sum stipulated to be paid in "respect of such breach, then no doubt arises the question of "penalty or no penalty, turning on a comparison between the "stipulated sum and the damages capable of flowing from the "breach or breaches in respect of which the stipulated sum is, "according to the terms of the agreement, expressed to be pay-"able. But the provision here in question does not appear to "me to answer that description. Clause 11 provides for the "determination of the hire in a number of different events and "in some of these events it enables the hiring to be determined "by a specified notice from the owners to the hirer, while in "others of them it causes the hiring to determine automatically."

Then it is said that the essential feature in this case, which differentiates it from all precedent cases, is that the obligation in this contract is not to pay but to repay the £500. It is no doubt convenient to talk of repayment in the circumstances of this case, but it is nonetheless a terminological inexactitude and one which the contract does not itself use. If a distinction is to be drawn between repayment and payment, repayment must mean the handing back of a sum which the payee has never in law been entitled to treat as his own because it has been paid under a mistake of fact or as a deposit or for a consideration which has wholly failed or for some similar reason. This sum was paid to the defendant upon an event and in exchange for a promise. When paid, it was due absolutely and without qualification, and nothing has happened since that has altered the character of the payment. If the defendant now has to pay £500 to the plaintiff, it is not because the plaintiff has shown that he was never truly liable to pay that sum to the defendant but because something has happened which has created a new liability on the defendant to pay a like sum to the plaintiff.

The same point is put in another way when it is argued that, since the plaintiff was liable only in the event of permanent total disablement and since events have shown that the defendant never was totally disabled, his promise to pay it back must be enforceable. This argument appears to me to put underwriters in a dilemma. Either the word "impossibility" in the policy is to be strictly construed or it is not. If it is not, if the definition in the policy is satisfied when the assured shows that on medical advice and with due regard to his own health and safety it is impossible for him to play professional football again, then the claim was a good one and properly met. If it is to be construed strictly as physical impossibility, then the claim was a bad one, but the underwriters paid it with their eyes open. Conceivably they might have made some sort of conditional payment pending some further proof or disproof of permanent total disablement.

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But they sought to protect their interests, not by making a qualified or conditional payment but by obtaining an undertaking. Without this undertaking they would have no cause of action at all, so now their rights depend solely on the undertaking and their remedy must be for the breach of it.

This leads to the alternative case made on behalf of the plaintiff that the £500 can be recovered as liquidated damages. The law on this point is well settled and is summarised by Lord Dunedin in the *Dunlop* case.[15] The £500 must be a genuine covenanted pre-estimate of damage; it must not be imposed in terrorem or be extravagant and unconscionable in amount in comparison with the greatest loss that could follow from the breach. If, as the defendant submits, his resumption of football caused the underwriters no injury so that they could not recover more than nominal damages for the breach of contract, the £500 must be a penalty in reality as well as by description.

The judge considered that the damages for the breach would be substantial because underwriters might in certain circumstances have to pay out a second £500. I should have thought with respect that the risk of having to pay £500 can only properly be estimated at something less than £500; £500 is compensation for the certainty. But it is sufficient to say that this risk only arises if the promise be construed, as the judge construed it, as one by the defendant not to play professional football as a member of the union, for it is only if he is a member of the union that the risk can arise again. If the promise is not so construed, the defendant has not broken it and is not liable to pay anything, either as a penalty or as liquidated damages. This point must therefore be considered on the other construction on which there is no possibility of the underwriters suffering any substantial damage under this head.

In this court it has been argued that the underwriters would not have paid the money except in exchange for the promise and therefore that the amount of their payment must be taken as the measure of the damage which they have suffered. This is not the law. Damages are not measured at the price which the aggrieved party has thought it worthwhile to pay for the undertaking he has obtained; they are measured by the harm done to him by the breach. They are to be estimated as the sum necessary to put him in the same position as if the contract had not been broken, not in the same position as if the contract had not been made. By this argument the underwriters are seeking to treat the case as analogous to one in which the consideration for the payment had wholly failed; apart from other objections, the undertaking was only part of the consideration for the £500.

There is, therefore, no evidence of any direct damage flowing from the breach. But in the *Dunlop* case[16] it was held that for the purposes of this branch of the law indirect as well as direct

[15] [1915] A.C. 79, 86. [16] [1915] A.C. 79.

damage must be considered. In that case the sum was payable for breach of an undertaking given by the buyer to the seller of goods not to sell them below list price. The sale below list price did the seller no direct damage, but it was held to damage him indirectly. Lord Parker of Waddington put the point succinctly when he said [17] that the damage consisted "in the disturbance "or derangement of the system of distribution by means of which "the appellants' goods reach the ultimate consumer."

The most that can be said here by way of comparison is that underwriters are interested as a matter of principle in paying only claims for genuine permanent total disablement. Is that the sort of thing that Lord Parker would have had in mind? In my opinion it is not. A system for the distribution of goods is a concrete thing capable of commercial injury; a rule or principle whereunder only just claims are met is abstract. If underwriters can be said to have a "system" of paying only claims for permanent total disablement within the meaning of the policy, that system was not disturbed or deranged by the assured's act in playing football again. I can only repeat the reasoning I have already used. If the test of "impossibility" is the strict one, the underwriters' loss was caused by their own act in paying a claim that they knew not to be within the policy. If the test is the liberal one, then payment of a good claim cannot cause disturbance or derangement of any system. Either way the defendant's act in playing football has caused the underwriters no injury. All he has done is to demonstrate as a fact something which everybody at all material times knew to be the fact, namely, that he was physically capable of playing football again if he wanted to.

If this reasoning be dismissed and if it becomes necessary to examine all the circumstances in order to see whether the plaintiffs' real object was to compensate themselves for a loss or to deter the defendant from a course of action, I entertain no doubt that it was the latter. I am satisfied that their intention, so far as it can be inferred from the material before the court, was to exact a penalty. Clearly underwriters cannot care at all whether the assured plays football or not. Why, then, do they demand the promise? Theoretically it is futile for underwriters to require of a man a promise that he will not perform the impossible. But in practice, as this case shows, claims that fall short of proof of impossibility may be made and met. Underwriters are not interested in whether the assured plays football again but they are interested in diminishing the number of claims they have to meet. A very good way of doing that is to demand, as a sort of guarantee, a promise that the assured will not play again; playing is his livelihood, and if he has any real capacity left for it he will not sell it for £500. I cannot see that the promise is of any use to underwriters except as an instrument for restricting

[17] [1915] A.C. 79, 99.

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claims. But it is not of great use for that purpose unless it has a sanction and the sanction is the penalty prescribed. I can see no reason at all for thinking that the object of this clause is not expressed clearly and precisely in the language which the underwriters themselves have used.

In saying this I imply no criticism of underwriters. They are perfectly open about what they are doing. They do not even seek to veil the word "penalty." They might keep claims down by insisting on a literal fulfilment of the definition of "permanent "total disablement," and then the undertaking would be of no added use to them. They do it instead—and no doubt more satisfactorily for all concerned—by taking a more liberal view of the definition and seeking to penalise claimants who take money when they are still fit for professional football and prepared to play it. Unfortunately for themselves, underwriters have chosen a way which the law does not permit them to enforce. It does not help them if they are not acting unconscionably in this particular case. The meaning and effect of the clause, as Lord Dunedin said in the *Dunlop* case,[18] has to be considered as at the date of the contract and not at the date of the breach. It has, moreover, to be tested in the light of its potentialities and not by speculation about how decent underwriters might be expected to use it. It could be used extremely harshly. Under it a man who years after his accident and after he has spent the benefit he has received has taken payment for a single game might be faced with a demand that might ruin him. It is because it is capable of such harsh use that equity deems a penalty clause to be unconscionable unless it can be justified by showing that the penalty bears a reasonable relation to the injury done by the breach and is a genuine estimate of the damage occasioned.

I would therefore dismiss the appeal and uphold the judgment for the defendant. Since it has appeared from this case that underwriters have now adopted a new form of undertaking which does not use the word "penalty" and which may in the future come up for consideration, I think it wise to say that I have not formed any opinion about the construction of the new form. Clearly, it places underwriters in a better position than they are in in the present case, for the burden will then be on the assured to show that the payment is in truth a penalty though not so described. Whether he can successfully discharge that burden may have to be determined in some future case. I think it wise to say also that, although in the course of this judgment I have canvassed alternative meanings of the word "impossibility" in the policy, I have reached no conclusion about the true meaning.

SLADE J. I agree with the judgment of Sellers L.J. It is clear from clause 1 of the policy dated August 8, 1955, that the

[18] [1915] A.C. 79, 87.

sole basis of the payment of £500 to the defendant was that the injury he sustained had occasioned him "permanent total "disablement" as defined in definition clause 4 of the policy. By definition clause 4, "permanent total disablement" is deemed to have arisen if, as a result of his injury, the member has been disabled from playing association football for six consecutive months "and has become so permanently incapacitated "as to make it *impossible* for him ever to resume employment "as a *professional* player of association football." General condition 4 provides the machinery for establishing permanent total disablement to the satisfaction of the underwriters so that payment can be made after the expiration of the period of six months.

General condition 8 gives the necessary protection to the underwriters in case future events should falsify the medical certificates (see general condition 2) which had established to the satisfaction of the underwriters that the defendant had in fact suffered permanent total disablement. The effect of general condition 8 is, as Sellers L.J. has pointed out, to make a payment for permanent total disablement conditional and not final. The best evidence of falsification by subsequent events would of course be that the defendant had achieved the "impossible" by resuming employment as a professional player and by actually playing professional football.

The policy was a contract between the underwriters and the union, albeit one made by the union for the benefit of its members, of whom the defendant was one.

General condition 8 provides that no claim for permanent total disablement shall be paid until the claimant has given to the underwriters a "signed declaration." It does not mention the word "agree." The document this court has to construe *does*, however, use the words "I hereby declare *and agree*."

In the light of the sole purpose for which this document was required by the underwriters, and for which it came into existence, namely, to enable them to recover their money if the "permanent" total disablement turned out to be merely temporary, I am unable to construe the words "I hereby declare and "agree that I will take no part as a playing member of any form "of professional football in the future" as imposing a contractual obligation upon the defendant never again to play professional football.

The sole concern of the underwriters, for whose protection the document alone came into existence, was not to stop the defendant from playing professional football again but to recover their £500 if he did so and thereby established conclusively that he had never at any time been *permanently* totally disabled from doing so.

It seems to me quite unrealistic to construe the document as imposing a *contractual* ban upon the defendant from playing

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professional football again. I should have thought that the underwriters would welcome his doing so, since that was their only hope of recovering their £500. They certainly could not recover it, however fit the defendant became to play professional football again, if he refrained from playing it or if he played football again but confined himself to the amateur game.

I would allow this appeal and enter judgment for the plaintiff for £500.

Appeal allowed. No order as to costs.

Solicitors: *William Charles Crocker; Vizard, Oldham, Crowder & Cash for Wild, Hewitson & Shaw, Cambridge.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

1961
Feb. 2, 3, 14.
Lord Parker C.J., Winn and Widgery JJ.

REGINA *v.* CHERTSEY JUSTICES. *Ex parte* FRANKS.

Town Planning—Enforcement notice—Prosecution for non-compliance —Continuing offence — Information charging further offences not heard until more than six months after date—Penalty dated back to previous conviction—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 24 (3)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 104.

Crown Practice — Certiorari — Error of law on face of record — Oral decision—Fine based by justices on misconception of law—Written register of conviction—Oral decision a speaking order.

Justices—Limitation—Continuing offence—Town planning—Breach of enforcement notice—Breaches more than six months prior to date of information.

A farmer failed to comply with an enforcement notice requiring him to discontinue the use of certain land as a caravan site and was convicted of an offence under section 24 (3) of the Town and Country Planning Act, 1947.[1] He continued to ignore the notice and on July 2, 1958, he was convicted of a further offence under the section. As he still continued the offending use, on November 13, 1958, an information was laid against him alleging that he had continued to use or permit the land to be used in contravention of the terms of the notice and of section 24 (3), but that information was not heard until March 9, 1960, on which date justices

[1] Town and Country Planning Act, 1947, s. 24 (3): "Where, by virtue "of an enforcement notice, any use "of land is required to be discon- "tinued, . . . then if any person, "without the grant of permission in "that behalf under this Part of this "Act, uses the land or causes or "permits the land to be used, . . . "in contravention of the notice, he "shall be guilty of an offence and "liable on summary conviction to a "fine not exceeding £50; and if the "use is continued after the convic- "tion, he shall be guilty of a further "offence and liable on summary con- "viction to a fine not exceeding £20 "for every day on which the use is "so continued."

convicted him and fined him £1,338. Stating the decision of the justices, the chairman said that they would impose a fine at the rate of £3 a day from the date of the last conviction, which was 446 days earlier. The notice of fine served on the farmer did not disclose the basis of the fine.

On an application for an order of certiorari to bring up and quash the decision of the justices on the ground that they had acted in excess of jurisdiction, in that they had purported to try an information, and to convict and fine the applicant in respect of offences alleged to have been committed more than six months before the date on which the information had been laid:—

Held, (1) that the offence was a continuing offence which occurred from day to day, and the justices were precluded by section 104 of the Magistrates' Courts Act, 1952,[2] from hearing the information in so far as it alleged an offence occurring more than six months before its date.

Verney v. *Fletcher (Mark) & Sons Ltd.* [1909] 1 K.B. 444; 25 T.L.R. 248, D.C. and *Reg.* v. *Slade, Ex parte Saunders* [1895] 2 Q.B. 247, D.C. applied.

(2) That on the true construction of the words in the final sentence of section 24 (3) of the Town and Country Planning Act, 1947, a person who committed a further offence was liable to a fine not exceeding £20 for every day on which an offence triable by the justices was committed, and therefore, as the justices were not, by virtue of section 104 of the Magistrates' Courts Act, 1952, concerned with an offence committed on any day more than six months prior to the date of the information, they could not impose a daily penalty in respect of any such day.

(3) That where the decision of the bench was announced orally it was that oral order and not the written register of conviction which an applicant for an order of certiorari must seek to quash, and as the oral decision in the present case was a speaking order giving reasons which disclosed an error of principle certiorari would go and the conviction would be quashed.

APPLICATION for order of certiorari.

The following facts are taken substantially from the judgment: The applicant, Eric Ralph Pentz Franks, was the owner and occupier of Glenridge Farm, Callow Hill, in the urban district of Egham in the county of Surrey. He used the land at all material times as a caravan site, certain caravans and other movable dwellings being stationed thereon. On October 7, 1957, the Egham Urban District Council, to whom the appropriate powers had been delegated by the Surrey County Council, the local planning authority under the Town and Country Planning Act, 1947, served on the applicant an enforcement notice under section 23 of the Act, requiring him to discontinue the use of the land as a caravan site, on the grounds that such use had been begun without permission. He was required to remove the caravans from the land. The applicant failed to comply with

[2] Magistrates' Courts Act, 1952, s. 104: "Except as otherwise "expressly provided by any enactment, a magistrates' court shall not "try an information or hear a complaint unless the information was "laid, or the complaint made, within "six months from the time when the "offence was committed, or the "matter of complaint arose: . . ."

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the enforcement notice, and on July 2, 1958, he was convicted by justices of an offence under section 24 (3) of the Act. Notwithstanding that conviction the applicant continued to ignore the enforcement notice, and on December 17, 1958, he was convicted of an offence of the kind created by the final sentence of section 24 (3) of the Act, namely, of continuing the offending use after his initial conviction, and fined £334, a sum calculated at the rate of £2 a day over a period of 167 days' default. The applicant appeared to have been undeterred by those two convictions because his use of the land as a caravan site continued, and on November 13, 1959, a further information was laid on behalf of the Egham Urban District Council alleging an offence under section 24 (3). That information, after reciting the conviction of December 17, 1958, alleged that the applicant had nevertheless continued "and continues to use or permit to be "used the said land in contravention of previous planning control "and of the terms of the said notice and of section 24 (3) of the "Town and Country Planning Act, 1947." The information was not heard until March 9, 1960, but on that date the applicant was convicted of the offence with which he was charged and fined £1,338. The notice of fine subsequently sent by the court to the applicant did not disclose how that sum was arrived at. It appeared from an affidavit of one Kenneth Greenwood, a solicitor who appeared on behalf of the applicant before the justices, that in announcing the decision of the justices their chairman used words to the following effect: "We find the case proved and we "shall impose a fine at the rate of £3 a day from the date of "the last conviction to date, that is 446 days."

The applicant moved for an order of certiorari to bring up and quash the conviction on the ground that the justices had acted in excess of the jurisdiction of the court in that they had purported to try an information, to convict the applicant and to order him to pay a fine in respect of an offence or offences alleged to have been committed more than six months before the date on which the information had been laid.

Douglas Frank for the applicant.

Neil McKinnon Q.C. and *Jeremiah Harman* for the local authority.

The following cases (other than those referred to in the judgment) were cited in argument: *Reg.* v. *Willesden Justices, Ex parte Utley*[3]; *Chepstow Electric Light and Power Co.* v. *Chepstow Gas and Coke Consumers Co.*[4]; *Rowley* v. *Everton &*

[3] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838, D.C.

[4] [1905] 1 K.B. 198; 21 T.L.R. 35, D.C.

Sons Ltd.[5]; *Rumball* v. *Schmidt*[6]; *Morant* v. *Taylor*[7]; *Airey* v. *Smith.*[8]

Cur. adv. vult.

Feb. 14. LORD PARKER C.J. Widgery J. will give the judgment of the court.

WIDGERY J. In these proceedings Mr. Frank moves for an order of certiorari to bring up and quash a decision of justices of the peace for the county of Surrey sitting in petty session at Chertsey convicting the applicant of an offence under section 24 (3) of the Town and Country Planning Act, 1947, and ordering him to pay a fine of £1,338 and costs. [His Lordship stated the facts and continued:] In attacking the decision of the justices, Mr. Frank referred us to section 104 of the Magistrates' Courts Act, 1952, which is in the following terms: "Except as otherwise "expressly provided by any enactment, a magistrates' court shall "not try an information or hear a complaint unless the informa-"tion was laid, or the complaint made, within six months from "the time when the offence was committed, or the matter of "complaint arose: . . ."

Mr. Frank contends that, though the offence charged is a continuing offence committed the day after the initial conviction and thereafter occurring and repeated each day, the time-limit in the Magistrates' Courts Act, 1952, runs from each day as though charged as a separate offence. It follows, in his submission, that the justices had no jurisdiction to hear the information so far as it alleged or may be taken to have alleged any offence committed more than six months prior to its date. It would also follow, according to his argument, that the daily penalty of £20 could not be imposed in respect of any day prior to the earliest day to which the justices could have regard for the purpose of deciding whether an offence was then committed. He referred us to *Reg.* v. *Slade, Ex parte Saunders*,[1] where an order for payment of a daily penalty on failure to comply with a closing order under the Public Health (London) Act, 1891, had been quashed on the ground that it could not validly be made in respect of a longer period than that of six months prescribed by section 11 of the Summary Jurisdiction Act, 1848.

Mr. Frank contends that in the present case the justices have clearly imposed the reduced daily penalty of £3 over and in respect of a longer period than that of six months prior to the date of the information, and that as the conviction and sentence occurred prior to the coming into force of section 16 of the

[5] [1941] 1 K.B. 86; 57 T.L.R. 86; [1940] 4 All E.R. 435, D.C.
[6] (1882) 8 Q.B.D. 603, D.C.
[7] (1876) 1 Ex.D. 188, C.A.
[8] [1907] 2 K.B. 273; 23 T.L.R. 447, D.C.
[1] [1895] 2 Q.B. 247, D.C.

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Administration of Justice Act, 1960, this court has no power to rectify the error by amendment.

The argument put forward by Mr. McKinnon for the local planning authority can be summarised in three main propositions. First, it is said that the offence of continuing an unlawful use after the initial conviction is a single offence, albeit a continuing one, and that, if that offence continues for as much as one day into the period of six months preceding the information, the justices may hear that information, and section 104 of the Magistrates' Courts Act, 1952, contains nothing to limit the penalty to be imposed when once it is established that the information itself can be heard.

Secondly, and alternatively, Mr. McKinnon says that, if the justices are required to disregard that part of the information which relates to an offence committed outside the six months' period, the daily penalty is no more than a measuring rod to determine the maximum penalty for those offences, and that on proof of an offence within the six months' period the penalty for that offence can be calculated throughout the whole period for which the offending use has continued subsequent to the previous conviction. If this be correct it seems logical that, in the present case, the penalty imposed on March 9, 1960, might have been calculated with reference to the entire period since July 2, 1958, notwithstanding the intervening conviction and fine on December 17, 1958, but Mr. McKinnon says that such apparent duplication of penalties would be contrary to a general principle of the common law that a man may not be punished twice for the same default. Lastly, Mr. McKinnon contends that there is no excess of jurisdiction or error of law on the face of the record and that this is not a proper case for certiorari.

We cannot accept Mr. McKinnon's first contention. In our judgment this continuing offence occurs from day to day, as did the infringement of the Factory and Workshop Act, 1901, in *Verney* v. *Fletcher (Mark) & Sons Ltd.*,[2] and section 104 of the Magistrates' Courts Act, 1952, is effective to prevent the justices from hearing the information so far as it alleged an offence occurring more than six months before its date. Apart from the fact that that occurrence from day to day is a natural feature of such a continuing offence, it seems to us that Mr. McKinnon's insistence upon the offence being one and indivisible is inconsistent with the local planning authority's own view—which we accept—that the conviction on December 17, 1958, did not present the applicant with a defence of autrefois convict when the information of November 13, 1959, was heard.

The question raised by Mr. McKinnon's second contention turns on the proper construction of section 24 (3) of the Act of 1947. After consideration we think that the final sentence of the subsection, namely, "he shall be guilty of a further offence

[2] [1909] 1 K.B. 444; 24 T.L.R. 248, D.C.

"and liable . . . to a fine not exceeding £20 for every day on "which the use is so continued," is to be construed as meaning a fine not exceeding £20 for every day on which an offence triable by the justices was committed. The alternative meaning which the language of the section could be said to bear would be much more onerous for the offender. If he were to be made liable indirectly to a penalty referable to each day on which he de facto offended but in respect of which no triable offence could have been alleged by the information initiating the charge (or if so alleged could not have been the subject of a conviction) some such periphrasis as "to a fine not exceeding an amount equiva-"lent to £20 per day on which . . ." would have been more appropriate and could easily and naturally have been employed. The expression "fine . . . for every day . . ." tends to connote a fine for an offence on a day falling in point of date within the trial jurisdiction rather than a daily factor of calculation of the total.

In our judgment a penal provision of this kind should not be given a wider interpretation in the absence of clear words, and we prefer a construction which avoids the possible duplication of penalties referred to earlier in this judgment even though we recognise that Parliament may have intended to increase the severity of successive sentences as a deterrent to the persistent offender. In view of the terms of section 104 of the Magistrates' Courts Act, 1952, the justices in the present case were not concerned with an offence committed on any day falling more than six months prior to the information, nor could they, in our judgment, impose a daily penalty in respect of any such day.

Even on this basis it was open to the justices to impose a very much heavier penalty than the fine of £1,338 which they inflicted on the applicant, and this is the basis of Mr. McKinnon's submission that no excess of jurisdiction is disclosed in the notice of fine. Where, however, the chairman of justices announces the decision of the bench, it is this oral order and not the written register of convictions which the applicant must seek to quash.

Where, as in this case, the oral decision is a speaking order, and gives reasons which disclose an error of principle, certiorari will go. In the absence of any power to alter the fine, this court must, with some reluctance, quash the conviction.

Appeal allowed with costs.
Certificate that a point of law of general public importance involved.
Leave to appeal refused.

Solicitors: *Sharpe, Pritchard & Co. for Horne, Engall & Freeman, Egham; Champion & Co.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

March 1. 1961 *Feb.* 28;

Lord Parker C.J., Winn and Widgery JJ.

CLAPHAM *v.* NATIONAL ASSISTANCE BOARD.

Bastardy—Affiliation order—National assistance—Complaint by mother—Appeal against affiliation order allowed by quarter sessions on the merits—Subsequent complaint by National Assistance Board—Whether entertainable—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 44.

On February 18, 1959, on a complaint under section 1 of the Affiliation Proceedings Act, 1957, by the mother of an illegitimate child, justices adjudged the defendant to be the putative father of the child and made an affiliation order against him. The defendant, who had not given evidence before the justices, appealed to quarter sessions where he gave evidence which was supported by that of another witness. Quarter sessions allowed the appeal on the merits and set aside the affiliation order. In August, 1960, the National Assistance Board, which had given assistance under Part II of the National Assistance Act, 1948, by reference to the requirements of the child, laid a complaint against the defendant applying under section 44 of that Act [1] for a summons to be served on the defendant under section 1 of the Act of 1957.[2] The justices, despite a submission on behalf of the defendant that they had no jurisdiction, heard further evidence and, holding that there was corroboration of the mother's evidence, made an affiliation order against the defendant. The defendant appealed, contending, in reliance on the words "shall in all other respects . . . proceed as "on an application by the mother" in section 44 (3) of the Act of 1948, that the right of the board under section 44 was merely a right to apply for a summons, and that on the hearing of the complaint the board had no better right than the mother so that, since the decision of quarter sessions on the merits was final and the substantive issue between him and the mother was settled, the justices ought not to have proceeded:—

[1] National Assistance Act, 1948, s 44: "(1) The following provisions "of this section shall have effect "where—(*a*) assistance is given under "Part II of this Act by reference to "the requirements of an illegitimate "child . . . (2) If no affiliation order "is in force, the board . . . may "within three years from the time "when the assistance was given . . . "make application to a court of summary jurisdiction having jurisdiction in the place where the mother "of the child resides for a summons "to be served under section 3 of the "Bastardy Laws Amendment Act, "1872. (3) In any proceedings on "an application under the last foregoing subsection the court shall hear "such evidence as the board . . . "may produce, in addition to the "evidence required to be heard by "section 4 of the said Act of 1872, "and shall in all other respects . . . "proceed as on an application made "by the mother under the said "section 3."

[2] Affiliation Proceedings Act, 1957, s 1: "A single woman . . . who has "been delivered of an illegitimate "child, may apply by complaint to a "justice of the peace for a summons "to be served on the man alleged by "her to be the father of the child."

S. 4: "(1) On the hearing of a "complaint under section 1 of this "Act the court shall hear the evidence "of the mother . . . and such other "evidence as she may produce, and "shall also hear any evidence tendered by or on behalf of the defendant. (2) If the evidence of the "mother is corroborated in some "material particular by other evidence to the court's satisfaction, the "court may adjudge the defendant "to be the putative father of the child "and may also . . . proceed to make "against him an order . . ."

Held, that the right of the board under section 44 of the Act of 1948 was not limited to the right to apply for a summons, but was an independent substantive right, independent and separable from any right which the mother would have had, to obtain an affiliation order, and at no stage did the board step into the shoes of the mother. The issue between the defendant and the board, therefore, had not been determined and the justices had jurisdiction to hear the board's complaint.

National Assistance Board v. *Mitchell* [1956] 1 Q.B. 53; [1955] 3 W.L.R. 591; [1955] 3 All E.R. 291, D.C. and *National Assistance Board* v. *Tugby* [1957] 1 Q.B. 506; [1957] 2 W.L.R. 316; [1957] 1 All E.R. 509, D.C. applied.

Per curiam. The application referred to in section 44 (3) is the application for a summons, and the opening words "In any "proceedings on an application under the last foregoing subsection" should be interpreted as meaning "in any proceedings arising out "of an application for a summons"; similarly, the last words of the subsection "proceed as on an application made by the mother" mean that the court should "proceed as on a complaint arising out "of an application made by the mother" under section 1 of the Act of 1957 (post, p. 455).

CASE STATED by West Riding of Yorkshire justices sitting at Ossett.

On August 3, 1960, a complaint was laid by the National Assistance Board against the appellant, James Willie Clapham, that a certain woman alleged that he was the father of an illegitimate child born on December 28, 1958, of which she was the mother and that, assistance having been given under Part II of the National Assistance Act, 1948, on July 25, 1960, and divers other days by reference to the requirements of the child, the board applied under section 44 (2) of the National Assistance Act, 1949, for a summons to be served on the appellant under section 1 of the Affiliation Proceedings Act, 1957.

The following were among the facts found by the justices. The mother gave birth to an illegitimate child on December 28, 1958, and national assistance was first paid by reference to the requirements of the child under Part II of the National Assistance Act, 1948, on January 12, 1959, and thereafter had been paid weekly. On February 18, 1959, the same court heard a complaint by the mother against the appellant under section 1 of the Affiliation Proceedings Act, 1957, when evidence was given by the mother and a statement made to the court by the appellant but no other evidence was given, and the court adjudged the appellant to be the putative father of the child and made an affiliation order. The appellant appealed to quarter sessions and his appeal was heard on March 16, 1959: evidence was given by the mother and on her behalf by her mother and a police constable. The appellant gave evidence and evidence was given on his behalf by another person. Quarter sessions allowed the appeal, with the result that the affiliation order was set aside. The board was not a party to the proceedings before the justices on February 18, 1959, or to the subsequent appeal. There was no affiliation order

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in force relating to the child either on August 3, 1960 (the day when the board's complaint was made) or at the date, October 12, 1960, when the justices heard that complaint.

It was contended by the appellant, inter alia, that the mother had applied to the justices for a bastardy order in respect of a male child born to her and alleged that he was the father; that on that allegation being put to him, he declined to have the matter dealt with by the Ossett borough justices; that the justices having proceeded to hear the case had made an order in favour of the mother; that he appealed to quarter sessions on the grounds (1) that the finding was contrary to the weight of the evidence, (2) that there was no or not sufficient evidence, and (3) that he was not the father of the child; that his appeal was upheld at quarter sessions and was, therefore, a finding "on "the merits" of the case; that where a matter had been before quarter sessions and the appeal had been dismissed or upheld on its merits, the decision of quarter sessions was final and that, the decision of quarter sessions being final no other proceedings could be brought before the justices in respect of the complaint. It was submitted that the mother might make any number of applications to the justices provided that, if her first application be dismissed on its merits, she produced fresh evidence which should be of a weighty or serious kind, but that where her claim had been dismissed on appeal to quarter sessions on its merits that decision stood and was res judicata and no further proceedings before the justices could be brought in respect of that complaint; that the main purpose of section 44 of the National Assistance Act, 1948, was to protect the interests of the board where monetary assistance had been given to a person who for some reason had failed to take proceedings before the justices and then found herself out of time; that the main purpose of the Act was to protect public revenue and to provide machinery for recovery of sums paid to persons in need; and that the Act was not designed to create fresh causes of action or to enable the board to step in and bring proceedings on behalf of a person who had already exercised her legal rights and remedies and had been subject to a contrary decision.

It was contended by the board that assistance was in payment by reference to the requirements of the child; that the appellant was the father of the child; that corroborative evidence of that was given by persons other than the child's mother; that no affiliation order was in force in relation to the child; that the board's right of action under the National Assistance Act, 1944, was separate and distinct from the mother's right under section 1 of the Affiliation Proceedings Act, 1957; that section 44 was a financial section giving the board power to recover expenses; that that power could not be derogated by virtue of the acts, omissions or conduct of the mother or any other person or by any decision to which the board had not been a party; that the fact that the mother had herself taken action against the appellant

under section 1 of the Act of 1957 and had obtained an affiliation order and that that order had been set aside by quarter sessions in no way fettered the board's right of action under section 44 of the Act of 1948; that even if further action under the Act of 1957 by complaint on the part of the mother might be effectively barred by the decision of quarter sessions, that decision neither barred the rights of the board nor relieved the board from carrying out its duties under the provisions of a different statute, namely the Act of 1947; that section 44 of the Act of 1948 contained its own conditions which had to be satisfied in order to give jurisdiction to justices to whom a complaint had been made and in the present case all those conditions were satisfied; and that the board was in a position to tender material evidence which had not been tendered by the mother to quarter sessions.

The justices decided that they had jurisdiction to hear the case and, having proceeded to find further facts, held that there was corroboration of the mother's evidence and made an order adjudging the appellant to be the putative father of the child and ordering him to pay £1 10s. per week to the mother for the maintenance and education of the child until it should attain the age of 16 years.

The appellant appealed, the question for the opinion of the court being whether the justices had in fact jurisdiction to hear the board's complaint.

M. E. Bathurst for the appellant.
J. R. Cumming-Bruce for the board.

The following cases were referred to in argument: *National Assistance Board* v. *Mitchell*[3]; *National Assistance Board* v. *Tugby*[4]; *National Assistance Board* v. *Parkes*[5]; *Oldfield* v. *National Assistance Board*[6]; *National Assistance Board* v. *Wilkinson*[7]; *Stopher* v. *National Assistance Board*[8]; *Reg.* v. *Glynne*[9]; and *Anderson* v. *Collinson*.[10]

LORD PARKER C.J. This is an appeal by James Willie Clapham, by case stated by justices for the West Riding of the County of Yorkshire, sitting at Ossett, from an order made by the justices on October 12, 1960, whereby they found that he was

[3] [1956] 1 Q.B. 53; [1955] 3 W.L.R. 591; [1955] 3 All E.R. 291, D.C.
[4] [1957] 1 Q.B. 506; [1957] 2 W.L.R. 316; [1957] 1 All E.R. 509, D.C.
[5] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1, C.A.
[6] [1960] 1 Q.B. 635; [1960] 2 W.L.R. 423; [1960] 1 All E.R. 524, D.C.
[7] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255, D.C.
[8] [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700, D.C.
[9] (1871) L.R. 7 Q.B. 16.
[10] [1901] 2 K.B. 107; 17 T.L.R. 425.

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the putative father of an illegitimate infant born on December 28, 1958, and ordered payment of weekly sums to the mother for the maintenance and education of the child.

The complaint was made by the National Assistance Board under their powers under section 44 of the National Assistance Act, 1948, they having paid national assistance by reference to the requirements of the child from January 12, 1959. The appellant's grounds of appeal, are, broadly speaking, that the justices had no jurisdiction in the circumstances of this case to make the affiliation order in question.

The short facts were these: the mother, as I have said, gave birth to this child on December 28, 1958. On February 18, 1959, the justices heard a complaint made by her against the appellant under section 1 of the Affiliation Proceedings Act, 1957. Evidence was given by the mother and a statement was made to the court by the appellant. The justices adjudged that he was the putative father of the child, and made an affiliation order against him. He then appealed to the appeals committee of quarter sessions, where the case was re-heard. Evidence was given again by the mother and also by her mother and two other witnesses. The appellant on this occasion gave evidence, and he was supported in what in effect was an alibi by another witness. The appeal was allowed on the merits and the affiliation order was set aside. Thereafter, as I have said, the National Assistance Board, having paid national assistance by reference to the requirements of the child, preferred a complaint on their own behalf. In those proceedings they called further evidence than the mother had been able to call on the previous occasion and in effect destroyed the alibi which the appellant had raised with success before the appeals committee of quarter sessions. The justices, on the evidence before them, holding that there was corroboration of the mother's story, made this affiliation order.

Mr. Bathurst, for the appellant, admits that there was plainly evidence before the justices on which they were entitled to make the order, always on the assumption that they had jurisdiction. What is said, quite shortly is that as between the parties to the original complaint, namely, the mother and the appellant, the decision of quarter sessions is final; it was a decision on the merits and as between those two parties the position is settled. The argument in the present case is that the National Assistance Board in effect stepped into the shoes of the mother and that, accordingly, the issue is settled as between the appellant and the National Assistance Board, and the justices ought not to have proceeded further.

The relevant provisions are to be found in the Affiliation Proceedings Act, 1957, and the National Assistance Act, 1948 Section 1 of the Affiliation Proceedings Act, 1957, provides: "A "single woman who is with child, or who has been delivered of "an illegitimate child, may apply by complaint to a justice of the "peace for a summons to be served on the man alleged by her

"to be the father of the child." Section 2 deals with the time within which such an application can be made, and section 4, which is the well-known section, provides, by subsection (1), that the justices must hear the evidence of the mother and such other evidence as she may produce and shall also hear any evidence tendered by or on behalf of the defendant. Subsection (2) deals with corroboration, and provides: "If the evidence of the mother "is corroborated in some material particular by other evidence to "the court's satisfaction, the court may adjudge the defendant "to be the putative father of the child and may also, if it thinks "fit in all the circumstances of the case, proceed to make against "him an order (referred to in this Act as 'an affiliation order') "for the payment by him of" certain expenses and sums by way of maintenance.

The National Assistance Act, 1948, by section 44, gives the National Assistance Board certain rights as against a putative father. [His Lordship read subsections (1) (2) and (3) and continued:] I think that this much is clear and laid down by authority, that section 44 is giving to the National Assistance Board a wholly independent and separable right from that of the mother. Thus, in *National Assistance Board* v. *Mitchell* [1] it was held "that the board's right to apply for an order under the Act "of 1948 was entirely separate from the mother's right under the "Act of 1872; and provided that the board applied within three "years of the date on which they last gave assistance they were "entitled to apply for an order on proving that the children were "bastards in respect of whom an order could have been made "under the Act of 1872"; that was the Bastardy Laws Amendment Act, 1872, which was in force until the Affiliation Proceedings Act, 1957, was passed.

The same also appears from *National Assistance Board* v. *Tugby* [2] where again Lynskey J. said [3]: "The effect of section "44 is to give the board a right independent of and separable "from any right given to the mother by the Bastardy Acts, and "even though she herself has lost her right by effluxion of time "or otherwise by marriage to apply."

The argument raised on behalf of the appellant stresses the fact that in both those cases the independent and separable right which was held to exist in the National Assistance Board was merely a right to apply for a summons. The argument goes on that, once the justices come to hear the complaint, then, except that they shall hear such evidence as the National Assistance Board may produce, they shall, in the words of subsection (3) of section 44, "in all other respects . . . proceed as on an application "made by the mother under the said section 1 of the Act of 1957." Accordingly, if I may summarise Mr. Bathurst's argument, he

[1] [1956] 1 Q.B. 53; [1955] 3 W.L.R. 591; [1955] 3 All E.R. 291.

[2] [1957] 1 Q.B. 506; [1957] 2 W.L.R. 509, D.C.; [1957] 1 All E.R. 316.

[3] [1957] 1 Q.B. 506, 512.

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says, True, section 44 gives the board three separate rights: it gives them a right to apply for a summons even if the mother could not, either because she is too late or because she is no longer a single woman; secondly, the board have a right to tender evidence themselves; thirdly, they have a right to get an affiliation order in their favour. But again, to quote the words of subsection (3) "in all other respects" they have no separate rights, but they step into the shoes of the mother, and stepping into the shoes of the mother they have, so the argument runs, no better right than she would have if she had made the application. In the present case quarter sessions decided against the mother on the merits and she is bound by that decision. Accordingly, so it is said, the board is also bound by that decision and the justices had no right to hear and determine the case as they did.

I am quite unable to accept that argument. It seems to me clear, as I have said, that section 44 gives a new, independent substantive right to the National Assistance Board, and I am quite unable to accept the argument that that separate independent right is limited to a right to apply for a summons. It is a right, as it seems to me, to get an affiliation order made in their favour, independent of what right the mother would have had. True, in *Mitchell's* case [4] and *Tugby's* case [5] the wording in the judgments was limited to an independent and separable right to apply for a summons, but in both those cases that was the question before the court. The court was not considering, and did not have to consider, whether the board had the further independent right to get an affiliation order in their own favour. It seems to me to a high degree artificial to say that, while there is a wholly separable and independent right to apply for a summons, yet, when the complaint is heard, that separate and independent right is limited in the way suggested. Full effect can be given to the words of subsection (3) of section 44 by treating the subsection as a purely procedural section. Indeed, that is how it was referred to by Lord Goddard C.J. in *Mitchell's* case,[6] where, having referred to subsections (2) and (3), he said [7]: "That seems to me to be a procedural section." It is true that he was referring to the whole section, but it is quite clear in the context that Lord Goddard C.J. was referring to subsections (2) and (3) of that section. I agree that subsection (3) is purely procedural and, as it seems to me, the words "and shall in all "other respects, but subject to the provisions of the next following subsection, proceed as on an application made by the "mother under the said section [one]" are clearly necessary to ensure that the justices, inter alia, should apply the principle that corroboration in some material particular is required and, indeed, to deal with the payment of expenses and maintenance

[4] [1956] 1 Q.B. 53.
[5] [1957] 1 Q.B. 506.
[6] [1956] 1 Q.B. 53.
[7] Ibid. 56.

save in so far as those provisions are altered by subsection (4) of section 44.

Accordingly, as it seems to me, the National Assistance Board have a quite independent and separable right from the mother not merely to apply for a summons but to obtain an affiliation order. At no stage do they step into the shoes of the mother, and the issue as between them and the putative father has not been determined, it having been long recognised that an affiliation order is not a proceeding in rem.

I would add only one further matter. Subsection (3) of section 44 is not, in my judgment, very happily worded. It begins by saying: "In any proceedings on an application under "the last foregoing subsection." The application referred to is, therefore, an application for a summons, and it seems to me that subsection (3) must be interpreted as meaning: "In any pro-"ceedings arising out of an application for a summons." Again, in the last two lines of the subsection the words "proceed as "on an application made by the mother under the said section "[one]" must mean that the court shall "proceed as on a "complaint arising out of an application made by the mother."

For the reasons I have endeavoured to state I have come to the conclusion that the justices were perfectly right and that the appeal should be dismissed.

WINN J. I agree. I desire to add only two short observations. The first refers to the wording of section 44 (3) which my Lord has discussed, and I pause only to observe that a somewhat similar anomaly is to be detected in the Affiliation Proceedings Act, 1957, because by section 1 the right is given to the mother to complain by summons, and section 4 deals with the hearing of a complaint under section 1, whereas the substance of the matter is that the hearing referred to in section 4 must be the hearing pursuant to the summons being issued. We have not investigated the matter, but it may be that originally such proceedings as these took the dual form of a finding as to paternity, and an adjudgment whether or not the man named in the woman's complaint was the father, followed by a complaint requiring that he show cause why he should not pay.

The other observation is this. Lest it might still seem odd to anyone that the National Assistance Board should be given a right to an order wholly independent of that of the mother of the illegitimate child—a similar right incidentally being given by section 26 of the Children Act, 1948, to local authorities—I would refer to the historical fact which emerges clearly from the judgment of Lynskey J. in the *Tugby* case,[8] that the Act of 1948 repealed the provisions of section 5 of the Bastardy Laws Amendment Act, 1873, an Act which itself modified the provisions of section 8 of the Act of 1872. Thereby, in effect, the Act of 1948

[8] [1957] 1 Q.B. 506, 512.

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constituted the National Assistance Board the successors to the Poor Law Guardians who, under the Act of 1873, always had an independent right to apply for a summons against a man in respect of a child which had become chargeable to the union or parish. They were entitled on proof being given as in the section provided to obtain from the justices an order that the man was the putative father and an order against him for payment of a contribution towards the maintenance of the child.

For these reasons I agree that the appeal should be dismissed.

WIDGERY J. I also agree.

Appeal dismissed. No application was made for costs.

Solicitors: *J. H. Milner & Son for Green, Williamson & Way, Wakefield; Solicitor, National Assistance Board.*

J. F. L.

[CHANCERY DIVISION.]

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Feb. 3, 6.

Buckley J.

In re MANIFOLD, DECD.
SLATER AND ANOTHER *v.* CHRYSSAFFINIS AND OTHERS.

[1960 M. 656.]

Will—Validation by Act of 1861*—British subject with domicile of origin in England—Foreign domicile at date of death—Will made in* 1957 *valid under foreign law—Will made abroad in* 1958 *invalid under foreign law—Dispositions not the same in both wills—Administration with both wills annexed granted in England in* 1959 *to attorneys for executor of foreign will—Whether* 1958 *will a valid and effective disposition—Whether English assets payable to foreign executor—Duty of court with regard to* 1958 *will—Whether distributable on footing that* 1958 *will valid and effective—Wills Act,* 1861 (24 *&* 25 *Vict. c.* 114), *ss.* 1, 4.

Administration of Estates—Ancillary administration—Surplus assets—Whether to be handed over to principal administrator — Cypriot executor—Ancillary administration in England.

A testatrix, a British subject whose domicile of origin was England but who was domiciled at her death in Cyprus, by a will made in 1957 appointed a Cypriot executor and gave her residue to English beneficiaries. That will was valid according to Cypriot law. In 1958 she made, also in Cyprus, a will appointing an English executor, by which she similarly bequeathed her residuary estate but which was invalid under Cypriot law for defective execution so that, under Cypriot law, the executor there would be unable to give effect to its dispositions. In 1958 the testatrix died and probate of the 1957 will was granted in Cyprus to the executor, probate of the 1958 will being refused there to the executor of

that will. In 1959 administration with both wills annexed was granted in England to the executor of the 1958 will and another as attorneys for the executor of the 1957 will. The scheme of both the wills was broadly the same, but the details of the dispositions were not: some properties disposed of by one will were not disposed of by the other and vice versa, and pecuniary legatees in some instances took more under the 1957 will than the 1958 will, while in other instances they took more under the 1958 will than the 1957 will.

On a summons by the attorney-administrators to determine, in effect, whether after paying funeral expenses, debts and testamentary expenses, they were at liberty to hand over the assets of the estate to the Cypriot executor, or in what manner they ought to deal with funds:—

Held, (1) that attorney-administrators or administrators in an ancillary administration were not under a duty to hand over surplus assets to the principal administrator, although they might be justified in so doing (post, p. 463).

In re Achillopoulos [1928] Ch. 433 and *Eames* v. *Hacon* (1880) 16 Ch.D. 407 considered.

(2) The Wills Act, 1861,[1] operated not merely to validate a will as a document giving the right to a grant of administration, but as an effective disposition conferring beneficial interests on the legatees and devisees; that since the 1958 will was validated by section 1 of the Act, section 4 operated, and it was the duty of the court to see that the persons charged with the administration of the estate in England carried into effect the provisions of the will as far as lay in their power to do so; and that, therefore, the attorney-administrators ought not to hand over moneys in their hands to the executor of the 1957 will, but should distribute in England the assets in their hands on the footing that the 1958 will was valid and effective and revoked the 1957 will, those assets to be distributed as though they were the whole of the estate and the legacies to abate rateably so far as necessary.

In re Grassi [1905] 1 Ch. 584; 21 T.L.R. 343; *In re the Goods of Meatyard* [1903] P. 125; and *In re Lorillard* [1922] 2 Ch. 638; 38 T.L.R. 666, C.A. applied.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment of Buckley J. On June 25, 1957, the testatrix, Christina Fanny Manifold, who had an English domicile of origin but at the date of her death was domiciled in Cyprus, made a will by which she revoked all former testamentary dispositions and appointed the

[1] Wills Act, 1861, s. 1: "Every "will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such "person at the time of making the "same or at the time of his or her "death) shall as regards personal "estate be held to be well executed "for the purpose of being admitted "in England and Ireland to probate, "and in Scotland to confirmation, "if the same be made according to "the forms required either by the "law of the place where the same "was made or by the law of the "place where such person was domiciled when the same was made, or "by the laws then in force in that "part of Her Majesty's dominions "where he had his domicile of "origin."

S. 4: "Nothing in this Act contained shall invalidate any will or "other testamentary instrument as "regards personal estate which would "have been valid if this Act had not "been passed, except as such will or "other testamentary instrument may "be revoked or altered by any subsequent will or testamentary instrument made valid by this Act."

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first defendant, George Nicholas Chryssaffinis, the executor thereof after making a number of specific devises and bequests she gave her residue to the third, fourth and fifth defendants. That will was in a form and executed in a manner that accorded with the law of Cyprus and was in every way a valid will under Cypriot law.

On June 18, 1958, the testatrix made a further will by which she revoked, or purported to revoke, any former testamentary dispositions and appointed the first plaintiff, Harry Cecil Gwyther Slater, to be the executor thereof. By that will she made various specific dispositions and bequeathed pecuniary legacies and left her residue to the third, fourth and fifth defendants. That will was in one respect defective as regards execution under Cypriot law in that the attesting witnesses omitted to place their initials on each sheet of the will, which was written on more than one sheet of paper, as required by Cypriot law. Accordingly, when the first plaintiff sought to obtain probate of the 1958 will in Cyprus, the Probate Registrar in Cyprus refused to make a grant, and there has been no appeal from that decision. On September 10, 1958, the Cypriot court granted probate of the 1957 will to the first defendant. On February 25, 1959, letters of administration of the estate of the testatrix with both wills annexed were granted by the Principal Probate Registry of the High Court in England to the two plaintiffs Harry Cecil Gwyther Slater and Gladys Edna Curtis as attorneys for the first defendant.

The scheme of both the wills on broad lines was the same, but the details of the dispositions in the wills were not the same. There were properties which were specifically disposed of by one will and not by the other and vice versa. The pecuniary legatees in some instances took more under the 1957 will than under the 1958 will, while in some instances they took more under the 1958 will than under the 1957 will.

The testatrix's estate in England was sworn for probate purposes at approximately £45,000 gross and at a very slightly smaller sum net. It included personal chattels, stocks and shares and other investments and money and certain immovable properties. The plaintiffs, as administrators in this country, paid the funeral expenses, the few debts which the testatrix owed in this country, the estate duty payable in this country and certain testamentary expenses. They also paid the first defendant a sum of approximately £13,000 for the purpose of enabling him to discharge the death duties payable in Cyprus. The plaintiffs, stated that, although the net residue of the estate had not yet been finally ascertained, they had in their hands the sum of £26,200 odd, representing the personal estate, and a sum of £3,140 odd, representing the proceeds of the real estate of the testatrix. The first defendant stated that the net estate of the testatrix in his hands, that is to say, representing assets other than those in England, at the date of the taking out of the proceedings in August, 1960, amounted approximately to £35,000,

of which approximately £25,000 was represented by cash and £10,000 was the value of the immovable property. The 1957 will contained pecuniary legacies of an aggregate value of £39,300. The 1958 will contained pecuniary legacies of the aggregate value of £32,400.

The first defendant, a Queen's Counsel, practising in Cyprus, swore an affidavit in which he deposed to certain matters of Cypriot law. He stated that the grant of probate of the 1957 will made to him operated as a judgment of the Cypriot court and, until revoked, was binding and conclusive in Cyprus: accordingly, he could only act in Cyprus on the footing that the 1957 will was the last will of the testatrix and could have no regard to the provisions of the 1958 will except in so far as it affected devolution of immovable property outside the jurisdiction of the Cypriot court unless and until the grant of probate of the 1957 will to him was revoked. He went on to say that notice of his intention to seek that grant of probate was given to all interested parties but that no one had applied to have the decision of the registrar varied or reviewed, and he pointed out that there had been a decision recently in the Cypriot courts which might perhaps indicate that the view taken by the registrar with regard to the invalidity of the execution of the 1958 will was mistaken, but he said: "Having "regard to the lapse of time since the issue of the said grant to "me it is most unlikely that the Cypriot court would now review "the decision of the District Registrar." He then proceeded in his affidavit as follows: "If it should be held in the present "proceedings that the plaintiffs were bound to distribute the "estate in England in accordance with the terms of the 1958 will, "difficult problems would arise. As stated by the plaintiff Harry "Cecil Gwyther Slater the estate of the testatrix is unlikely to "to be sufficient to pay in full to each pecuniary legatee the "larger benefit bequeathed by the 1957 will and by the 1958 "will. The law of Cyprus applies the doctrine of abatement in "the same way as the English courts would apply it. The "doctrine of election does not exist under the law of Cyprus; but "if any legatee under the 1957 will who resides in Cyprus is paid "any sum of money from the estate of the testatrix out of funds "not under my control, I should have to apply for directions to "the Cyprus courts, and I apprehend that I should be directed "either to take such payment into account in the distribution of "the estate under my control or to take proceedings against such "legatee to recover such sum (on the footing that the payer had "no authority to intermeddle with the estate of the deceased). "It may also be that a legatee outside the jurisdiction of the "Cyprus courts who is paid out of funds not under my control "a sum larger than his legacy under the 1957 will or larger than "such legacy with any necessary abatement would be ordered by "the Cyprus courts to repay to me the excess: but I appreciate "that there would be difficulties in enforcing such order. "Lastly, I would confirm that as regards any assets which came

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"to my hands as executor of the testatrix or as principal administrator, I would (except as hereinafter mentioned), be bound under the law of Cyprus to distribute the same under the terms of the 1957 will and without regard to the terms of the 1958 will. At the time of the grant to me, I swore an oath to the court undertaking that 'I will faithfully administer the property of the testatrix according to law and the tenor of the will,' i.e., the 1957 will. The law of Cyprus would, however, follow the lex situs as regards the devolution of immovable property and, accordingly, if the proceeds of immovable property in England reach my hands, it is probable that I would be directed by the Cyprus courts to distribute the same, in accordance with the provisions of the 1958 will if that is the will which governs their devolution under the law of England. If this Honourable Court were to make an order which left me in any doubt as to my duties as such executor or administrator I would immediately apply to the court in Cyprus for directions as to how I should act."

The plaintiffs took out a summons to determine: 1. Whether, after paying the funeral expenses and debts of the testatrix of which they had notice and the testamentary expenses incurred by them (a) they were at liberty to pay the funds respectively representing (i) the remaining personal estate of the testatrix in the hands of the plaintiffs (other than any articles specifically bequeathed by her last will dated June 18, 1958) and (ii) the proceeds of sale of the real estate of the testatrix in England not specifically bequeathed by her last will to the defendant George Nicholas Chryssaffinis as personal representative of the testatrix in the Island of Cyprus (where she was domiciled at the time of her death) notwithstanding that her last will was not validly executed according to the law of that island or, (b) ought to apply the funds or either of them in or towards payment of the pecuniary legacies bequeathed by the last will, and pay the balance (if any) to the defendant George Nicholas Chryssaffinis as such personal representative, or, (c) ought to apply the funds or either of them in or towards payment of the pecuniary legacies bequeathed by the last will and pay the balance (if any) to the residuary legatees named therein, or, (d) ought to deal with the funds or either of them in some and what other manner; and 2. if the court should direct the plaintiffs to apply the funds or either of them in or towards payment of the pecuniary legacies, whether and in what manner the respective legatees ought to bring into account any and which of the benefits which they must respectively have received or be entitled to under the earlier will of the testatrix dated June 25, 1957, admitted to probate in Cyprus. The third question in the summons asked for directions, and the fourth question asked if and so far as was necessary that there should be administration of the estate of the testatrix.

G. C. D. S. Dunbar for the attorney-administrators.

L. H. L. Cohen for the executor of the 1957 will.

Baden Fuller for an infant pecuniary legatee.

E. Wright for other pecuniary legatees being also residuary legatees.

The following cases cited in argument are not referred to in the judgment: *In re Cockerell* [2]; *Government of India* v. *Taylor* [3]; *Codrington* v. *Codrington* [4]; *In re Ogilvie*.[5]

BUCKLEY J. The Wills Act, 1861, received the Royal Assent on August 6 of that year. I should have liked to reserve my judgment to be delivered on the centennial anniversary of that date, thereby celebrating the event by deciding what appears to be a new point arising on the Act after all this lapse of time, but it would be neither proper nor convenient to do so. I propose, therefore, to deliver my judgment today.

[His Lordship stated the facts as set out above, read section 1 of the Wills Act, 1861, and continued:] In the present case the 1958 will was made in Cyprus, that is to say, out of the United Kingdom. It was made by a British subject and it was made by a British subject whose domicile of origin was England. Accordingly, the section is applicable to the present case.

Mr. Cohen, who appears for the first defendant, has submitted, first, that wherever there is ancillary administration in this country and the principal administration elsewhere, it is the duty of the English administrators to hand over the clear value of the English assets, after payment of debts and expenses properly incurred here, to the persons in the position of executors or administrators in the forum of the principal administration. He puts his case on the alternative ground that where there are attorney-administrators in England it is their duty as attorneys of their principal to account to their principal for the clear balance of the English assets. In connection with those submissions he referred me to various authorities, the first being *In re Achillopoulos*.[1] That was a case of a Greek residing in Alexandria and whether under Greek law or under Egyptian law the distribution of his movable property was governed by Greek law. The administration was taken out in this country by an attorney-administrator on behalf of one of the persons who were heirs under Greek law to the movable property of the deceased. Before the case was finally disposed of, new letters of attorney were granted by all the heirs of the movable estate of the deceased in favour of two persons, and a new grant of administration was made in this country in favour of those two persons. The question was raised whether the attorney-administrators ought to

[2] [1918] P. 4.

[3] [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292, H.L.

[4] (1875) L.R. 7 H.L. 854, H.L.

[5] [1918] 1 Ch. 492.

[1] [1928] Ch. 433.

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hand over the surplus assets in this country to the persons who were the heirs to the movable property of the deceased under Greek law, there being no one under Greek law to whom as administrator any formal grant similar to the grant of administration in this country could be made. Tomlin J. said [2]: "There "is no question, I think, but that where a testator domiciled "abroad has died, and the executors, under the law of the "domicile, have procured a grant in this country by their attor-"neys for him, the court is free in proper circumstances to "authorise the administrator to hand over the surplus of the "assets in this country to the executors of the law of the domi-"cile." The problem in that particular case was whether the attorney-administrators could hand over to the heirs, being persons who had not any sort of formal grant of representation in their favour. Tomlin J. said [3]: "In this case I am satisfied "by the evidence to which my attention has been called that "the three persons who were made original defendants to the "summons are the persons who by the law of the domicile, "under the Greek law, are charged with the duty of administer-"ing the estate, paying the debts, and seeing that the surplus "gets into the proper hands. That being so, I am free, if I see "fit, to give to the administrators over here liberty to hand over "any surplus to those defendants." Then a little later he said [3]: "I take the view that the duty of an attorney-administrator for a "foreign principal, who is the executor of the law of the domicile, "is that he is to take the necessary steps for ascertaining and "paying the English debts or the debts payable in the United "Kingdom, but having done that, he is free to hand over the "surplus (unless he has notice of some foreign debt) without the "necessity of foreign advertisements or taking any active steps "abroad to ascertain the position in regard to the debts." The effective part of the order made by Tomlin J. was that the plaintiffs [4] "are to be at liberty to pay or retain the costs, hereinbefore "directed to be taxed, out of the assets of the testator in their "hands as such administrators as aforesaid; and to pay or "transfer to the defendants, Aristis Mavromichali, Maria Mpasia, "and Helen Theotoki, the surplus of such assets remaining, after "payment or retention of the said costs and payment of any "further claims against the testator's esate of which the plain-"tiffs shall have received notice, prior to such payment or "transfer as aforesaid."

It is clear from that judgment that Tomlin J. was expressing the view that it was proper for the court to authorise the attorney-administrators to hand over the clear balance of the estate to their principals. It will be observed that the order is not mandatory. It merely says that they are "at liberty" to do so, and

[2] [1928] Ch. 433, 444.
[3] Ibid. 445.
[4] Ibid. 446.

the language in which Tomlin J. expressed his decision was language which suggests that the court had a discretion in the matter as to whether or not it would permit assets to be dealt with in that way. I do not think that that authority supports the proposition put forward by Mr. Cohen in the more restricted way in which he has expressed it when he suggests that attorney-administrators or administrators in an ancillary administration are under a duty to hand over surplus assets to the principal administrator.

Mr. Cohen also referred me to *Eames* v. *Hacon*.[5] It is only necessary to read the opening sentences of the judgment of Fry J. in that case[6]: "The property in question in this action is claimed "by the legal personal representative of the intestate who was "constituted by the Irish court, which, for the purposes of this "case, I assume to the forum of the domicile of the deceased. "Prima facie, that person is, in my judgment, entitled to receive "the moneys belonging to the personal estate of the testator, "which represent the clear net receipts obtained in any country "wherever it may be, and through the intervention of any letters "of administration wheresoever granted." Fry J. there says that that is the prima facie right of the principal administrator, but the use of the words "prima facie" seems to me to be consistent with the language carefully adopted by Tomlin J. in *In re Achillopoulos*.[7] I think that the position really is this: that the attorney-administrators in this country for the principal administrator over in Cyprus when they have paid those expenses which they have to meet in connection with the administration of the deceased's estate in this country, and when they have paid the debts of the deceased in this country, may be justified in paying over the balance to their principal, but I do not think it follows by any means that in every case they are bound to do so.

Mr. Cohen and Mr. Wright, who argued on the same side, contended that a testamentary disposition of movables is by the ordinary rule of private international law governed by the law of the domicile of the deceased at the date of his death, that the Wills Act, 1861, does not override that principle, and that in the present case, as under Cypriot law the movable property of the deceased must be distributed in accordance with the terms of the 1957 will, the effect of the Wills Act, 1861, could not be to render the 1958 will an effective disposition of assets in this country in the way provided by the 1958 will. They referred me, among other things, to a passage in Tristram and Coote, 21st ed., p. 84, where it is stated: "Where a British subject left a will "valid by the law of his domicile, which was revoked by a later "will invalid by the law of his domicile, but which could have "been proved as valid in accordance with Lord Kingsdown's "Act, the court of domicile, when granting probate of the earlier

[5] (1880) 16 Ch.D. 407.
[6] Ibid. 408.
[7] [1928] Ch. 433.

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"will, retained the later will and refused to give it out. As "the distribution of the personal estate in England would be "required to be made in accordance with the terms of the will "declared valid by the court of the domicile, the registrar held "that the grant of probate issued by the court of domicile could "be resealed in England." That case appears to be very similar to the present case in this respect. There was, first of all, a will valid by the law of the domicile (as in the present case the 1957 will was valid by Cypriot law) which was revoked by a later will invalid by the law of the domicile (as in the present case the 1958 will purported to revoke the 1957 will but was invalid by Cypriot law) and the later will was one which could have been proved as valid in accordance with Lord Kingsdown's Act, that is to say, the Wills Act, 1861 (as the 1958 will is valid under that Act). Apparently, in the case referred to in Tristram and Coote, the court of domicile, in granting probate to the earlier will, retained the later will and refused to give it out, so that the later will was not available to those who wanted to use it in this country. Although I have not heard any discussion on this point, I apprehend that that would not have made it impossible to obtain some sort of grant in this country of that will. However, the registrar there elected to admit to probate the earlier will by resealing it, and the grant was apparently made because, in the registrar's view, the earlier will was the will which regulated the distribution of the assets according to the law of domicile and, therefore, was the only effective document, and it would not have been right to admit the later will to probate notwithstanding that it complied with the requirements of the Wills Act, 1861.

When one comes to look at the language of section 1, it is to be noted that it provides that a will which complies with the requirements of the section "shall as regards personal estate be "held to be well executed for the purpose of being admitted in "England and Ireland to probate." One argument which has been put forward is that the section does not validate the 1958 will for all purposes, but merely for the purpose of being admitted to probate, and that it does not validate that will so as to give it any dispositive effect which would conflict with the 1957 will, being the will which is recognised by the law of the domicile.

In that connection I must refer to the decision in *In re Grassi.*[8] The testator in that case was a British subject who at the time of his death was domiciled in England, but he made a will in Italy which was a holograph will not attested by any witnesses and accordingly not a will which under the Wills Act, 1837, was duly executed according to English law. The question arose whether, having regard to section 1 of the Wills Act, 1861, the will was not a valid and effective will. Mr. Birrell, who appeared for the testator's widow, who was a beneficiary under the will in question, said, in the course of argument[9]:

[8] [1905] 1 Ch. 584; 21 T.L.R. 343. [9] [1905] 1 Ch. 584, 588.

"Technical persons will no doubt say that the Act was only "intended to enable wills to be admitted to probate, and that, "although the legal title in the leasehold vests in the executor, "the beneficial interest does not go to the intended donee pointed "out in the will; but that is not the effect of the Act." The object of section 1 of Lord Kingsdown's Act (according to him) "in saying that the will is to be 'well executed for the purpose "'of being admitted to probate' is only to place such a restric-"tion or limitation on the enabling words as are necessary to "prevent its being said that the will is to be valid for all pur-"poses—e.g., to render valid things which in other wills would "contravene Thellusson's Act or the law against perpetuities." On the other side Mr. Buckmaster contended [10] that some effect must be given to the words "'for the purpose of being admitted "'to probate'" and that they were satisfied by holding that on probate being obtained here the executor obtains the legal title in the estate and that "no beneficial interest in "any personality passes to the persons named as bene-"ficial legatees in the will." So the point whether the Act merely validates the will for the purpose of obtaining a grant of representation or whether it validates the will as a disposition of the testator's property was clearly taken in argument. Buckley J. said [11]: "The 1st section of Lord Kingsdown's "Act relates to wills made out of the United Kingdom by "British subjects. The 2nd section relates to wills made "in the United Kingdom by British subjects. The frame-"work of the two sections is substantially the same, but there are "certain verbal differences between the two sections, which may, "and I think must, have arisen from a want of scanning the "language, and not from the existence of any purpose of pro-"ducing different results. For instance, section 1 refers to 'a "'British subject,' whereas section 2 speaks of 'any British "'subject.' Section 1 refers to 'the law of the place'; section 2 "refers to 'the laws for the time being in force in that part of the "'United Kingdom where the same is made.' Again, there is a "difference of language in the words pertinent to the matter "which I have to decide, inasmuch as section 1 says that the will "shall, as regards personal estate, 'be held to be well executed "'for the purpose of being admitted . . . to probate,' whereas "section 2 says that the will 'shall, as regards personal estate, "'be held to be well executed and shall be admitted . . . to "'probate.' Does section 1 mean that the will is to be well "executed for the purpose only of being admitted to probate, "and not for any other purpose? I cannot understand how that "can possibly be held to be the meaning. The variance between "the two sections is, in my judgment, one of words only, and "not of meaning. What is the effect of being 'well executed for "'the purpose of being admitted to probate'? Does that extend

[10] [1905] 1 Ch. 584, 589.

[11] Ibid. 591.

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"to make a gift of leasehold property to a certain person effectual? I cannot see why it should not." A little later he said [12]: "A disposition by will to which Lord Kingsdown's Act applies is no doubt not effectual in any way other than that which results from its being admitted to probate; for example, although it might be admitted to probate it is clear, on the authority of *Freke* v. *Lord Carberry*,[13] that provisions in a will infringing Thellusson's Act or the English law against perpetuities would not be validated by Lord Kingsdown's Act. Therefore section 1 of that Act does not say that the will shall be valid for all purposes. The section says, in effect, that the will shall be valid for the purposes of being admitted to probate, and will then take its place and be effectual for such purposes following on probate as the law of England allows." It seems to me that I am bound, following that decision, to hold that where a will is a will proper to be admitted to probate under either section 1 or section 2 of the Act, when admitted to probate it will be regarded by the courts of this country as being a valid and effective disposition of the testator's property in accordance with its terms to the extent to which the law of this country allows that disposition to take effect, and that the effect of the Act is to give to such a will a dispositive effect.

The general rule undoubtedly is that a will which is validly executed, which is valid as regards form in accordance with the law of the domicile of the deceased at the date of his death, will be admitted to probate in this country without reference to the Wills Act at all. It may be that there are some cases in which the difficult question of renvoi arises in which that simple statement of the principle is not applicable. Counsel referred me to *Bremer* v. *Freeman*,[14] referred to in Dicey's Conflict of Laws, 7th ed., pp. 68 and 69, where it is suggested that that case led to the passing of the Act of 1861. The Act of 1861 in the great majority of cases applies either where there is no will which is valid by the law of the domicile at the date of the testator's death or where there is such a will which is valid by the law of the domicile at the date of the testator's death and not effectually revoked by any later will recognised by that law, but where there is a later will in existence which complies with the terms of the section so as to be a will capable of being admitted to probate in this country. In the first case there will be an inevitable conflict between the terms of the will recognised under the Act in this country but not recognised by the law of the domicile and the law of the domicile relating to the distribution of property in respect of which there is no effective testamentary disposition. In the second case there will be a conflict between the terms of the will recognised as being valid and effective by the law of the domicile and the terms of the later will which is recognised by the courts of this country under the Act.

[12] [1905] 1 Ch. 584, 592.
[13] (1873) L.R. 16 Eq. 461.
[14] 10 Moore P.C. 106.

Where there is no such conflict (for instance where the disposition contained in the will happens to conform precisely to the distribution on intestacy recognised by the law of the domicile) the section will have no operative effect. Although there may be some basis for the suggestion that questions arising out of the law of renvoi may have something to do with the passing of this Act, I have to recognise the fact that the great majority of cases in which the Act is likely to apply are cases in which there will be a conflict between the law of the domicile and the effect of the will which is to be admitted to probate under this Act. I think that this view is consistent with and supported by the terms of section 4 of the Act, which provides: "Nothing in this Act contained "shall invalidate any will or other testamentary instrument as "regards personal estate which would have been valid if this "Act had not been passed. . . ." The 1957 will in the present case would undoubtedly be a will which would have been valid for all purposes if the Act had not been passed, because the 1958 will, not having been executed in accordance with Cypriot law, would not but for the Act be admitted to probate in this country. Then the section goes on: "except as such will or "other testamentary instrument may be revoked or altered by "any subsequent will or testamentary instrument made valid by "this Act." The 1958 will complies exactly with the terms of section 1 and is, in my judgment, a will which is made valid by this Act. Section 4 appears to me to recognise the fact that such a will may conflict with an earlier will recognised by the law of the domicile and so operates to revoke or to vary the provisions of the earlier will. That the Act does not validate the will merely for the purpose of obtaining a grant is further established by the decision in *In the Goods of Meatyard.*[15] In that case the testator by a will in English form made in September, 1898, and duly attested by two solicitors' clerks of a London firm of solicitors, "revoked all former wills and testa-"mentary dispositions theretofore made by him," and appointed certain persons as executors and trustees, and after giving certain legacies he disposed of his real and personal estate in the United Kingdom of Great Britain and Ireland. He next made a will in Brussels in Belgian form dealing with his property in Belgium which purported to revoke all wills previous to that will. Later again he made a codicil to his English will in which he confirmed the English will. Jeune P. held that the deceased was domiciled in Belgium. A grant had been obtained in Belgium in relation to the Belgian will. The executors of the English will applied for a grant in England of the English will. Jeune P. said[16]: "The duty of this court is to follow, so far as it can, the law "of the testator's domicile, namely, the law of Belgium, by "recognising the persons whom the Belgian court has invested "with the power and duties of administrators. This is in accord

[15] [1903] P. 125.

[16] Ibid. 129.

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"with more than one authority, the strongest of which is, per-"haps, *In the Goods of Earl*,[17] in which Lord Penzance had "before him a very similar case; and the principle there laid "down is that this court ought to act in accordance with the "law of the testator's domicile." Accordingly, in that case, a grant having been made in Belgium, the English grant was refused to the executors of the English will but the grant in respect of that will was made to the Belgian administrators or executors notwithstanding that the case was one to which section 2 of the Wills Act, 1861, was applicable.

It is clear from that, I think, that the fact that a will is one to which the Act applies does not mean that whoever may be named in the will as executors have a right to a grant. The operation of the Act is therefore not merely to validate the will as a document which nominates somebody to have the right of administering the estate in this country. That is fully consistent with the views taken in *In re Grassi*,[18] that the Act has the much wider effect of making effective a will which confers beneficial interests on the persons who are legatees or devisees under it.

So I reach this position. I have here a will recognised by law as having been duly executed and as being admissible to probate as regards personal estate which in terms revokes an earlier will, the 1957 will. The 1958 will is one which, on the authorities which bind me, I regard as conferring a beneficial interest on those who claim under it. It seems to me that the duty of this court is to see that the persons charged with the administration of the estate in this country carry the dispositions contained in that will into effect so far as it lies in their power to do so. That the court has a discretion to retain the administration of an estate in this sort of case under its control is clear from *In re Lorillard*.[19] In that case a testator who was domiciled in New York died in England, leaving assets and creditors both in England and America, and the estate was in course of being administered by the courts in both countries. In the English administration, after all the creditors whose debts were capable of being proved by English law had been paid, the English administrators had a surplus in their hands. There were still creditors who were unpaid but their debts were debts which were statute barred by English law and, therefore, could not be effectively relied on in this jurisdiction. They were not, however, statute barred by American law. The question which arose was whether in those circumstances it was the duty of the English administrators to hand over the surplus in the English administration to the American administrators who were the principal administrators of the estate. The result of that would have been that the amount which was handed over would have been used to pay the creditors in the United States. Both Eve J. and the

[17] (1866) L.R. 1 P. & M. 450.
[18] [1905] 1 Ch. 584.
[19] [1922] 2 Ch. 638.

Court of Appeal came to the conclusion that the court in England had a discretion in the matter and that the proper exercise of that discretion was to direct the English administrators not to hand over the surplus to the American administrators but to retain it and to distribute it to the beneficiaries under the authority of the order of the court in England. Just as in that case the court considered itself justified in retaining control of the administration of the estate notwithstanding that there were claims upon it by creditors which might have been successfully asserted in the United States of America, so in a case like the present I think that the court is justified in saying that the English attorney-administrators ought not to hand over money which they have available in their hands to the first defendant who would be unable to give effect to the dispositions contained in the 1958 will because Cypriot law would not permit him to do so. It seems to me that the right course in such a case as this is for the English administrators to proceed to distribute the assets which they have in their hands in this country in accordance with what I think is the result of the provisions of the Act of 1861, that is to say, on the footing that the 1958 will is a valid and effective will and does effectively revoke the 1957 will. They will have to distribute those assets as though they were the whole of the estate, because they are the whole of the assets so far as the English administrators are concerned, and all the legacies will have to abate to the extent that is necessary having regard to the amount of the funds available to the English administrators.

What effect that will have on the distribution of the assets in Cyprus I do not know, and I do not think that I am concerned to know. It may be that the Cypriot courts will take into account in the distribution of those assets in accordance with the dispositions contained in the 1957 will the amounts which the various legatees under the 1957 will will have received by reason of the distribution made by the English administrators; or it may be that the Cypriot court will proceed in some other way. That is entirely a matter for the authorities in Cyprus.

I am bound by the provisions of the Wills Act, 1861, to see that the assets that are being administered in this country are administered in accordance with what I think is the result of the provisions of that Act. It is true that the result of this will be that the movable property in England will not be distributed in accordance with the law of the domicile of the deceased at the date of her death; that is to say, movable property in England will not be distributed in the way in which the normal rule of private international law applicable to such cases would require. That is the result of the Act of Parliament, and Parliament is, of course, able to say how assets that are administered by the courts of this country shall be applied, and it is perfectly within the capacity of Parliament to say that in certain circumstances the rule that movables shall be distributed in accordance with the

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law of domicile of the deceased at his death shall not apply, and I think that this is such a case.

I will declare on question 1 that the plaintiffs, after paying funeral expenses and debts of the testator of which they have had notice and the testamentary expenses incurred by them, ought to apply the funds in or towards the payment of the pecuniary legacies bequeathed by the 1958 will and pay the balance, if any, to the residuary legatees named therein, and that the pecuniary legacies shall abate rateably so far as necessary.

On question 2 I will declare that, in making the distribution, the plaintiffs are not to take into account any benefits which persons interested under the 1958 will may be entitled to under the 1957 will, or otherwise under the estate of the testator.

Declarations accordingly.
Plaintiff's costs on the trustee basis; costs of the other parties on the common fund basis.

Solicitors: *Slaughter & May; Neish, Howell & Haldane; Gibson & Weldon for Roberts & Andrew, Exeter; Bird & Bird.*

K. R. A. H.

[HOUSE OF LORDS.]

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PLATO FILMS LTD. AND OTHERS . . . APPELLANTS;

AND

SPEIDEL . . . . . RESPONDENT.

Libel—Pleadings—Reputation—Striking out—Defence—Mitigation of damages—Reputation of plaintiff—Admissibility of specific instances of misconduct—Different kinds of reputation—Necessity of pleading—New issue of fact—R.S.C., Ord. 19, *r.* 15; *Ord.* 21, *r.* 4.
Practice—Pleadings—Damages—Defence—Need to plead new issue of fact in mitigation—Libel—Bad reputation of plaintiff—R.S.C., Ord. 19, *r.* 15; *Ord.* 21, *r.* 4.

The plaintiff, who was the Supreme Commander of Allied Land Forces in Central Europe, brought an action against the defendants claiming that he had been libelled in a film published and exhibited by them, in which he was depicted as being privy to the murders of King Alexander of Yugoslavia and M. Barthou in 1934, and as having betrayed Field-Marshal Rommel in June, 1944. By paragraph 5 of their defence the defendants pleaded justification. Alternatively, in mitigation of damages they said that evidence in chief would be given at the trial of (A) the "circumstances under

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* *Present*: Viscount Simonds, Lord Radcliffe, Lord Denning, Lord Morris of Borth-y-Gest and Lord Guest.

"which the alleged libel was published," and (B) as to the plaintiff's character. As particulars of (A) they pleaded that the matters of complaint formed part of the film in which the plaintiff was further depicted as having been guilty of war crimes and atrocities (specific instances of which were given), the truth of which the plaintiff did not deny in his statement of claim. Under (B) the defendants pleaded that the plaintiff was widely reputed to have been guilty of the two acts with which he had been charged in the alleged libel, and also of the war crimes instanced in (A) and, in addition, of the direction of aspects of Nazi anti-Jewish policy and the suppression of German democratic life.

The Court of Appeal held that sub-paragraph (A) should be struck out and gave leave for (B) to be amended to read: "Alternatively "in mitigation of damages the defendants will at the trial of the "action give evidence in chief that the plaintiff had on or before November 19, 1958, a bad reputation as a man who was a party to "and/or responsible for acts which were war crimes and/or against "humanity and/or atrocities."

On appeal by the defendants:—

Held, dismissing the appeal, (1) that sub-paragraph (A) was objectionable and should be struck out (post, pp. 476, 478, 492, 495, 497).

(2) That (Lord Radcliffe not concurring), as to sub-paragraph (B), evidence of particular acts of misconduct on the part of the plaintiff could not be given in mitigation of damages where the defendant had failed to justify the libel complained of (post, pp. 475, 488, 495).

Per Lord Radcliffe. It would be wrong to hold that general evidence of reputation cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to the plaintiff's current reputation; they are the basic material on which his reputation rests (post, p. 481).

Scott v. *Sampson* (1882) 8 Q.B.D. 491, D.C. and *Hobbs* v. *Tinling* [1929] 2 K.B. 1; 45 T.L.R. 328, C.A. applied.

Wood v. *Earl of Durham* (1888) 21 Q.B.D. 501; 4 T.L.R. 778, D.C. overruled.

Decision of the Court of Appeal [1960] 3 W.L.R. 391; [1960] 2 All E.R. 521, C.A. affirmed.

APPEAL from the Court of Appeal (Ormerod and Devlin L.JJ.).

This was an appeal, by leave of the Appeal Committee of the House of Lords, by the appellants, Plato Films Ltd., Stanley Forman and Kenneth John Edward Smith, who were the defendants in the action, from an order of the Court of Appeal dated May 19, 1960, whereby (subject to variations hereinafter mentioned) the order of Sachs J. made in chambers on March 31, 1960, affirming the order of Master Clayton made on November 16, 1959, was upheld, and it was ordered that the appellants, should pay the respondent, General Hans Speidel, the plaintiff in the action, two-thirds of the costs of the appeal. By his order, Master Clayton ordered that paragraph 5 of the appellants' defence should be struck out and the variation made by the Court of Appeal, hereinbefore mentioned, was that the introductory words of paragraph 5 of the defence, namely, "Alternatively, in mitigation of damages, "the defendants will at the trial of this action give evidence in "chief" should be restored, and that the appellants should have

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leave to amend by adding thereafter "that the plaintiff had on or "before November 19, 1958, a bad reputation as a man who was "party to and/or responsible for acts which were war crimes "and/or crimes against humanity and/or atrocities."

Plato Films Ltd. appealed.

The facts are stated in the opinion of Viscount Simonds.

Gerald Gardiner Q.C. and *D. J. Turner Samuels* for the appel-

J. G. Foster, Q.C. and *Colin Duncan* for the respondent.

The following authorities, which were not referred to in their Lordships' opinions, were cited in argument: *Richards* v. *Richards* [1]; *Wyatt* v. *Gore* [2]; *Carr* v. *Hood* [3]; *Cassidy* v. *Daily Mirror Newspapers Ltd.* [4]; *Maisel v. Financial Times Ltd.* [5]; *MacGrath* v. *Black* [6]; *Bamfield* v. *Massey* [7]; *Bate* v. *Hill* [8]; *Verry* v. *Watkins* [9]; *Carpenter* v. *Wall* [10]; *Thornton* v. *Stephen* [11]; *Pearson* v. *Lemaitre* [12]; *Anderson* v. *Calvert* [13]; *Bridgmont* v. *Associated Newspapers Ltd.* [14]; *Wood* v. *Cox* [15]; *D. & L. Caterers Ltd.* v. *d'Ajou* [16]; *Mills* v. *Armstrong* [17]; *West Ham Union* v. *Edmonton Union* [18]; *Westminster Corporation* v. *Southern Railway Co.* [19]; *Lissenden* v. *C.A.V. Bosch Ltd.* [20]; *Hill* v *William Hill (Park Lane) Ltd.* [21]; *Collinson* v. *Loder* [22]; *Warne* v. *Chadwell* [23] and *Liberace* v. *Daily Mirror Newspapers Ltd.* [24]

The following authorities referred to in the opinion of Lord Denning were not cited in argument: *Smithies* v. *Harrison* [25]; *Smith* v. *Richardson* [26]; *Snowden* v. *Smith* [27]; *King* v. *Waring* [28]; *Clarkson* v. *Lawson* [29] *Vessey* v. *Pike* [30] and *Brittridge's Case.* [31]

Their Lordships took time for consideration.

March 2. Viscount Simonds. My Lords, this appeal raises an interesting question but it is one to which I have no doubt that the Court of Appeal has given the correct answer.

[1] (1844) 2 M. & Rob. 557.
[2] (1816) Holt N.P. 299.
[3] (1808) 1 Camp. 354n.
[4] [1925] 2 K.B. 331; 45 T.L.R. 485, C.A.
[5] (1915) 84 L.J.K.B. 2145; 31 T.L.R. 192, H.L.
[6] (1926) 95 L.J.K.B. 951, C.A.
[7] (1808) 1 Camp. 460.
[8] (1823) 1 C. & P. 100.
[9] (1836) 7 C. & P. 308.
[10] (1840) 11 A. & E. 803.
[11] (1837) 2 M. & Rob. 45.
[12] (1843) 5 M. & Gr. 700.
[13] (1908) 24 T.L.R. 399, C.A.
[14] [1951] 2 K.B. 578; [1951] 2 T.L.R. 682; [1951] 2 All E.R. 285, C.A.
[15] (1888) 4 T.L.R. 652.
[16] [1945] K.B. 364; 61 T.L.R. 343; [1945] 1 All E.R. 563, C.A.
[17] (1888) 13 App.Cas. 1; 4 T.L.R. 360, H.L.
[18] [1908] A.C. 1; 24 T.L.R. 108, H.L.
[19] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322, H.L.
[20] [1940] A.C. 412; 56 T.L.R. 347; [1940] 1 All E.R. 425, H.L.
[21] [1949] A.C. 530; 65 T.L.R. 471; [1949] 2 All E.R. 452, H.L.
[22] (1750) Buller N.P. 10.
[23] (1819) 2 Stark. 457.
[24] (1959) Times Newspaper, June 17, 18.
[25] (1701) 1 Ld.Raym. 727.
[26] (1737) Willes 20.
[27] (1811) 1 M. & S. 286n.
[28] (1803) 5 Esp. 13.
[29] (1830) 6 Bing. 587.
[30] (1829) 3 C. & P. 512.
[31] (1602) 4 Co.Rep. 18b.

The respondent was at all material times the Supreme Commander of the Allied Land Forces in Central Europe. He brought the action out of which this appeal arises against the appellants, Plato Films Ltd., and two directors of that company, claiming damages for libel and an injunction. The libel alleged was that in a film called "Operation Teutonic Sword," which was exhibited and published by them at the National Film Theatre, London, on November 19, 1958, he had by words and photographic pictures been depicted (a) as a party to the murders of King Alexander of Yugoslavia and M. Barthou in October, 1934, and (b) as having betrayed Field-Marshal Rommel to the Nazis in or about June, 1944.

By their defence the appellants pleaded that the words and photographic pictures were true in substance and in fact. But, in addition to this plea of justification, they sought to put in a plea which I must set out in full. It was as follows:

"5. Alternatively in mitigation of damages the defendants will "at the trial of this action give evidence in chief as to the "circumstances under which the alleged libel was published and "as to the character of the plaintiff.

"(A) *Particulars of circumstances under which the alleged libel "was published.*

The photographic pictures and words of which the plaintiff "complains were published and exhibited as part of the film "wherein the plaintiff was further depicted as having been guilty "of the conduct hereinafter set out, the truth of which the "plaintiff in his amended statement of claim does not deny: "namely that he:

"(*a*) while Chief of Staff to the Military Commander in occu-"pied France between about September, 1940, until about May, "1942, was a party to and/or responsible for acts which were war "crimes and/or against humanity and/or atrocities namely:

"(i) the taking and/or shooting of civilians or others as "hostages;

"(ii) the deportation and/or removal to concentration camps "and/or to the East of Jewish and other persons;

"(iii) the execution in occupied France of the decrees where-"under the aforesaid and similar acts were carried out.

"The defendants rely on those parts of the said film which "correspond with paragraphs 140 and 169 (inclusive) and 287 "thereof.

"(*b*) While Chief of General Staff to German Army Groups "during the retreat of the German Armies in the U.S.S.R. was "party to and/or responsible for acts generally accepted among "civilised peoples as being contrary to the rules of warfare and/or "wanton destruction of property and/or of terrorisation. The "defendants will rely on those parts of the said film corresponding "with paragraphs 170 to 200 (inclusive) and 204 thereof.

"(*c*) While being a Military Attaché on the staff of or attached

"to the German Embassy in Paris between in or about the period "between 1934 and 1938 (inclusive) engaged in espionage on "behalf of Nazi Germany in preparation for the invasion of "France. The defendants rely on those parts of the said film "which correspond with paragraphs 99 to 112 (inclusive), 140 and "202 thereof.

"(*d*) While being a Military Attaché on the staff of or attached "to the German Embassy in Madrid in and about 1939, engaged "in espionage on behalf of Nazi Germany against France, Great "Britain and North Africa. The defendants will rely on those "parts of the said film which correspond with paragraphs 112, "113 and 202 thereof.

"(B) *Particulars of the matters relating to the character of the "plaintiff.*

"The plaintiff is widely reputed to have been and in fact was:

"(i) guilty of the conduct alleged against him in the said film "as set out in paragraphs 3, 4, and 5 (A) hereof;

"(ii) while Chief of Staff to the Military Commander in "occupied France between the aforesaid dates:

"(*a*) concerned in enforcing and carrying out the General Staff "and other orders relating to the taking, selection, arrest, deten-"tion, execution and deportation of hostages;

"(*b*) concerned in developing directing and enforcing Nazi "Anti-Jewish policy in occupied France;

"(iii) since 1926 an advocate of and believer in the suppression "of German democratic political life."

The paragraphs to which reference is made in the plea are from the English text of the film.

The respondent forthwith applied in chambers that this plea should be struck out of the defence on the ground that it was scandalous and contrary to the rules of pleading and tended to prejudice, embarrass or delay the fair trial of the action. The master in chambers ordered that it should be struck out and his order was upheld by Sachs J. The appellants appealed to the Court of Appeal, who in part allowed their appeal, in that they were permitted to plead as follows: "Alternatively in mitigation "of damages the defendants will at the trial of this action give "evidence in chief that the plaintiff had on or before November "19, 1958, a bad reputation as a man who was a party to and/or "responsible for acts which were war crimes and/or against "humanity and/or atrocities." The respondent has not appealed against this order and I say nothing about it. It must be left to the trial judge to determine what evidence he will admit. But this was not enough for the appellants, who by their appeal to this House ask that their plea should be restored in its entirety.

My Lords, I do not think that the Court of Appeal could have come to a different conclusion so far as they affirmed Sachs J. if this case had come before them in or before the year 1882. For

already by that time the clear preponderance of authority extending over a considerable period was that evidence of particular acts of misconduct on the part of the plaintiff could not be given in mitigation of damages where the defendant had failed to justify the libel of which the plaintiff complained. I find it unnecessary to examine this volume of authority, for that task was thoroughly performed by Cave J. in *Scott* v. *Sampson* [1] in a judgment which has to this day never been challenged. His conclusion was that: "As to . . . evidence of facts and circumstances tending to show "the disposition of the plaintiff, both principle and authority seem "equally against its admission. At the most it tends to prove "not that the plaintiff has not, but that he ought not to have, a "good reputation, and to admit evidence of this kind is in effect "as was said in *Jones* v. *Stevens* [2] to throw upon the plaintiff "the difficulty of showing a uniform propriety of conduct during "his whole life. It would give rise to interminable issues which "would have but a very remote bearing on the question in "dispute, which is to what extent the reputation which he "actually possesses has been damaged by the defamatory matter "complained of. Among all the cases which have been reviewed "there is not one which can be cited in support of the admis-"sibility of this evidence. In *Bracegirdle* v. *Bailey* [3] such "evidence was repected by Byles J., after consulting with Willes "J., and in *Jones* v. *Stevens* [4] the evils attending its admission "are eloquently pointed out."

That was in 1882. In the year 1929 *Hobbs* v. *C. T. Tinling & Co. Ltd.* [5] came before the Court of Appeal, and though the question in that case was not precisely the same, the court made it very clear that *Scott* v *Sampson* [5a] had been correctly decided. The judgment of Cave J., said Scrutton L.J., had been accepted as an accurate statement of the law. But, said the appellants, it had never been reviewed in this House. That is true and, long though the decision has stood unchallenged, I should not hesitate to reverse it, if (to use the language of Lord Wright in *Admiralty Commissioners* v. *Valverda* (*Owners*) [6] it was one of those cases in which serious inconvenience would follow from perpetuating an erroneous construction or ruling of law. But it is far, indeed, from being such a case. That the law was misunderstood or misstated by Cave J. and Scrutton L.J. seemed to me after a fresh review of all the authorities discussed in *Scott* v. *Sampson* [7] an impossible contention. In effect, therefore, the plea of the appellant was that the law was not what it ought to be. That is a plea to which this House is not inclined to listen when it is sitting as a supreme appellate tribunal, and perhaps I should

[1] (1882) 8 Q.B.D. 491, 504–505.
[2] (1822) 11 Price 235
[3] (1859) 1 F. & F. 536.
[4] 11 Price 235.
[5] [1929] 2 K.B. 1; 45 T.L.R. 328, C.A.
[5a] 8 Q.B.D. 491.
[6] [1938] A.C. 173, 194; 54 T.L.R. 305; [1938] 1 All E.R. 162, H.L.
[7] 8 Q.B.D. 491

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ignore it. But I cannot refrain from observing how emphatically I dissent from the view that the law should be altered to the advantage of those who make defamatory statements about others. The defences that are open to one who does so are numerous and adequate. If none of them is available to him what excuse has he, and why should any indulgence be shown him? It is, of course, possible that the so-called "notorious rogue" may recover damages which a perfect system of justice would deny him. But it does not follow that, because he receives more than he ought, the libeller pays less than he ought. I have some sympathy for the view expressed so eloquently by Wood B. in *Jones* v. *Stevens* [8]; that even evidence of general bad reputation should be excluded. But I recognise that the law admits it. It is, no doubt, true that in practice it may be difficult to define exactly either the borderline between evidence of general bad reputation and that of specific conduct which has led to it or the area of conduct which the general bad reputation is to cover. That is only to say that a libel action is an imperfect instrument for doing justice in every case. There may, in the result, be cases in which a rogue survives both evidence of general bad reputation and, where he has gone into the witness-box, a severe cross-examination nominally directed to credit, and recovers more damages than he should. But I would rather have it so than that the law should permit the injustice and, indeed, the cruelty of an attack upon a plaintiff for offences real or imaginary which, if they ever were committed, may have been known to few and by them have been forgotten. I say nothing more of the inconvenience of having one or more trials within the original trial. The main issue has been determined when the defendant has failed in his plea of justification. How many other trials of the offences pleaded in mitigation are to be permitted?

There is one aspect of the appellants' plea in mitigation which deserves special mention. They plead that the respondent has been depicted in the film as having been "guilty of the conduct "hereinafter set out the truth of which the plaintiff . . . does not "deny." It surprises me that it should be considered a proper matter for pleading that a plaintiff has not thought fit to include in his action every libellous statement made about him by a defendant. It is, in my opinion, wholly improper.

My Lords, I do not think it necessary to say anything about R.S.C., Ord. 36, r. 37. Its operation is expressly limited to those cases in which justification is not pleaded, and no relevant implication can be fairly drawn from it in regard to cases in which it is pleaded. I am the less inclined to do so because the very experienced counsel who appeared at the bar on this appeal professed great doubt as to its meaning and effect. In any case,

[8] 11 Price 235.

it does not, and does not purport to, alter the common law as laid down in *Scott* v. *Sampson*[9]: see *Mangena* v. *Wright*.[10]

Finally, I must say something upon a question which was much discussed before your Lordships, though it does not arise upon the face of the order under appeal. In his judgment Devlin L.J. said[11]: "It will also be for him [the trial judge] to "determine whether the jury should see the whole film, including "those parts which are supposed to represent the plaintiff as a "war criminal, or whether they should see only the parts that are "relevant to the libel. We express no opinion on these matters "because we are concerned with questions of the admis-"sibility of evidence only in so far as they enter into the point "of pleading." It was urged on behalf of the appellants that it is a rule of law that in a libel action the defendant has the right to have exhibited to the jury the whole of the film or other publication in which the libel is contained, and that the judgment of the Court of Appeal implied that there was no such right, but that it lay in the discretion of the trial judge to determine whether there should be such an exhibition. I am not sure that the Court of Appeal meant to decide anything of the kind. But, in any event, I think it right to say that it will be the duty of the trial judge first to determine whether (as the appellants allege) in all circumstances the defendant has such a right and, if he answers this question in the negative, then to consider whether in the circumstances of this case the right should be conceded. These are matters upon which it would not be right at this stage for your Lordships to come to any conclusion.

The appeal should, in my opinion, be dismissed with costs.

LORD RADCLIFFE. My Lords, this appeal is wholly concerned with questions of pleading in preparation for a trial which has not yet taken place, and the points of pleading that arise are confined to issues in mitigation of damages. These issues are pleaded by defendants who have put in a separate defence of justification in respect of the matters alleged as libels by the plaintiff. Necessarily, therefore, one must restrict what one says at this stage to what requires to be said in advance of the trial with regard to the law bearing upon the disputed pleadings.

The pleading in question is paragraph 5 of the defence, which has been recited in full in the speech of my noble and learned friend on the Woolsack. Essentially, that paragraph seeks to do two things: (a) to rely on the fact that the film which contained the alleged libels depicted the plaintiff as having been responsible for or associated with other actions of a shameful nature which he had not complained of in his statement of claim and which, they pleaded, he did not therefore deny; (b) to assert with regard

[9] 8 Q.B.D. 491.
[10] [1909] 2 K.B. 958; 25 T.L.R. 534.
[11] [1960] 3 W.L.R. 391, 396; [1960] 2 All E.R. 521.

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to the character of the plaintiff that he was both widely reputed to have been, and in fact was guilty of the matters complained of in the statement of claim, and these other matters, and also certain additional activities discreditable to him.

That part of paragraph 5 which is summarised under (A) above has been struck out by the orders in the courts below. In my opinion, these orders should stand. I do not think that what is there alleged is a matter of pleading at all, where mitigation of damages is in question: and I know of no rule of court which can be vouched as requiring it. If it is said that other parts of the entire film constitute "circumstances in which the alleged libel "was published" (in themselves a recognised head of mitigation), I think that that is a highly artificial meaning to attribute to the phrase. The real purport of this portion of paragraph 5 of the defence seems to be to make the point that the plaintiff must be taken to have admitted the truth of such accompanying derogatory statements as he has not challenged in his libel claim. That is not a matter for pleading. If it amounts to anything at all, it is a matter for comment. As a proposition of law designed to set up some sort of estoppel, I think that it has no foundation. As a comment, if it is permissible to make the comment at any stage of the hearing, that must be at the trial and not before. I agree, therefore, that paragraph 5 (A) of the defence should remain expunged from the pleadings.

It was argued that the allowance or rejection of this pleading involved a decision of law as to whether at the trial the defendants would be entitled to require that the entire film should be shown to the jury, and not merely those portions that made up the sound track and pictures conveying the libels complained of. In my opinion, this point, which is not one of pleading, is not involved in our decision today. It can only be dealt with as part of the conduct of the trial. Certainly I do not regard the elimination of paragraph 5 (A) as affecting one way or the other the general rule recognised in *Cooke* v. *Hughes* [12] as to a defendant's right to have the whole of a publication placed before the jury; but that principle leaves open the question what in any particular case constitutes the publication or article in which the libel is contained.

Paragraph 5 (B) raises more than one question, but the main one, which seems to be the core of this appeal, is whether a defendant may offer in mitigation of damages evidence which bears upon the disposition of the plaintiff as distinct from his reputation or only such evidence as bears upon his reputation. On this main point I am clearly of opinion that in law he has normally been, and ought to be, confined to the latter branch of evidence.

I think that the law on all this question of mitigation of damages by proving bad character or reputation depends upon two points of principle and, surrounding them, a number of rules

[12] (1824) Ry. & M. 112.

which are primarily rules of practice or convenience designed for such purposes as to contain the length of trials within manageable limits, to prevent the jury being avoidably confused as to the bearing of evidence on different issues, and to limit the grosser abuses of too great a liberty of reference given to either plaintiff or defendant. No one can regard these rules as constituting an instrument of precision for determining the vague concepts which themselves make up the definition of libel. I will only say that, in my view, either side may from time to time need protection from abuse of the permitted liberties: but this is better achieved by a sense of responsibility on the part of the counsel and by the judge's handling of the trial itself than by any close restriction of the range of evidence or cross-examination in matters of mitigation.

The two matters of principle are these. First, is it to be permissible to call evidence of character at all by way of mitigation? There is much to be said against allowing it, because, if it is allowed, there come in all the difficulties of limitation and possible unfairness of which we have been made conscious by the arguments in this case. On the other hand, there is, I think, the preponderating consideration in favour of this head of evidence that it would be outrageous that a person should recover damages for injury to a character that he is generally known not to possess, or, to put it another way, to a reputation that is not his. In my opinion, therefore, the decision of *Scott* v. *Sampson* [13] ought to be treated as settled law on this point, as, indeed, it has been for more than 80 years. It follows, too, that *Jones* v. *Stevens*,[14] which was a decision that a defendant cannot mitigate damages by any evidence of bad character whatsoever, is not good law and represents a wrong line of reasoning.

The second matter of principle turns on this point to which I have alluded, whether evidence of a plaintiff's bad character is to be understood as meaning the character which he bears in public estimation, by which I mean his reputation, or the character which might be attributed to him on a nice assessment of all his actions, if not his thoughts and desires, by which I mean his disposition. In my opinion, character in this context ought to mean the former conception exclusively. No evidence should be admitted which is not directed to that head of proof. It is quite true that in many of the earlier cases disposition, character and reputation are spoken of without any clear distinction between the different ideas which they convey; it is true, too, that on several occasions judges and text writers have spoken of the character which a man "ought to have" as being the relevant matter of proof; but I think that the essential contrast between reputation and disposition was explained clearly enough in the judgment of Cave J. in *Scott* v. *Sampson*,[15] and was

[13] 8 Q.B.D. 491, 598, 503.
[14] 11 Price 235.
[15] 8 Q.B.D. 491.

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reaffirmed in the judgment of Scrutton L.J. in *Hobbs* v. *Tinling*.[16] In my opinion, this is the right line of distinction. I do not believe that "the character that a man ought to have" or to enjoy has any intelligible meaning. It is not possible for a jury, learning, perhaps long after the event, of this or that discreditable action in a man's life, to remake the current public estimation of him by some ideal piece of analysis. The materials themselves could not be available. Moreover, any rule that made it possible for a defendant to put in evidence by way of mitigation some discreditable action of the plaintiff, irrespective of whether it was publicly known or not and so contributed to his reputation, would be a rule so inherently unfair that it ought not to be accepted.

These two principles commend themselves, I believe, to all your Lordships. But it does not seem to me at all clear that by settling them one has done enough to establish a workable rule governing the limits of evidence that can be called on the issue of reputation. This is not a question upon which I myself can find any certain guide in the numerous decisions prior to *Scott* v. *Sampson*.[17] Most of them were given at nisi prius, few are reasoned, they are in some cases inextricably associated with rules of pleading that no longer obtain; and, in fact, you could find among these decisions authority for almost any of a number of conflicting propositions. I am content to start with *Scott* v. *Sampson*,[17] which certainly reviewed and less certainly reconciled the previous decisions.

In *Scott* v. *Sampson*[17] Cave J. identified three classes of evidence more or less bearing on proof of reputation. The first he described as general "evidence of reputation" or bad character: "the estimation in which he stands in the opinion of others." This was admissible. He rejected the second class, "evidence of "rumours and suspicions to the same effect as the defamatory "matter complained of." The third class was also rejected, "evidence of particular facts tending to show the character and "disposition of the plaintiff." *Hobbs* v. *Tinling*[18] does nothing to extend or limit this classification, which it purports to follow, although Scrutton L.J. does not lighten the difficulties of maintaining the distinctions by treating "general evidence of bad "character" as a term interchangeable with evidence of "general "bad character" or reputation.

I think that one can safely get rid of the second class. If a man cannot justify the libel he has actually published, it would be too confusing to the jury to allow him nevertheless to put in evidence on the mitigation issue evidence of rumours or suspicions to the same effect, the more so as the two issues, justification and mitigation, are often not tried in successive stages. Such evidence is a poor sort of evidence at best: and, although it is not irrelevant on the question of a defendant's express malice in

[16] [1929] 2 K.B. 1.
[17] 8 Q.B.D. 491.
[18] [1929] 2 K.B. 1.

issuing the libel and, originally, was probably admitted on this basis, I think that the better rule of practice is not to allow it at all: see *Watt* v. *Watt*.[19] A jury will have a difficult enough time in learning to distinguish between the loss of credit which may result from a cross-examination of a plaintiff imputing to him a number of specific incidents bearing on his uprightness and probity and the retention of the same plaintiff's reputation if the same incidents are not or are not allowed to be proved in evidence by way of mitigation of damages.

I cannot see, however, how it can prove possible to treat the first and third classes as altogether exclusive of each other and I do not believe that in practice anyone ever does. The difficulty is that "general evidence of reputation" does not convey an idea of any content. Life not being a morality play or a Victorian melodrama, men do not enjoy reputations for being bad or good simpliciter: nor if they did, would the proof of such generalities throw any light upon the loss of reputation suffered from a particular libel. So far as the ordinary man enjoys a public reputation at all, it is a reputation, favourable or unfavourable, in respect of particular aspects or sectors of his life, and, of course, he is likely to have a good reputation in some aspects and a bad reputation in others. In any event, the existence of these reputations will, if tested, be found to rest on nothing more than particular incidents of some general notoriety or else on rumour or suspicion, which may or may not be well founded.

What, then, do we mean when we say that we affirm the principle of *Scott* v. *Sampson*[20] that general evidence of bad reputation is admissible but that evidence of particular facts tending to show the character and disposition of the plaintiff is not? I have not been able to find that the authorities supply any satisfactory answer to this. To begin with, there is a fallacy in supposing that some general phrase can govern the variety of situations that a libel can create, in particular in supposing that the admissible evidence ought to be the same, whether the libel is very particular or very general or whether the plaintiff is a public figure, whose reputation is largely based on notorious incidents, favourable or unfavourable, or a private individual whose affairs may well escape the burden of notoriety altogether. These considerations lead me to the opinion that it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material upon which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse. It remains true that the issue

[19] [1905] A.C. 115; 21 T.L.R. 386. [20] 8 Q.B.D. 491.

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is not whether the incidents actually happened but whether it is common report that they did. If it is, that seems to me the best available evidence of a plaintiff's reputation. I find it difficult to combine an aversion from rumour with an indulgence for general evidence of reputation which, unvouched, is virtually the same thing.

We seem to have reached a situation in which, while it is regularly said that only general evidence of reputation can be given, and that evidence of particular facts cannot, yet in practice, when before trial there are furnished particulars of evidence of character intended to be called in mitigation, the particulars just as regularly refer to specific incidents. This seems to me very unsatisfactory, because it makes the worst of both worlds. I have no liking for the rule which admits evidence of reputation at all; I regard it as a disagreeable necessity to take care of certain libel cases which require such a rule; but if we are to have it, I think that there is everything to be said for trying to express it in the fairest and most workable form. I doubt if that is what we achieve today.

It must be remembered that Cave J. in his judgment confined his exclusion of particular facts to those "tending to show the "character and disposition of the plaintiff," that is, those which go to disposition as contrasted with reputation. As I have said, I am sure that this principle ought to be maintained. But I think that it goes beyond either what he said or what he would seem to have wished to imply to treat general evidence of reputation as excluding all reference to particular facts, if they are of notoriety. If evidence were to be admitted but confined in this way and fair warning were given in advance of any particular incidents to be raised, as is now done, it would not be realistic to apply to it the description which in *Jones* v. *Stevens*[21] was thought to render inadmissible evidence of character, that it would "allow defendants to impeach all that transactions of "a man's life . . . and throw on him the difficulty of showing an "uniform propriety of conduct during all his existence."

If I apply what I have said to paragraph 5 (B) of the defence and compare it with the truncated form allowed by the order of the Court of Appeal, the plea that the plaintiff "in fact was" guilty of the conduct alleged would go out, since it is the repute, not the fact, that matters; and the references to paragraphs 3 and 4 in sub-head (i) would also go out, since those paragraphs are justification paragraphs which cannot be repeated as mere repute by way of mitigation. For the rest, I think that it would have been better to allow paragraph 5 (B) to stand as pleaded, subject to its reference to paragraph 5 (A), which will have disappeared, being rewritten. All that remains would be governed by the opening words "the plaintiff is widely reputed to have "been," which seem to me to apply the right limitation in law.

[21] 11 Price 235, 265.

I do not know that the Court of Appeal's more restricted version of the pleading would make substantial difference to whatever may happen at the trial: but it does not seem to me any fairer to the plaintiff than to the defendants to face him with so vast and vague a denunciation as that he is reputed to have been party to or responsible for acts which were war crimes or crimes against humanity or atrocities.

Subject to this, I would dismiss the appeal.

LORD DENNING. My Lords, the appellants here challenge the correctness of the judgment of Cave J. in *Scott* v. *Sampson*.[22] This is a bold thing to do, seeing that it has been accepted for so long as good law. But, as the challenge was supported by a considerable show of authority, I would like to meet it on its own ground. The law on the subject cannot properly be understood without some knowledge of the old forms of action. From the earliest writ in 1536 in the Year Books[23] down to the year 1852 the declaration contained three parts: First, The *prefatory averment* in which the plaintiff asserted that he was a man of good character. It usually said that he was a man of good character and reputation and had never before been suspected of misconduct of the kind which was imputed to him. Second: The *wrong done*. The plaintiff here alleged that the defendant had falsely and maliciously published of him the words following (here they were set out) imputing to him misconduct. Third: The *conclusion*. In this the plaintiff stated that by reason of the foregoing he had been injured in his character and reputation and claimed damages.

The defendant could not and did not plead to damages. He could only dispute them under the *general issue*, that is, not guilty. And this gave rise to several important questions. The first was whether, under the general issue, the defendant could give in evidence the *truth* of the words in mitigation of damages, even though he had not pleaded a justification. In 1701 Sir John Holt C.J. ruled that he could: see *Smithies* v. *Harrison*.[24] But in 1737 there was a celebrated case where the beer butler of Christchurch in Oxford brought an action because it was said of him: "John Smith is a rogue and has stolen my beer." All the twelve judges met to consider it and it was held by eight to four that, as the words imputed a felony, the defendant could not give evidence of truth in mitigation of damages but had to plead it specially by a plea of justification: see *Smith* v. *Richardson*.[25] And in 1750 this ruling was "extended to all sort of words, and "not barely to such as imported a charge of felony": see *Underwood* v. *Parks*.[26] The reason given for requiring it to be pleaded was so that the plaintiff might be prepared to defend himself.

[22] 8 Q.B.D. 491.
[23] Y.B. Eastern 27 Hen. 8, f. 11, pl. 27 (see Fifoot's History and Sources of the Common Law, p. 141).
[24] (1701) 1 Ld.Raym. 727.
[25] (1737) Willes 20.
[26] (1743) 2 Stra. 1200.

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From *Underwood* v. *Parks*[26] it followed inexorably that any evidence of particular facts which tended to prove a justification was not admissible in mitigation of damages but only in support of a plea of justification, if made: see Starkie on Slander and Libel, 2nd ed. (1830), vol. II, pp. 90–95.

The second question which arose for decision was whether, under the general issue, the defendant could give in evidence the bad character of the plaintiff. In 1809 Sir James Mansfield C.J. held that it was open to the defendant (in answer to the prefatory averment of the plaintiff) to call general evidence to prove that the plaintiff was a man of bad character and had, previously to the slander, been generally reputed to be guilty of misconduct of the kind imputed to him (see *Earl of Leicester* v. *Walter*[27]), and his decision was thereafter upheld by the full Court of King's Bench in *Anon.* v. *Moor*[28] and followed thenceforward by many other judges: see *Thompson* v. *Nye*,[29] by Erle J. But the judges did not allow the defendant to go into particular instances of misconduct, as distinct from general evidence: see *Smithies* v. *Harrison*,[30] by Holt C.J.; *Waithman* v. *Weaver*,[31] by Abbott C.J. The reason for the distinction was well put by Mr. Starkie: "The principle on which such general evidence is "admitted, whilst evidence of particular facts is excluded, has "been frequently recognised: it is this—that the party may be "prepared with general evidence in support of character, though "he cannot be supposed to be prepared with evidence to justify "his conduct through life": Starkie on Slander and Libel, 2nd ed., vol. II, at p. 93 in notis.

It is only right to say, however, that the Barons of the Exchequer took a different view. They did not admit even general evidence of bad character: see *Jones* v. *Stevens*.[32] But the judges of the King's Bench took no notice of what the Barons said. They continued to go the circuits of England and admitted general evidence of bad character just as they had done before. Mr. Starkie tells us that such good judges as Holroyd J., Lord Tenterden C.J., Lord Denman C.J. and Coltman J. all received general evidence of bad character despite the ruling of the Barons: see Starkie on Evidence, 3rd ed., vol. II, pp. 641–642. But they did not allow the defendant to go into particular instances of misconduct: see *Moore* v. *Oastler*,[33] by Lord Denman C.J., after consulting Parke B., and *Bracegirdle* v. *Bailey*,[34] by Byles J., after consulting Willes J.

There was once a suggestion that where the defendant pleaded a justification he could not give general evidence of bad character: see *Snowdon* v. *Smith*,[35] in notis by Chambre J. The reason is

[26] 2 Stra. 1200.
[27] (1809) 2 Camp. 251.
[28] (1813) 1 M. & S. 283.
[29] (1850) 16 Q.B. 175, 180.
[30] 1 Ld.Raym. 727.
[31] (1822) Dow. & Ry.N.P. 10.
[32] 11 Price 235.
[33] (1836) Starkie on Evidence, 3rd ed., vol. II, p. 642n.
[34] (1859) 1 F. & F. 236, 237.
[35] (1811) 1 M. & S. 286n.

not far to seek. Suppose a man accused another of theft and sought to justify it. If he had to make good this charge with the same strictness as in a criminal court, he would not be allowed to bring in evidence of bad character to support it. Could he be allowed to get it in by a side-wind in mitigation of damages? The judges eventually held that he could. In *Kirkman* v. *Oxley*[36] Heath J. allowed a defendant, who had justified a charge of theft, to go into evidence of the plaintiff's bad character in mitigation of damages: see Starkie on Evidence, vol. II, p. 306; and in 1826 Lord Tenterden did the same: see *Mawby* v. *Barber*.[37] On principle this is sound. The object of "general "evidence of character," as Mr. Starkie says, "is to diminish "the damages: and this the defendant is entitled to do, though "he fail to establish his justification": see Starkie on Slander and Libel, 2nd ed., vol. II, p. 97.

Such was the law as it stood in 1873. In that year the old system of pleading was replaced by the modern system of pleading: see section 69 of the Supreme Court of Judicature Act, 1873, and the Rules of Court, 1875. Each party was by Order 19 r. 4, required to plead all the material facts on which he relied: but by Order 21, r. 4, no denial or defence was necessary as to damages claimed or their amount, but they were deemed to be put in issue in all cases. These Rules did not affect the law as to the admissibility of evidence. But the new Rules did—and do—make it necessary for the defendant to plead the material facts on which he relies: and these facts include the plaintiff's bad character if and in so far as he relies on it. In this respect I agree with what was said in *Scott* v. *Sampson*[38] and the Court of Appeal in the present case. *Wood* v. *Earl of Durham*[39] is not good law.

This brings me to the case in 1882 of *Scott* v. *Sampson*[40] itself, the first decision after the new rules of pleading. Scott was a dramatic critic for the "Daily Telegraph." Sampson ran a weekly paper called "The Referee." Sampson wrote an article in "The Referee" to this effect: "Scott has systematically "abused his position as a dramatic critic so as to extort money. "He even threatened Admiral Glyn. He said he would publish "some unpleasant facts about Miss Neilson unless he were paid "£500: and Admiral Glyn paid him £500 to keep it out." Scott sued for libel. Sampson pleaded justification and failed. The jury found for Scott with £1,500 damages. But in the course of the trial Lord Coleridge C.J. rejected certain evidence which Sampson sought to adduce: and Sampson appealed on the ground that it ought to have been admitted.

Most of the rejected evidence related to particular instances of misconduct. For instance, Sampson sought to give evidence

[36] Starkie on Evidence, 3rd ed., vol. II, p. 306.
[37] (1826) Ibid. 642n.
[38] 8 Q.B.D. 491, 495–496, 507.
[39] (1888) 21 Q.B.D. 501; 4 T.L.R. 778, D.C.
[40] 8 Q.B.D. 491.

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that Scott had, when reviewing "Othello" in the "Daily Tele-"graph," grossly abused the actor who took the part of Iago because he disliked him personally. This evidence was clearly inadmissible. Such evidence of particular misconduct has never been allowed in any of the cases save one—*Knobell* v. *Fuller*,[41] where Eyre C.J. held that a defendant might, in mitigation of damages, give evidence of suspicion tending to justification but falling short of it. That case was so severely handled by Mr. Starkie that no one has taken any notice of it since: see Starkie on Slander and Libel, 2nd ed., vol. II, pp. 93–97. It was clearly wrong.

The rest of the rejected evidence related to rumours to the same effect as the libel. Sampson sought to call a witness to say that, before the article appeared in "The Referee," he had heard the same story in a London club. It seems perfectly obvious to us today that such evidence was not admissible. But at that time there was a considerable body of authority in support of it. Rumours were admissible, it was said, to the same effect as the libel so long as they were in existence previously to the publication. The point had been left open in *Thompson* v. *Nye*[42] in 1850, and there had been a division of opinion on it in Ireland in 1860 in *Bell* v. *Parke*.[43] I need add nothing to the forceful remarks made by Cave J. in rejecting it. Was the court to receive the gossip of some idler in a club? Rumour is a lying jade, begotten by gossip out of hearsay, and is not fit to be admitted to audience in a court of law.

Nothing in that decision touches the admissibility of general evidence of bad character. No such evidence was submitted. But Cave J. made it quite clear that in his opinion it would have been admissible. He summarised the former practice succinctly when he said that "general evidence of bad character was allowed "to be given under a plea of not guilty": see p. 503. And I have no doubt he was correct. But you must remember that, up to his day, the decisions were conflicting. The King's Bench judges had decided in favour of its admissibility, the Barons of the Exchequer against it. Cave J. came down on the side of the King's Bench judges. But it would appear that Hawkins J. from what he said later in *Wood* v. *Earl of Durham*[44]) would have come down in favour of the Barons. The Divisional Court in *Scott* v. *Sampson*[45] did not overrule *Jones* v. *Stevens*[46]: but your Lordships can, and I hope you will; and will hold that general evidence of bad character is admissible. The reasons in favour of it were given by Mr. Starkie (Starkie on Slander and Libel, 2nd ed., vol. 2, p. 88) 130 years ago in a passage, part of which was quoted by Cave J.[47]: "General evidence . . . seems "in principle to be admissible, as immediately and necessarily

[41] (1797) Peake Add.C. 139.
[42] 16 Q.B. 175.
[43] (1860) 11 Ir.C.L.R. 413.
[44] 21 Q.B.D. 501, 508.
[45] 8 Q.B.D. 491.
[46] 11 Price 235.
[47] 8 Q.B.D. 491, 503.

"connected with the question of damages. He complains of loss "of reputation, and that he has been deprived of his character "by the act of the defendant. Is not the defendant, then, to be "permitted to show that the plaintiff's character was previously "tainted . . . or that he had in fact little character or reputation "to lose? To deny this, would be to decide that a man of the "worst character was entitled to the same measure of "damages with one of unsullied and unblemished reputation. A "reputed thief would be placed on the same footing with the "most honourable merchant, a virtuous woman with the most "abandoned prostitute. To enable the jury to estimate the prob-"able quantum of injury sustained a knowledge of the party's "previous character is not only material but seems to be "absolutely essential."

My Lords, up till this point I have spoken of "general "evidence of *character*" because that is how it was usually referred to before *Scott* v. *Sampson*.[48] But Cave J. seems to prefer the expression "general evidence of *reputation*." The reason is, no doubt, because the words "character" and "reputa-"tion" have various meanings and he wished to make clear what he meant. A man's "character," it is sometimes said, is *what he in fact is*, whereas his "reputation" is *what other people think he is*. If this be the sense in which you are using the words, then a libel action is concerned only with a man's reputation, that is, with what people think of him: and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his own personality or disposition. That is why Cave J. spoke of "reputation" rather than "character."

But there is another sense in which the word "character" is used, and quite properly used, when it overlaps the word "reputation." Thus, when I say of a man that "He has always "borne a good character," I mean that he has always been thought well of *by others*: and when I want to know what his "character" is, I write, not to him, but to *others* who know something about him. In short, his "character" is the esteem in which he is held by others who know him and are in a position to judge his worth. A man can sue for damage to his character in this sense, even though he is so little known to the outside world that he has no "reputation" in the ordinary sense of that word. If it were said of Robinson Crusoe that he murdered Man Friday, he would have a cause of action, even though no one had ever heard of him before. But a man's "character," so understood, may become known to others beyond his immediate circle. In so far as the estimate spreads outwards from those who know him and circulates among people generally in an increasing range, it becomes his "reputation," which is entitled to the protection of the law just as much as his character. But

[48] 8 Q.B. 491.

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here I speak only of a reputation which is built upon the estimate of those who know him. No other reputation is of any worth. The law can take no notice of a reputation which has no foundation except the gossip and rumour of busybodies who do not know the man. Test it this way. Suppose an honourable man becomes the victim of groundless rumour. He should be entitled to damages without having this wounding gossip dragged up against him. He can call people who know him to give evidence of his good character. On the other hand, suppose a "notorious rogue" manages to conceal his dishonesty from the world at large. He should not be entitled to damages on the basis that he is a man of unblemished reputation. There must, one would think, be people who know him and can come and speak to his bad character.

This leads me to the conclusion that, in order to arrive at a man's character and reputation, you should call those who know him and have had dealings with him: for they provide the only sound foundation on which to build. And in actual practice it is only such persons who are called. I have looked into many of the cases where evidence of good or bad character has been given, and I have been engaged in quite a number myself. It usually takes this form: If it is evidence of good character, a witness of good standing is called, such as a clergyman, a schoolmaster or an employer, and is asked such questions as these: "What are "you? How long have you known him? Have you known him "well? Have you had an opportunity of observing his conduct? "What character has he borne during that time for honesty, "morality or loyalty?" (according to the nature of the case). "As "far as you know, has he deserved that character?" A good instance is *King* v. *Waring*.[49] A servant girl was given a reference accusing her of dishonesty. In support of her claim for damages, Lord Alvanley C.J. allowed a former employee to come and give evidence of her general character for honesty. But the witness cannot be asked questions in examination-in-chief about particular facts so as to illustrate the plaintiff's good behaviour on particular occasions. In cross-examination, however, he may be asked what are the grounds of his belief, and he may be asked as to particular facts known to him tending to shake it. If it is evidence of bad character which is given (such as that a man is a reputed thief or a woman is a common prostitute), the evidence often takes the form of a police officer who knows him being called and saying: "I know the defendant and have known him (or her) "for some time. He is a well known pickpocket," or "She is a "common prostitute," or as the case may be. In such cases the witness usually speaks from his own observation and knowledge. The greater his personal knowledge, the more valuable his evidence. A good illustration is *Wood* v. *Cox*.[50] There a jockey

[49] (1803) 5 Esp. 13.

[50] (1888) 4 T.L.R. 652, 656; (1889) 5 T.L.R. 272, C.A.

had been accused of "pulling" a horse called Success. It was said that "he nearly pulled his head off." He sued for damages. Lord Coleridge C.J. admitted evidence of four officials of the Jockey Club who gave evidence of the plaintiff's bad character for foul riding and not trying to win. (Incidentally, his employer, the Duke of Portland, gave evidence in the jockey's favour, though he seems to have been cross-examined to some effect.) The jockey got only one farthing damages When general evidence of bad character is given, the witness cannot in chief give particular instances: though he can, of course, in cross-examination be asked the grounds of his belief and on what it is based. When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule what is the relevant sector.

In the year following *Scott* v. *Sampson*,[51] Order 36, rule 37, was made. It is confined to cases where justification is not pleaded. This looks as if someone thought that the evidence receivable in mitigation of damages was different according as justification was pleaded or not: just as Chambre J. did in 1811. But this is not true. There is no difference in principle between the two cases. I prefer, however, to think that the makers of the rule thought that, when justification was pleaded, as it was in *Scott* v. *Sampson*,[51] that case made it clear that, if the defendant intended to give evidence in mitigation of damages, he had to include the material facts in his defence. See what Mathew J. said[52] and Cave J.[53] Then in order to cover cases where justification was not pleaded, Order 36, rule 37, was passed so as to require the defendant to give particulars. The rule did not enlarge the matters of which he could give evidence. So far as evidence of "character" was concerned, the defendant could still only give in chief general evidence of bad character and not particular instances: see *Mangena* v. *Wright*[54]; but henceforward he had to give notice to the plaintiff of his intention in that behalf at least seven days before the trial. These particulars may or may not be included in the pleadings. But in either case the court has, I think, power to strike them out if, and in so far as, they consider specific instances which would be likely to embarrass the fair trial of the action.

This brings me, however, to *Scaife* v. *Kemp & Co.*[55] Kemp & Co. were a trade protection society. They received an inquiry about the plaintiff, one J. Scaife of Liverpool. They mistook him for another man of the same name, J. Scaife of Liverpool, and they answered: "He is a bad payer, is frequently sued, and "nothing can be got out of him." When the plaintiff sued for libel, the defendants found out that he, too, was a bad payer.

[51] 8 Q.B.D. 491.
[52] Ibid. 494–495.
[53] Ibid. 507.
[54] [1909] 2 K.B. 958, 979.
[55] [1892] 2 Q.B. 319; 61 L.J.Q.B. 515.

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Both the Scaifes were apparently bad payers. But instead of pleading justification, as they should have done, the defendants furnished particulars under Order 36, rule 37. These particulars specified certain cheques dishonoured, executions levied, and so forth. And the defendants followed up these particulars with interrogatories asking whether certain cheques of the plaintiff at certain dates had not been dishonoured, whether or not certain executions had been levied on his goods, and so on. The master refused these interrogatories. But Denman J. allowed them: and on appeal Mathew and A. L. Smith JJ. affirmed his decision. It seems to me that both the particulars and the interrogatories were an attempt to get in evidence of particular facts which, if proved, would constitute a justification: and as such they were not admissible in mitigation of damages. In the absence of a plea of justification, they ought not to have been allowed. *Scaife* v. *Kemp & Co.*[55] was, I think, a wrong decision.

Finally, in the review of the cases I come to *Hobbs* v. *Tinling*.[56] It was a distinct affirmation of *Scott* v. *Sampson*. Hobbs had been convicted of conspiracy to blackmail. A newspaper thereupon accused him of a lot of other offences which it did not attempt to justify. But, in order to mitigate damages, it delivered particulars under Order 36, rule 37, giving many instances of specific misconduct. Scrutton L.J. said that this was wrong. The only matter which was properly included was this [57]: "That the plaintiff is a man of worthless reputation and "character, being known to the police, and in the profession of "the law as such." Then the newspaper, in order to mitigate damages, cross-examined Hoobs on specific instances of misconduct. This, too, it was held, was wrong. Such instances cannot be adduced in cross-examination to damages any more than they can be in chief. The defendants ought to have called the police officers and lawyers (indicated in their particulars) to prove he was a rogue.

Notwithstanding this weight of authority, Mr. Gerald Gardiner argued that in principle specific misconduct should be admitted in mitigation of damages. He put this instance: suppose a newspaper said of a man: "He has been convicted six times for "dishonesty," but, on being sued, the newspaper finds that he has in fact only been convicted twice. The newspaper cannot justify, he said, because it cannot prove the words were true. Nor can it bring forward the two convictions in mitigation of damages because they are specific misconduct. So the plaintiff will get damages on the footing that he has never been convicted at all. If such were the law, I would agree with Mr. Gardiner that it would be most unjust and ought to be remedied. But it is not the law. Although the newspaper cannot justify in whole it can justify in part. It can plead that, in so far as the words

[55] [1892] 2 Q.B. 319.
[56] [1929] 2 K.B. 1.
[57] Ibid. 11–12.

meant that he had been convicted twice, they were true and thus bring the two convictions before the jury. In *Clarkson* v. *Lawson*,[58] Serjeant Wilde put the very case: "If [the defendant] had "charged the plaintiff with stealing three horses, he might have "justified as to one," and Park J. said he could. "It was "the common practice," said Sir James Scarlett in one of the cases cited to your Lordships, "if a defendant could not justify "all, to justify a part of the libel, and produce witnesses to prove "the part justified, as a ground of mitigation and reduction of "damages"; see *Waithman* v. *Weaver*.[59] This rule is based on sound sense. Seeing that the law does not permit a defendant, in mitigation of damages, to adduce evidence which tends to justification, it must permit him to adduce the selfsame evidence when pleaded in partial justification: see *Vessey* v. *Pike*[60] by Lord Tenterden C.J. If it were not so, the plaintiff would recover damages for a character which he did not possess or deserve; and this the law will not permit.

But then Mr. Gardiner says that there are cases where not even a partial justification is open to the defendant, because of the way the plaintiff frames his action. He took this case. Suppose a newspaper said of a man: "He has murdered his "father, stolen from his mother and does not go to church on "Sundays," and the plaintiff brings a libel action complaining only of the imputation that he does not go to church. The defendants, said Mr. Gardiner, cannot justify the major charges of murder and theft, because the plaintiff has not complained of them. They cannot give evidence of them in mitigation of damages because they are only in specific instances. What is, then, the position? It would, says Mr. Gardiner, be most unjust that the plaintiff should get damages for the minor matter when, if the jury had had the whole before them, they would have given him nothing. I agree it would. But the answer is that the defendants, who had produced such a piece of bathos, would be entitled, in the apt words of Lord Coke, to "have showed all the "words and the coherence of them," see *Brittridge's Case*[61]: and the jury would no doubt only have given one farthing, as they did in *Cooke* v. *Hughes*.[62] In those cases the words so "cohered "together" that it was necessary for the jury to see all the words in order to make a correct appreciation of their impact. Whether the present is such a case, the judge will say at the trial. Your Lordships can hardly do so at this stage, not having seen the film.

Mr. Gardiner referred also to the Report of the Committee on the Law of Defamation in 1948 (Cmd. 7536): in which it was suggested that, as a result of *Scott* v. *Sampson*,[63] a libel action may resolve itself into a tactical battle so as to force the plaintiff into the witness box where he can be cross-examined to credit. I agree that, if this were the result, it would be plainly

[58] (1830) 6 Bing. 587, 591.
[59] Dow. & Ry.N.P. 10, 11.
[60] (1829) 3 C. & P. 512.
[61] (1602) 4 Co.Rep. 18b, 19b.
[62] (1824) Ry. & M. 112.
[63] 8 Q.B.D. 491.

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undesirable. The only legitimate purpose of cross-examination to credit is to damage or destroy the plaintiff's credibility: but, as often as not, the plaintiff will have said nothing to warrant it. The plaintiff cannot speak as to his own character and reputation because he does not know what other people think of him, or, at any rate, he cannot give evidence as to what they think of him. And if the purpose of the cross-examination is to introduce illegitimately specific instances of misconduct—which cannot be legitimately put in evidence—then it should be discouraged. It is not good for the law that a judge admit a "roving" cross-examination to credit and then go on to tell the jury to ignore it when they come to assess damages, knowing that it is an impossible thing to ask them to do. Better not to have it introduced at all. Better to keep to general evidence of bad character which, when given by people who know the plaintiff and can judge his worth, is worth more than many instances and does not embarrass the trial as they would do.

My Lords, I think I have now dealt with all the points raised by the appellants, save the seduction cases and the cases in aggravation of damages, but these are so far removed from the present case that I will not spend time on them. It remains only to apply the law to the present case. The original particulars under 5 (A) were misconceived because there is no need for the defendant to give evidence in chief about the rest of the film. If it is one single publication, in which it is necessary to see the whole in order correctly to appreciate the impact of the parts, the judge will let the jury see the whole and both sides can make any fair comment on it. The original particulars under 5 (B) were misconceived in so far as they related to specific instances of misconduct. The amended particulars, as allowed by the Court of Appeal, are permissible in so far as they relate to general evidence of bad character in a relevant sector.

I would therefore dismiss this appeal.

Lord Morris of Borth-y-Gest. My Lords, if a plaintiff complains that a defendant has published defamatory matter concerning him the defendant may in civil proceedings absolve himself from any liability to pay damages by showing that what was published was no more than the truth. But if a defendant fails to do that or is not otherwise protected, is he to be entitled to reduce his liability to pay damages for having published false defamatory matter by making new and further accusations and asserting that they reveal the plaintiff in his true light? Is a defendant in an action for defamation to be allowed for the purpose of reducing his liability in damages to say in effect: "Though "what I have published was false, if I had published what I "now assert all of that would have been true"? Or is he to be entitled to say: "If what is complained of is false, then the "damages which I ought to pay should be diminished because I

"have in fact published other defamatory statements of the "plaintiff and I say that those are true"?

My Lords, though it would seem incongruous if someone with a bad reputation could claim damages for injury to his reputation without risk of the fact of his bad reputation being made known to the court, it would seem objectionable if the measuring of the damages that should be paid for publishing some false defamatory matter could be made the occasion for asserting and investigating other allegations against a plaintiff with a view to disclosing his true character and disposition. If in a quest to discover or to assess the true character and disposition of a plaintiff a defendant could assert and seek to prove certain deeds which were discreditable to the plaintiff, the latter could hardly be denied the right to counter-balance them by asserting and seeking to prove deeds which redounded to his credit. The limits of roving inquiry would be hard to control. There would be trials within a trial. The last stage of a trial would be far removed from the first. While in some cases any unseemly use of opportunity to expose a plaintiff might dangerously react, there might be cases in which the possession of some piece of information as to the past could in callous and unscrupulous hands be the means of deflecting a plaintiff from pursuing a just claim.

It is the contention of the appellants that in an action for defamation a defendant should be allowed, on giving due notice, to adduce evidence in mitigation of damages not only of the circumstances under which the matter complained of was published but also of the true character and disposition (at the material time) of the plaintiff. This should, however, be limited (according to the appellants' contention) to what is relevant to the nature of the allegations made against the plaintiff in the publication complained of though not otherwise limited inasmuch as all facts intended to be alleged in the damages-mitigating process ought, it is contended, to be pleaded with particularity.

If the considerations both favourable to and adverse to these contentions were being judicially examined for the first time, there would be much to be said for being sparing (when the sole issue is that of the amount of the damages) in giving protection to those who give currency to defamatory statements the accuracy of which they cannot defend. But, my Lords, the vexing issues to which the appellants' contention gives rise were often before the courts in the periods before the decision in *Scott* v. *Sampson*.[63] In some cases a person who was sued sought to defend himself by showing that he had merely said what was currently and widely being said about the plaintiff. "If so many are saying this, what injury "has my mere repetition done?": such was one form of the plea. My Lords, had such a plea found any lasting favour, the ugly voices of rumour and gossip with their furtive breathing of scandal would have gained a hearing which the law denies to

[63] 8 Q.B.D. 491.

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them. In other cases it was sought (as it is now sought) to give evidence of particular facts tending to show the character and disposition of the plaintiff. If that could be done without prior notice it would be manifestly unfair. A plaintiff might not be prepared with the material to refute some suggestion which, had there been knowledge that it would be raised, could convincingly have been refuted. But even after due notice (the desirability of which the appellants recognise) ought such procedure to be allowed? A man should have damages, say the appellants, for injury to such reputation as he deserves to have and not for injury to a reputation that he does not deserve. The reason, they say, why justification is recognised as a defence in defamation proceedings is that if truth is shown it is thereby shown that a plaintiff cannot assert injury to a character which he neither does or ought to possess. In *M'Pherson* v. *Daniels* [64] Littledale J. said: "... the truth is an answer to the action, "not because it negatives the charge of malice ... but because "it shows that the plaintiff is not entitled to recover damages. "For the law will not permit a man to recover damages in respect "of an injury to a character which he either does not, or ought "not, to possess." But in my judgment that applies to the character which a plaintiff ought to possess in relation to the particular matters which are the subject of the libel complained of. A true statement made of a plaintiff may damage his reputation but so far as civil proceedings are concerned a defendant may say that inasmuch as the statement was true he is not liable for having caused the damage.

In his notable judgment in *Scott* v. *Sampson* [65] Cave J. traced the evolution of certain underlying principles, though he recognised and demonstrated that as to some issues there was a considerable conflict of judicial opinion. "Speaking generally," he said,[66] "the law recognises in every man a right to have the "estimation in which he stands in the opinion of others unaffected "by false statements to his discredit; and if such false state-"ments are made without lawful excuse, and damage results to "the person of whom they are made, he has a right of action. "The damage, however, which he has sustained must depend "almost entirely on the estimation in which he was previously "held." It was a logical step from this to conclude that those who have to award damages should be entitled to know, if it be the fact, that a plaintiff is a man of no reputation and that general evidence of reputation should be admitted: the balance of previous authority, the learned judge concluded, supported that view. One of the further issues in the case related to the admissibility of evidence of particular facts tending to show the character and disposition of a plaintiff. As to this Cave J. concluded that both principle and authority were equally against its admissibility: no case that had been cited to him supported its admissibility.

[64] (1829) 10 B. & C. 263, 272.
[65] 8 Q.B.D. 491.
[66] Ibid. 503.

Although the principles which were classified and stated in *Scott* v. *Sampson*[67] have now stood for nearly 80 years it would be open to your Lordships, if so persuaded, to hold that the case was wrongly decided. My Lords, I am not so persuaded. It records and sets out what might be regarded as the greatest common measure of principle which emerged from the progressive experience of trial courts over many years. It may nevertheless be recognised that criticisms can be directed against the rule which it affirmed: that general evidence of reputation can be admitted but not evidence of particular facts tending to show the character and disposition of a plaintiff. The line, it may be said, between general evidence of reputation and evidence as to rumour may often become slender. If there be cross-examination of a witness who has given general evidence of reputation then the floodgates may be opened through which streams of details and particular facts may flow. Furthermore, it may be said that under existing practice in cases where cross-examination of a plaintiff as to his credibility is legitimate the range of the questioning may be wide and the length of a trial correspondingly extended. Also it may be said that there may in some cases be difficulties in having available a witness who can speak as to a man's reputation. If there is force in some or all of these criticisms it may be that even more forceful criticisms could be directed against some proposed new rule. These matters, however, do not so much present themselves as the problems of the court but rather of any who might wish by legislation to seek to change the law as it has been evolved.

One of the complications in the present case arises from the circumstance that the appellants are seeking to assert that the film not only depicts the respondent as guilty of the particular conduct of which the respondent complains in the action but that the film further depicts him as having been guilty of other particularised conduct and they seek to be entitled in order to mitigate damages to prove that he was in fact guilty of such other conduct. For the reasons that I have indicated I do not consider that they ought to be entitled to do more than to adduce such evidence as the trial judge admits within the pleading in the form allowed by the Court of Appeal. I cannot think that the appellants should be entitled to give evidence of particular facts tending to show the character and disposition of the respondent merely because those alleged facts are said to be asserted or presented in some parts of the film itself. I furthermore cannot agree that it is legitimate to plead that it was a "circumstance" under which certain defamatory pictures and words complained of were published in a film that there were other pictures and words in the film "the truth of which the plaintiff in his amended "statement of claim does not deny."

The appellants have submitted that "the decision of the

[67] 8 Q.B.D. 491.

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"Court of Appeal that the defendants did not have the right to "require that those parts of the film referred to in paragraph "5 (A) be shown to the jury at the trial of this action was "wrong." My Lords, it seems to me that it will be for the judge at the trial to decide whether the appellants will have the right to insist that the whole of the particular film should be seen by the jury. The Court of Appeal recognised that the appellants might wish to make a comment to the jury that the respondent was prepared "to sit down under" charges made in the film and not complained of by the respondent in the action. My Lords, I do not consider that we are called upon to express opinion upon any of these matters. It will be for the judge at the trial to decide whether, either as of the right of one or other of the parties or otherwise, the jury should see the whole film, and it will also be for him to decide what evidence is admissible as being relevant to the issues raised by the pleadings.

I would dismiss the appeal.

Lord Guest. My Lords, I have had the opportunity of reading the speech delivered by my noble and learned friend on the Woolsack and I agree with the reasons which he gives for dismissing this appeal. I only desire to add these observations.

It was argued by the appellants that although the decision in *Scott* v. *Sampson*[68] was averse to their contention it should not be followed because it has led to inconvenience and injustice. I am not satisfied that it has led to these results. In my view, inconvenience and injustice would certainly follow if the law were to be as the appellants argued that it ought to be. If allegations of specific instances of misconduct were allowed to be proved in evidence in mitigation of damages, it would open the door to issues which were truly collateral and which had but an indirect bearing on the main question in the case. It would inevitably prolong the trial and tend to confuse the minds of the jury by distracting their attention from the main issue. The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations, whether or not relevant to the subject-matter of the libel, introduced by the defendants for the purpose of mitigating damages.

It is satisfactory that the law of Scotland has been for a number of years in consonance with the law of England on the matter (*C.* v. *M.*[69]). The decision in that case derived authority from an earlier case of *A.* v. *B.*[70] and I quote the opinion of Lord President Robertson: "But, then, courts of law are not bound to "admit the ascertainment of every disputed fact which may con-"tribute, however slightly or indirectly, towards the solution of "the issue to be tried. Regard must be had to the limitations "which time and human liability to confusion impose upon the

[68] 8 Q.B.D. 491.
[69] 1923 S.C. 1.
[70] 1895, 22 R. 402, 404.

"conduct of all trials. Experience shows that it is better to "sacrifice the aid which might be got from the more or less "uncertain solution of collateral issues, than to spend a great "amount of time, and confuse the jury with what, in the end, "even supposing it to be certain, has only an indirect bearing on "the matter in hand."

Upon the question of the extent to which the film should be exhibited to the jury the Court of Appeal have left that matter to the judge at the trial. The appellants submit that even if paragraph 5 (B) is to be struck out, they are still entitled to have paragraph 5 (A) remain as this is the only method of ensuring that the whole film will be shown to the jury. In my view paragraph 5 (A) is objectionable and should be struck out. It contains the objectionable expression in relation to the allegations "the truth of which the plaintiff in his amended statement of "claim does not deny." It also contains the defendants' gloss on the passages of the film referred to. The plaintiff is not, in my opinion, called upon at this stage to admit or deny this gloss.

The appellants base their argument for the retention of paragraph 5 (A) upon the decision in *Cooke* v. *Hughes* [71] where it was held that the defendant was entitled to have the whole publication in which the libel was contained read to the jury. The decision must be read in the light of the facts of that case. I have no doubt that in some cases it may be necessary in order to explain the context in which the libel is contained to put the whole publication before the jury. But this must depend on the circumstances of each case. In any event, the point taken by the appellants relates not to pleading but is a question of evidence. This House is being asked in advance to rule upon a question of evidence which will arise for the decision of the judge as a matter of law at the trial. In my view paragraph 5 (A) should be struck out for the reason I have given. But this does not mean that the defendants may not be entitled at the trial to have the whole film exhibited to the jury, if they can persuade the judge that in order to explain the libel it is necessary to do so. In my opinion the Court of Appeal were right in declining to make any comment on the question and leaving it to the judge at the trial.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Garber, Vowles & Co.; Holland & Co.*

F. C.

[71] Ry. & M. 112.

[CHANCERY DIVISION.]

1961
Feb. 14, 15.

Plowman J.

A. D. WIMBUSH & SON LTD. *v.* FRANMILLS PROPERTIES LTD.

[1959 A. No. 444.]

Landlord and Tenant—Business premises (security of tenure)—Notice of opposition to new tenancy—Notice served by present landlord's predecessor—Grounds of opposition that "the landlord intends to occupy "the premises"—Whether new landlord entitled to rely on notice—Meaning in notice of "landlord"—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*g*), 44.

By a lease dated July 25, 1938, F. J. M. demised certain shop premises to the applicants for a term of 14 years with an option for a further term of 7 years. The option was duly exercised and by a lease dated December 18, 1951, the applicants were granted a term of 7 years from June 24, 1952. On February 20, 1952, F. J. M. granted a 21-year lease from December 25, 1951, to F. P. Ltd., who thus became the applicants' landlords.

On May 19, 1953, F. P. Ltd. granted an underlease for 13½ years to begin on June 24, 1959, to M. & M. Ltd.

On July 2, 1958, F. P. Ltd. served on the applicants a notice in the following terms: "1. I [F. P. Ltd.] . . . landlord (note 7) of "the above-mentioned premises hereby give you notice terminating "your tenancy on the 30th day of June, 1959. . . . 3. I would "oppose an application to the courts under Part II of the Act for "the grant of a new tenancy on the ground that at the termination "of the current tenancy the landlord intends to occupy the holding "for the purposes, or partly for the purposes, of a business to be "carried on by him therein. 4. This notice is given under the "provisions of the Landlord and Tenant Act, 1954. Your attention "is drawn to the notes overleaf." Note 7, on the reverse side of the notice, said: "The term 'landlord' in this notice does not "necessarily mean the landlord to whom the rent is paid; it means "the person who is landlord for the purposes of Part II of the "Act."

On July 3 the applicants gave notice that they were not willing to give up possession on June 30, 1959, and applied to the county court for a new tenancy for a term of 7 years from the expiration of their existing tenancy. On the transfer of the proceedings to the High Court, the application was opposed by M. & M. Ltd., who became landlords on June 24, 1959; F. P. Ltd. having on December 31, 1958, assigned their interest to the second respondents, it was ordered on June 29, 1960, that all further proceedings against them be stayed.

On the hearing of the application the applicants contended that M. & M. Ltd. were not entitled to rely on section 30 (1) (*g*) [1] of

[1] Landlord and Tenant Act, 1954, s. 30 (1): "The grounds on which "a landlord may oppose an application under subsection (1) of section "24 of this Act are such of the "following grounds as may be stated "in the landlord's notice under section 25 of this Act or, as the case "may be, under subsection (6) of "section 26 thereof, that is to say

[Reported by Philippa Price, Barrister-at-Law.]

the Landlord and Tenant Act, 1954, because they were not the landlords referred to in the notice as intending to occupy the premises for the purposes of their own business. The validity of the notice was not disputed and it was accepted that, if M. & M. Ltd. were entitled to oppose the application on the ground set out in paragraph (*g*), that ground had been made out:—

Held, that the word "landlord" in paragraph 3 of the notice did not necessarily mean the landlord who had served the notice, and the reference in the paragraph to the "landlord" was a reference to the landlord who was entitled to defeat the applicants' claim to a new tenancy by establishing that he intended to occupy the premises for the purposes of his own business, and that could only be the person who was landlord within the meaning of section 44 of the Landlord and Tenant Act, 1954, at the date of the hearing, that being the date at which the question of intention was relevant; and that, provided that the notice given by the landlord under section 25 stated as the ground of opposition to the tenant's application the grounds stated by paragraph (*g*) of section 30 (1), the person who at the date of the hearing was the landlord and who was opposing the application, could properly pray in aid the notice given by a predecessor as landlord. Accordingly, M. & M. Ltd. were entitled to rely on the notice, and the court was precluded by section 31 (1) from granting the applicants a new lease.

Betty's Cafés Ltd. v. *Phillips Furnishing Stores Ltd.* [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, H.L. and dictum of Parker L.J. in *X. L. Fisheries Ltd.* v. *Leeds Corporation* [1955] 2 Q.B. 636, 640; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875, C.A. applied.

ADJOURNED SUMMONS.

A. D. Wimbush & Son Ltd., tenants of No. 2, Trinity House, Trinity Street, Coventry, applied to the court under section 24 of the Landlord and Tenant Act, 1954, for a new lease of the premises. The applicants, who had been tenants of the premises since 1938, carried on there the business of confectioners.

By a lease dated July 25, 1938, F. J. Mills demised the premises to the applicants for a term of 14 years, with an option for a further term of 7 years. That option was duly exercised and by a lease dated December 18, 1951, the applicants were granted a term of 7 years from June 24, 1952. On February 20, 1952, F. J. Mills granted a lease of the premises to Franmills Properties Ltd., the first respondents, for a term of 21 years. Thus, at that date, Franmills Properties Ltd. became the landlords of the applicants. On May 19, 1953, Franmills Properties Ltd. granted to Mills & Mills Ltd., the third respondents, an underlease of 13 years and 183 days from June 24, 1959, expiring on December 24, 1972. Thus, from June 24, 1959, down to the date of these proceedings, Mills & Mills Ltd. were the landlords of the applicants.

On July 2, 1958, Franmills Properties Ltd. served on the applicants a notice dated July 1, 1958, under section 25 of the

". . . (*g*) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

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Landlord and Tenant Act, 1954,[2] terminating their tenancy on June 30, 1959. The notice was addressed to the applicants and was in the following terms:

"1. I, Franmills Properties Ltd. . . . landlord (note 7) of the "above-mentioned premises hereby give you notice terminating "your tenancy on the 30th day of June, 1959.

"2. You are required within two months after receiving this "notice to notify me in writing whether or not you will be willing "to give up possession of the premises on that date.

"3. I would oppose an application to the court under Part II "of the Act for the grant of a new tenancy on the ground that "on the termination of the current tenancy the landlord intends "to occupy the holding for the purposes, or partly for the pur-"poses, of a business to be carried on by him therein.

"4. This notice is given under the provisions of the Landlord "and Tenant Act, 1954. Your attention is drawn to the notes "overleaf." Among the notes overleaf, note 7 provided: "The "term 'landlord' in this notice does not necessarily mean the "landlord to whom the rent is paid; it means the person who is "the landlord for the purposes of Part II of the Act. . . ."

The notice was accompanied by a letter written by the solicitor to Franmills Properties Ltd. and addressed to the secretary of the applicants. It was headed: "Shop No. 2 Trinity House, Coven-"try," and was in these terms: "You will recollect that my "clients, Franmills Properties Ltd., were in communication "with you during May, 1957, with regard to the grant of a new "lease of the above property and that they were unable to grant "a new tenancy on the expiry of your lease. As your lease "expires on June 24, 1959, it is necessary for my clients to serve "notice to terminate their tenancy under the Landlord and "Tenant Act, 1954. Accordingly I am enclosing herewith the "statutory notice and shall be much obliged if you will kindly "acknowledge receipt. You will observe that by virtue of para-"graph 2 of this notice it is incumbent upon you to notify my "clients within two months whether or not you are willing to give "up possession of the premises on June 30, 1959."

The correspondence in May, 1957, referred to in the first paragraph of the letter, included a letter dated May 14, 1957, from Franmills Properties Ltd. to the applicants stating as follows: "We regret to advise you that the board of this company is "unable to consider the grant of a new lease to you as the "property was let some years ago from a date coinciding with the "end of your lease to another tenant." On July 3, the applicants gave notice that they would not be willing to give up possession on June 30, 1959. On October 6, 1958, they applied

[2] Landlord and Tenant Act, 1954, s. 25 (6): "A notice under this "section shall not have effect unless "it states whether the landlord would "oppose an application to the court "under this Part of this Act for the "grant of a new tenancy and, if so, "also states on which of the grounds "mentioned in section 30 of this Act "he would do so."

to the Coventry County Court, under section 24 of the Act, for a new tenancy and those proceedings were transferred to the High Court. In their application for a new tenancy the applicants proposed a new lease for a term of 7 years from the expiration of their then present lease at a rent of £1,100 per annum and the terms and conditions, apart from rent, contained or incorporated in the existing lease. Although under the Act the court would have had jurisdiction to grant a lease for a term not exceeding 14 years, counsel for the applicants did not seek to resile from what was stated in that notice as to the length of term which the court was asked to grant.

The application was opposed by Mills & Mills Ltd., who became the applicants' landlords for the purposes of the Act on June 24, 1959. Franmills Properties Ltd., although they were the applicants' landlords until December 31, 1958, were no longer interested, having on that date assigned their interest to the second respondents, the trustees of Sir Thomas White's Charity. They went into voluntary liquidation early in 1959 and by an order dated June 29, 1960, Pennycuick J. directed that all further proceedings in the matter be stayed against them, except for the purposes of obtaining directions as to their costs.

The second respondents, the trustees of Sir Thomas White's Charity, were not really interested because even if the court ordered a new lease for the 7 years which the applicants asked for, such lease would expire before the lease of Mills & Mills Ltd. fell in.

On the hearing of this application the validity of the notice given by Franmills Properties Ltd. was not in question.

R. E. Megarry Q.C. and *G. A. Grove* for the applicants.
L. A Blundell Q.C. and *J. T. Plume* for the respondents.

The cases cited in argument are referred to in the judgment.

Plowman J. stated the facts and continued: The first question to consider is whether under the Act of 1954 the applicants are entitled to a new lease at all. Section 29 (1) is in these terms: "Subject to the provisions of this Act, on an application under "subsection (1) of section 24 of this Act for a new tenancy the "court shall make an order for the grant of a tenancy comprising "such property, at such rent and on such other terms, as are "hereinafter provided." So, subject to the provisions of the Act, which I take to be a reference to sections 30 and 31, I am bound to order a new tenancy. However, I must refer to sections 30 and 31. Section 31 (1) provides: "If the landlord opposes an "application under subsection (1) of section 24 of this Act on "grounds on which he is entitled to oppose it in accordance with "the last foregoing section and establishes any of those grounds "to the satisfaction of the court, the court shall not make an "order for the grant of a new tenancy." Mr. Blundell submits

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that I cannot make an order in favour of the applicants because the landlords do oppose on grounds on which they are entitled to do so under section 30 and they have established those grounds.

The relevant part of section 30, paragraph (*g*) of subsection (1), is in these terms: "The grounds on which a landlord may "oppose an application under subsection (1) of section 24 of this "Act are such of the following grounds as may be stated in the "landlord's notice under section 25 of this Act or, as the case "may be, under subsection (6) of section 26 thereof, that is to "say . . . (*g*) subject as hereinafter provided, that on the termina-"tion of the current tenancy the landlord intends to occupy the "holding for the purposes, or partly for the purposes, of a business "to be carried on by him therein, or as his residence."

I am not concerned with the part of the paragraph which states, "subject as hereinafter provided," because that relates to a case where the landlord has owned his interest for less than 5 years, and the present case is not such a case. The relevant part of paragraph (*g*) is in terms which I will read again: "that "on the termination of the current tenancy the landlord intends "to occupy the holding for the purposes . . . of a business to be "carried on by him therein." It is not disputed in the present case that if the landlords, Mills & Mills Ltd., are entitled to oppose the application on that ground, then that ground has in fact been established by evidence, and I am satisfied (as section 31 (1) requires me to be) that if that is a ground on which the landlords can rely, it has been established.

The real contest in this case is and has been on the question whether Mills & Mills Ltd., the landlords, are entitled to set up paragraph (*g*) of section 30 (1) at all. Here I must go back to the notice which was given by Franmills Properties Ltd. on July 1, 1958, under section 25 of the Act. It is common ground that they were the applicants' landlords at that time.

[His Lordship read the notice and continued:] Among the notes overleaf is a note, note 7, which states, "The term "'landlord' in this notice does not necessarily mean the land-"lord to whom the rent is paid," and that note must apply just as much to the occasion in paragraph 3 of the notice where the word "landlord" is used as it does to the occasion in paragraph 1 where attention is specifically drawn to note 7 on the back; that is to say, when in paragraph 3 the giver of the notice says, "I would oppose an application to the court under Part II of the "Act for the grant of a new tenancy on the ground that on "the termination of the current tenancy the landlord intends to "occupy," note 7 sounds a cautionary note in pointing out that the word "landlord" in that context does not necessarily mean the landlord to whom the applicants are at that moment paying the rent. Mr. Blundell also points out that if the word "land-"lord" were being used in paragraph 3 in a sense which confined it exclusively to Franmills Properties Ltd., one would have

expected not to find the word "landlord" there at all, but to have found repetition of the word "I" with which the paragraph commenced. Mr. Megarry points out that the landlord giving the notice was Franmills Properties Ltd. He submits that, on its fair construction, the notice means that Franmills Properties Ltd. intended to occupy the holding for the purposes of a business to be carried on by it and that it cannot really refer to Mills & Mills Ltd., of whom, in fact, at that date the applicants had never heard as landlords. They knew of their existence, because they were carrying on business in adjoining premises, but I think that it is fair to say that they had never at this time heard of Mills & Mills Ltd. as landlords. Mr. Megarry submits that in those circumstances Mills & Mills Ltd. are not entitled to rely on this notice for the purposes of section 30 of the Act.

[His Lordship read the letter from the solicitor to Franmills Properties Ltd. to the applicants, that accompanied the notice and said:] The correspondence in May, 1957, in fact included a letter dated May 14, 1957, written by Franmills Properties Ltd. to the applicants and stating in the second paragraph: "We "regret to advise you that the board of this company is unable "to consider the grant of a new lease to you as the property was "let some years ago from a date coinciding with the end of your "lease to another tenant." Mr. Blundell says that by following this trail the applicants could have deduced that the landlord referred to in paragraph 3 of the notice which I have read was someone other than Franmills Properties Ltd. I think it obviously would have been much better if the letter accompanying that notice had stated plainly that the landlord referred to in paragraph 3 of the notice was not in fact intended to be Franmills Properties Ltd. at all but was Mills & Mills Ltd. It would have been quite easy to have done that, and it would have saved a lot of trouble, but I cannot agree that the word "landlord" in paragraph 3 of that notice necessarily means Franmills Properties Ltd. at all. In my judgment, the reference in that paragraph to the landlord must be taken to be a reference to the landlord who is entitled to defeat the applicants' claim to a new tenancy by establishing that he intends to occupy the premises for the purposes of his own business, and that can only be the person who is landlord within the definition in section 44 of the Act at the date of the hearing, because that is the date at which the question of the intention is relevant, as was established by the decision of the House of Lords in *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[1] As I say, I think that the fair construction of this paragraph, in the light of the Act, is that it refers to the landlord who will be taking this point at the relevant time in opposition to the applicants' claim for a new lease.

However, Mr. Blundell went further than that. He said that even if Mr. Megarry is right on the question of construction—i.e.,

[1] [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, H.L.

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that the reference to "the landlord" in paragraph 3 of the notice is in truth a reference to Franmills Properties Ltd.—it does not matter. What Mr. Blundell says, as I understand it, is this. Mills & Mills Ltd. are admittedly the landlords today; it is not in dispute that they intend to occupy these premises for the purposes of their own business; such an intention falls within paragraph (*g*) of section 30 (1) of the Act, and the ground which is specified in that paragraph is in fact the ground which is specified in the landlords' notice under section 25; therefore, section 31 (1) of the Act applies and I am precluded from making any order in favour of the applicants. He submits that section 30 does not require that the landlord who served the notice should have any such intention as is referred to in paragraph (*g*): what is required is that the landlord opposing the application should have the relevant intention, and it is sufficient that the notice given under section 25 should contain a sufficient reference to paragraph (*g*). I accept this argument.

I was referred to certain cases on what is meant by a sufficient reference to paragraph (*g*): *Biles* v. *Caesar* [2] and *Bolton's (House Furnishers) Ltd.* v. *Oppenheim*,[3] to which I do not think I need refer, because if the question is (and in my view it is): Does this notice refer sufficiently to paragraph (*g*) as being the ground on which the landlord who opposes the application will oppose it, it seems to me that the answer to that is clearly "Yes," particularly as paragraph (*g*) is in terms set out in the notes at the back of the form, and what is stated on the front follows the form of the note on the back.

X.L. Fisheries Ltd. v. *Leeds Corporation*,[4] referred to by Mr. Blundell, in my judgment supports the view which I have taken It is perfectly true, as Mr. Megarry pointed out, that the question which arose in that case is not precisely the same as the question in the present case. The question there was not whether, if I may put it in this way, landlord No. 2 could take advantage of a section 25 notice served by landlord No. 1, but whether landlord No. 2 could serve his own notice, landlord No. 1 not having served a notice at all. But Parker L.J., in an interlocutory observation during legal argument, said [5]: "If the landlord sets the machinery "in motion by giving notice under section 25 (6), he has to "anticipate the grounds on which he will rely in objecting to an "application, and if there is after that a change of landlord "within the two months' period, the new landlord will merely "inherit the grounds stated by his predecessor in title, since no "provision is made for amendment."

Mr. Megarry, quite rightly, drew attention to the fact that that is an interlocutory observation, but he also very fairly calls attention to the fact that it was an interlocutory observation which

[2] [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151, C.A.

[3] [1959] 1 W.L.R. 685, 913, C.A.; [1959] 3 All E.R. 90.

[4] [1955] 2 Q.B. 636; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875.

[5] [1955] 2 Q.B. 636, 640.

had the approval of the Court of Appeal in *Piper* v. *Muggleton*.[6] Jenkins L.J., who delivered the judgment of the court, said[7]: "The incoming 'landlord' must, we think, be bound by the acts "or omissions of his predecessor while answering that descrip-"tion (see *per* Parker L.J. in the case just cited), [*X.L. Fisheries* "v. *Leeds Corporation*[4]] and that may well preclude any effec-"tive opposition on his part, save as regards the terms of the new "tenancy." Since the observation of Parker L.J. to which I have referred is the only observation falling from him which is reported in the *X.L. Fisheries* case,[8] it follows that the approval which Jenkins L.J. was giving to the observation of Parker L.J. must have been to this observation which I have read.

Evershed M.R., after referring to section 30 (1) and paragraph (*f*) of that subsection, said this[9]: "The question is whether "those sections contemplate or require that the landlord, through-"out the whole period after the machinery of the Act has been "set in motion, should be the same person, whether an individual "person or a persona ficta. I think that the answer to that ques-"tion is inevitably in the negative. I can find nothing in the "sections or the language used therein which would require the "continuity throughout of the same person as landlord; and, "indeed, it would be a strange thing if the Act did so require, "because, though Parliament may do many things, it cannot "insist that a particular person shall live a particular length of "time. It is, in other words, I think quite plain that when the "landlord comes to put in his notice of opposition, it is sufficient "if at the time he puts it in he is in fact the landlord. It is, "therefore, sufficient if he, having acquired the premises or the "reversion since the date of the request, is able to say when he "puts in his notice of opposition before the two months' period "expires that he is the landlord and (to take the example that I "chose from section 30) that on the termination of the current "tenancy he intends to reconstruct."

In my judgment, first, this notice, fairly construed, means that it is the person who will be opposing the tenant's application for a new lease who will oppose on the ground set out in paragraph (*g*) of section 30 (1) of the Act; secondly, Mr. Blundell is right in submitting that in any case, provided the notice which the landlord gives under section 25 states as the ground of opposition which is to be made to the tenant's application the grounds stated under paragraph (*g*), then the person who at the date of the hearing is the landlord, and who is opposing the application, can properly pray in aid the notice which has been given by a predecessor as landlord. It follows from that that I am precluded (whatever I might otherwise have done) by section 31 (1) from granting the applicant a new lease. I have, however, been asked

[4] [1955] 2 Q.B. 636.

[6] [1956] 2 Q.B. 569; [1956] 2 W.L.R. 1093; [1956] 2 All E.R. 249, C.A.

[7] [1956] 2 Q.B. 569, 578; [1956] 2 W.L.R. 1093.

[8] [1955] 2 Q.B. 636.

[9] Ibid. 646.

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to go on to consider the question of what length of term I should have granted them if I had been bound to grant them a new lease, and I have been asked to do this in case my decision on the earlier point should be held to be wrong. Taking into account all the circumstances of this case, as I am bound to do under section 33 of the Act—the circumstances which are set out in the evidence, the submissions which have been made by Mr. Megarry and Mr. Blundell, the cases to which I have been referred, such as *Upsons Ltd.* v. *Robins Ltd.*,[10] the observations of Lord Morton in the *Betty's Cafés* case,[11] and the decision of Wynn-Parry J. in *In re No. 88, High Road, Kilburn* [12]—I should have granted the applicants a tenancy starting with the end of the current tenancy and expiring on June 24, 1962, that is to say, three years after the end of the 7-year term granted to them by the second of their two leases.

Application dismissed. Costs.

Solicitors: *Stafford, Clark & Co. for Oakley & Co., Birmingham; Sharpe, Pritchard & Co. for Newsome & Co., Coventry.*

[10] [1956] 1 Q.B. 131; [1955] 3 W.L.R. 584; [1955] 3 All E.R. 348, C.A.

[11] [1959] A.C. 20.

[12] [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527.

[PRIVY COUNCIL.]

J. C.*

1961 *March* 6.

ELVAN ROSE . . . . . Appellant;

AND

THE QUEEN . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE BAHAMA ISLANDS.

Crime — Homicide — Diminished responsibility — Direction to jury — Degree of "abnormality of mind" not to be assessed on basis of M'Naughten Rules—Insanity to be considered in broad popular sense—Intention not conclusive of abnormality of mind—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2—*Homicide* (*Special Defences*) *Act,* 1959, *s.* 2 (*Bahama Islands*).

Bahama Islands — Crime — Homicide — Diminished responsibility — Direction to jury—Homicide (*Special Defences*) *Act,* 1959, *s.* 2.

By section 2 of the Homicide (Special Defences) Act, 1959, of the Bahama Islands (identical in terms with section 2 of the English Homicide Act, 1957): "(1) Where a person kills . . . "another, he shall not be convicted of murder if he was suffering "from such abnormality of mind . . . as substantially impaired

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* *Present*: Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest.

"his mental responsibility for his acts . . . in doing . . . the "killing . . . (3) A person who but for this section would be "liable . . . to be convicted of murder shall be liable instead to be "convicted of manslaughter."

A direction by the judge in dealing with the defence of diminished responsibility at the trial of the appellant, who was convicted of murder and sentenced to death, that the jury were to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity as laid down in the M'Naughten Rules was a serious and vital misdirection. If insanity was to be taken into consideration, as would usually be the case, the word must be used in its broad popular sense. The direction to the jury must always be related to the particular evidence, and the words "borderline" and "insanity" might not in some cases be helpful.

Interpretation of "abnormality of mind" and "mental "responsibility" by Lord Parker C.J. in *Reg.* v. *Byrne* [1960] 2 Q.B. 396 at 403 and 404; [1960] 3 W.L.R. 440, C.C.A. approved.

Reg. v. *Walden* [1959] 1 W.L.R. 1008; [1959] 3 All E.R. 203, C.C.A. considered.

There was a further misdirection which might have been a determining factor in the jury's verdict, when the judge said: "Do "you think that he did that [the killing] under the influence of "this diminished responsibility, or do you think that he knew just "exactly what he was doing? Did he intend to do it? If so, "murder; if not, manslaughter." A man might know what he was doing and intend to do it and yet suffer from such abnormality of mind as substantially impaired his mental responsibility.

Verdict of murder and sentence of death quashed, and a verdict of manslaughter and a sentence of imprisonment for life substituted therefor.

APPEAL (No. 61 of 1960) in forma pauperis from a conviction of murder in the Supreme Court of the Bahama Islands after a trial before Henderson C.J. and a jury (May 14, 1960). The appellant, Elvan Rose, who had no right of appeal from his conviction other than by special leave to Her Majesty in Council, had been sentenced to death.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellant was charged and tried together with another man named James Ingraham for the murder of Samuel Otis King on February 17, 1960. Ingraham was also convicted and sentenced to death. He had not appealed. On February 17, 1960, both the accused were prisoners serving sentences in Fox Hill prison where the deceased man, King, was employed as an overseer. At about 3.30 p.m. an assistant turnkey named Gay was knocked unconscious in a corridor of the prison. He did not see who struck the blow, but shortly afterwards both accused were seen bending over him as though searching him. They then went to the south main gate where King was in charge and attempted, without success, to open it. The appellant told King to open it and, when he refused, took out a knife and threatened him with it. King broke away from the appellant who followed him and, after telling him he was going to kill him because he would

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not give up the keys, stabbed him with a knife inflicting two wounds, one of which was fatal. It was not disputed on the appeal that the accused killed King and that if the jury had been properly directed on the defence of diminished responsibility the verdict could not be questioned.

The relevant statutory provisions in the Bahama Islands were contained in section 2 of the Homicide (Special Defences) Act, 1959, and provided: "2.—(1) Where a person kills or is a "party to the killing of another, he shall not be convicted of "murder if he was suffering from such abnormality of mind "(whether arising from a condition of arrested or retarded "development of mind or any inherent causes or induced by "disease or injury) as substantially impaired his mental respon-"sibility for his acts and omissions in doing or being a party "to the killing.

"(2) On a charge of murder, it shall be for the defence to "prove that the person charged is by virtue of this section not "liable to be convicted of murder.

"(3) A person who but for this section would be liable, "whether as principal or as accessory, to be convicted of murder "shall be liable instead to be convicted of manslaughter.

"(4) The fact that one party to a killing is by virtue of this "section not liable to be convicted of murder shall not affect the "question whether the killing amounted to murder in the case "of any other party to it."

The language was identical with that of the English Homicide Act, 1957.

There was no dispute that the evidence for the defence (see the judgment of the Board) constituted evidence fit to be considered on the issue of diminished responsibility and the grounds of appeal were that the jury were wrongly directed on that issue.

1961. Feb. 6, 7, 8. *J. T. Molony Q.C.* and *D. A. Grant* for the appellant

Neil Lawson Q.C. and *Mervyn Heald* for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Reg.* v. *Matheson* [1]; *Reg.* v. *Bertrand* [2]; *Director of Public Prosecutions* v. *Smith* [3]; *Carraher* v. *H.M. Advocate* [4]; *Palmer* v. *Palmer* [5]; *In re Dillet* [6]; *Zahiruddin* v. *King-Emperor* [7]; *Ex parte Macrea* [8]; *Stirland* v. *Director of Public Prosecutions* [9]; *Teper* v. *The Queen* [10]; *Chan Kau* v.

[1] [1958] 1 W.L.R. 474; [1958] 2 All E.R. 87, C.C.A.
[2] (1867) L.R. 1 P.C. 520.
[3] [1960] 3 W.L.R. 546, H.L.
[4] 1946 S.C.(J.) 108.
[5] [1955] P. 4; [1954] 3 W.L.R. 756; [1954] 3 All E.R. 494, C.A.
[6] (1887) 12 App.Cas. 459, P.C.
[7] (1947) L.R. 74 I.A. 80.
[8] [1893] A.C. 346; 9 T.L.R. 463, P.C.
[9] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13, H.L.
[10] [1952] A.C. 480; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447, P.C.

The Queen[11]; *Bullard* v. *The Queen*[12]; *Kwaku Mensah* v. *The King*[13]; *Reg.* v. *Dunbar*[14]; *Jannokee Doss* v. *Bindabun Doss.*[15]

March 6. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts set out above and continued: It will be convenient at this stage to endeavour to summarise the effect of the medical evidence adduced by the defence in support of the plea of diminished responsibility. It is to be found in the evidence of Dr. Mary Etheridge, who had qualified in Paris as a Doctor of Medicine and was a licentiate of the Royal College of Physicians in London and a member of the Royal College of Surgeons. She had specialised in neuro surgery and neuro psychiatry in Paris and served as a specialist in the Royal Army Medical Corps in India during the war. She had also worked at the Hammersmith Hospital and at the National Hospital for Nervous Diseases in London. She had acted as consultant in neurology, neuro surgery and neuro psychiatry at Princess Margaret Hospital and the Bahamas General Hospital.

She had examined the appellant and his history and said she found a clear-cut history of delusions and hallucinations. She found indications of possible head injuries which she subsequently verified. In the cases of three of these injuries there was a history of subsequent unconsciousness and amnesia. She caused X-ray photographs to be taken and carried out an examination of his optic nerves. After giving in considerable detail a description in highly technical language, which must have been extremely difficult for the jury to follow or understand, she summarised her conclusions in these words: "With the material at our disposal "we were forced to certain conclusions, and these were: That "we had a man who had given evidence or at least who had "suggested to at least one observer—and I'm talking now about "Cpl. Hepburn—that he was mentally unbalanced, who had "suggested to another observer—and I'm referring now to Dr. "Podlewski—that his condition might be delusional, it might "have suggested a delusional state as he said and had given to "myself evidence of injury to his skull with the possibility—and "in view of his history I would say the probability—of underlying "brain damage as evidenced by his delusional state, his hallu-"cinations and, on at least two occasions, his extremely brutal "and violent behaviour—maniacal behaviour—I would say. If I "had to put a name on it I would call it, with Mr. Adolph Meyer, "post-traumatic constitution, with paranoid developments, the "thing which we call today the punch drunk syndrome."

In cross-examination she was asked: "Q. Dr. would you say

[11] [1955] A.C. 206; [1955] 2 T.L.R. 192; [1955] 1 All E.R. 266, P.C.

[12] [1957] A.C. 635; [1957] 3 W.L.R. 656, P.C.

[13] [1946] A.C. 83; 62 T.L.R. 83, P.C.

[14] [1958] 1 Q.B. 1; [1957] 3 W.L.R. 330; [1957] 2 All E.R. 737, C.C.A.

[15] (1836) 1 Moo.I.A. 67.

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"that all this adds up to being insane? A. I didn't say such a "thing. Q. No, I am asking you? A. Then I would say no. "Not insane in the way which I imagine you mean. Q. Well, "you don't think he is insane in any way? A. I didn't say "such a thing. Q. No, I am asking you? A. I showed that he "showed mental trouble, mental disorders, disorders of the intel-"lect, he has periods of insanity. Q. Well, you are saying that "he had periods of insanity? A. Insane in the way that in "general people understand it."

Later on in answer to the question "Do you now say he has "paranoia?" she replied: "I said that Rose has had repeated "injury to his brain which showed that his intellect had been "impaired, which showed that he at many times, and he has "given you evidence of it, has had completely not only diminished "but absent moral responsibility."

The effect of the evidence of Dr. Podlewski, who was recalled in rebuttal by the prosecution, may be summarised by setting out the last two or three questions and answers in his examination-in-chief: "Q. Is it your opinion that this man is sane or insane. "That is, was he sane or insane on 17th February? A. My "opinion is that there is nothing in what I have seen of him to "indicate that he was suffering from any serious mental illness "at this time. Q. Could you say whether or not he was on the "borderline of insanity? A. I could definitely say he was not "on the borderline. Q. I notice you keep saying, doctor, 'any "'serious mental illness'; would you like to explain that to us? "A. Well, in the legal sense when I say 'serious mental illness' "I mean the type of mental illness which would substantially "diminish his responsibility for his actions. Q. I see. A doctor "might think that there might be something wrong with him. "Is that what you mean? A. It is a possibility."

It had been elicited in the cross-examination of this witness when he had given evidence earlier in the trial that the appellant had been convicted of murder and sentenced to death in 1957. On that occasion he had made a report on his mental condition. This was put in evidence and showed that the appellant at that time had complained of molestation and annoyance by people who were threatening to kill him. The doctor was unable to ascertain whether this belief was delusional or not, but, if it was, it would be consistent with the existence of paranoia. His sentence was subsequently commuted to life imprisonment.

The above will suffice to indicate the two conflicting medical views of the appellant's condition which the jury were called upon to consider in deciding whether on balance of probability the defence had established the plea of diminished responsibility which would justify a verdict of manslaughter.

The contention of the appellant is that the jury did not have a correct or sufficient direction in law as to the nature of this defence and in particular were misdirected as to the meaning of the words "mental responsibility."

Before turning to the passages of which complaint is made their Lordships desire to emphasise that the Chief Justice was engaged in the difficult task of instructing the jury as to the meaning, and application to the evidence in the present case, of a difficult section which has introduced a novel conception into English criminal law, and, moreover, he was doing this before the Court of Criminal Appeal in this country had given judgment in *Reg.* v. *Byrne*.[1] After reading the section of the Act to the jury and explaining the burden of proof the Chief Justice read to the jury the following extract from the summing-up of Paull J. in *Reg.* v. *Walden*, which had received the approval of the Court of Criminal Appeal in England[2]: "There are some cases, you "may think, where a man has nearly got to that condition but "not quite, where he is wandering on the borderline between "being insane and sane, where you can say to yourself, 'Well, "'really, it may be he is not insane, but he is on the borderline. "'. . . He is not really fully responsible for what he has done.' "Now, you may think, and it is entirely a matter for you, that "that is what is meant by those words in the Act . . . 'such "'abnormality as substantially impairs his mental responsibility.' "In other words, he is not really responsible for what he has "done. His responsibility, if not wholly gone, has been "impaired."

The Chief Justice then proceeded as follows: "That, I think, "might help you when you are considering this question of "impaired responsibility. And, since that is supposed to be, or "is said to be a borderline case of sanity or insanity, then it "seems to me that I should explain very briefly what we under-"stand by insanity in law. And that is that the person is so "deranged that he doesn't know what he was doing and he "doesn't know if what he was doing is right or wrong—he's "unable to distinguish."

Then he quoted in full the rule in M'Naughten's case, reading it out verbatim. He observed that it is "not this case, but I "want you to see what insanity is so that you can see whether it "is borderline or not." After quoting it he went on: "'Wrong' "means legally wrong. Do you think here, therefore, that "there was this question of borderline? That's what you've got "to look at. Do you think that Rose was suffering from this "abnormality?"

It is said by counsel for the appellant that Rose's abnormality should not be judged by the test whether it bordered on insanity or not, and that no such test is justified by the language of the section. In any event it is not a conclusive test to be applied in every case. Furthermore, if insanity is to be introduced into the application of the section, there is no justification, he said, for confining it to legal insanity within the M'Naughten definition.

[1] [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440, C.C.A.

[2] [1959] 1 W.L.R. 1008, 1012; [1959] 3 All E.R. 203, C.C.A.

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For the Crown it was argued that "mental responsibility" in the section means "mental responsibility in law," i.e., the standard required for a man to be held responsible in law for his acts, and that standard was to be found in the rules in M'Naughten's case because there was no other standard to which it could be referred. It was right, therefore, said the Crown, for the Chief Justice to invite the jury to apply the test of borderline of insanity as defined in the M'Naughten Rules.

Their Lordships cannot accept the Crown's contention. It would be an undue limitation of the wide words of the section. In *Reg.* v. *Byrne* [3] Lord Parker C.J., delivering the judgment of the court, after setting out the matters required to be proved in the defence of diminished responsibility, proceeded: "'Abnormality of mind,' which has to be contrasted with the "time-honoured expression in the M'Naughten Rules 'defect "'of reason,' means a state of mind so different from that of "ordinary human beings that the reasonable man would term it "abnormal. It appears to us to be wide enough to cover the "mind's activities in all its aspects, not only the perception of "physical acts and matters, and the ability to form a rational "judgment as to whether an act is right or wrong, but also the "ability to exercise will power to control physical acts in accor-"dance with that rational judgment. The expression 'mental "'responsibility for his acts' points to a consideration of the "extent to which the accused's mind is answerable for his phy-"sical acts which must include a consideration of the extent of "his ability to exercise will power to control his physical acts."

Later, after referring to the citations from Scots cases in *Reg.* v. *Spriggs*,[4] Lord Parker continued [5]: "They indicate that such "abnormality as 'substantially impairs his mental responsibility' "involves a mental state which in popular language (not that of "the M'Naughten Rules) a jury would regard as amounting to "partial insanity or being on the borderline of insanity."

Their Lordships respectfully accept this interpretation of the words "abnormality of mind" and "mental responsibility" as authoritative and correct. They would not, however, consider that the Court of Criminal Appeal was intending to lay down that in every case the jury must necessarily be directed that the test is always to be the borderline of insanity. There may be cases in which the abnormality of mind relied upon cannot readily be related to any of the generally recognised types of "insanity." If, however, insanity is to be taken into consideration, as undoubtedly will usually be the case, the word must be used in its broad popular sense. It cannot too often be emphasised that there is no formula that can safely be used in every case—the direction to the jury must always be related to the particular

[3] [1960] 2 Q.B. 396, 403.
[4] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.
[5] [1960] 2 Q.B. 396, 404.

evidence that has been given and there may be cases where the words "borderline" and "insanity" may not be helpful.

In the result their Lordships are of opinion that the direction given to the jury by which they were told to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity as laid down in the M'Naughten Rules was a serious and vital misdirection which would, no doubt, not have been given had the Chief Justice had the benefit of Lord Parker's judgment in *Reg.* v. *Byrne*.[6]

There was a further passage in the summing-up which was strongly relied upon by counsel for the appellant. Towards the end of his charge the Chief Justice, referring to the killing, said: "Do you think that he did that under the influence of this "diminished responsibility, or do you think that he knew just "exactly what he was doing? Did he intend to do it? If so, "murder; if not, manslaughter." This was a misdirection. A man may know what he is doing and intend to do it and yet suffer from such abnormality of mind as substantially impairs his mental responsibility. This misdirection, coming where it did, may have been a determining factor in the jury's verdict.

There were two other passages which were the subject of complaint, but their Lordships, although appreciating that they were open to criticism, would not have regarded them standing alone as misdirections which could reasonably have affected the jury's verdict. One of these dealt with the appellant's amnesia, which was said to have covered the period from the moment he saw blood when Gay was knocked down until several days later. It is not necessary to set out the passage, but it would seem that the judge had not quite appreciated the use which the defence were making of this amnesia, if it existed.

In the other passage the Chief Justice, in dealing with the case of the appellant's fellow accused, Ingraham, had overlooked the provisions of subsection (4) of the Act and told the jury that if they found that the appellant was suffering from diminished responsibility, and consequently was guilty only of manslaughter, and that Ingraham was acting in concert with him and encouraging him to do what he did, then they should find Ingraham also guilty only of manslaughter.

As already indicated, their Lordships would not have regarded these passages by themselves as sufficient to vitiate the verdict against the appellant.

In the event, their Lordships are of opinion that the appellant was deprived of his right to have his defence of diminished responsibility properly considered by the jury and they must consequently humbly advise Her Majesty that the verdict of guilty of murder and the sentence of death passed upon the appellant should be quashed and a verdict of guilty of

[6] [1960] 2 Q.B. 396.

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manslaughter and a sentence of imprisonment for life substituted therefor.

Solicitors: *Blyth, Dutton, Wright & Bennett; Charles Russell & Co.*

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[COURT OF APPEAL.]

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CAMPBELL DISCOUNT CO. LTD. *v.* GALL.

[Plaint No. QO 254.]

Hire-Purchase—Hire-purchase agreement—Agent, whether dealer—Blank form signed by hirer—Agreement by hirer with dealer for hire-purchase price within statutory protection—Contract form filled up by dealer for price outside statutory protection—Deposit paid to dealer—Whether agreement enforceable—Whether parol evidence admissible to prove true nature of transaction—Status of dealer in hire-purchase agreement — Whether hirer estopped by negligence — Hire-Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *ss.* 2 (1) (2), 5 (*e*).

Hire-Purchase—Agency—Whether dealer agent—Blank form signed by hirer—Filled in by dealer.

Estoppel — Conduct, by — Negligence — Motor-car — Hire-purchase — Blank form signed by hirer—Form filled up by dealer for price outside statutory protection—Whether hirer estopped by negligence.

Contract — Construction — Extrinsic evidence — Hire-purchase — Evidence to show true nature of transaction.

The defendant agreed with a car dealer to buy a car on hire-purchase terms for £265. He paid a deposit of £65, understanding that repayment of the balance would be by weekly instalments of £2. He then signed the hire-purchase agreement form of the plaintiff finance company provided by the dealer, leaving the dealer to fill in the details. The dealer, whether by mistake or fraud, filled in a false price of £325 and terms for monthly instalments of £13. The finance company accepted the transaction and sent the defendant a copy of the agreement. The defendant, according to evidence given at the subsequent trial, informed the company by letter and telephone that the copy agreement did not represent the contract he had made; and he refused to pay any instalments and did not use the car. The company took back the car and sued him for £52, representing four instalments. The defendant claimed that the agreement was void since it was for an amount less than £300 and, accordingly, within the protection of the Hire-Purchase Acts, 1938 [1]

[1] Hire-Purchase Act, 1938, s. 2: "(1) Before any hire-purchase agreement is entered into in respect of any goods, the owner shall state in writing to the prospective hirer, otherwise than in the note or memorandum of the agreement, a price at which the goods may be purchased by him for cash (in this section referred to as the 'cash price'): Provided that this subsection shall be deemed to have been sufficiently complied with—(*a*) if the hirer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached to or displayed with the goods clearly stating the cash price, either of the goods as a whole or of all the different articles or sets of articles comprised therein, or (*b*) if the hirer has selected the goods by reference to a catalogue, price list, or advertisement, which

and 1954, that it did not comply with the requirements of section 2 of the Act of 1938; and he counterclaimed for the return of his deposit:—

Held, (1) that the dealer was not the agent of either the hirer or the finance company (post, p. 520).

(2) That the question whether the written document was enforceable against the hirer or was void depended on an examination of the true nature of the transaction; and for that purpose parol evidence was admissible in a case which involved the Hire-Purchase Acts, since those Acts, like the Bills of Sale Acts and the Rent Acts, could not be excluded by documents which, though purporting to be outside the Acts, represented a transaction which was in truth within their ambit (post, p. 518).

(3) That the parol evidence here showed that the true bargain was one within the Acts and, as it did not comply with the statutory requirements, it was void and unenforceable by the company unless the hirer was estopped by his own negligence in signing the form in blank, from asserting as against the company that the written document was not his agreement.

(4) That the hirer was not estopped from denying the truth of the written document for he owed no duty of care to the finance company, and the doctrine of estoppel by negligence applied only to negotiable instruments (post, p. 521).

Accordingly, there was not and never had been any agreement between the hirer and the company on which they could sue him for the instalments; but, for the same reason, he could not recover from the company the deposit paid to the dealer, since it was not referable to any contract with the company.

Per Holroyd Pearce L.J. It is doubtful whether an agreement which is unenforceable under the Hire-Purchase Acts can by estoppel be rendered valid and enforceable (post, p. 522).

Wilson and Meeson v. *Pickering* [1946] 1 K.B. 422; 62 T.L.R. 223; [1946] 1 All E.R. 394, C.A. applied.

Eastern Distributors Ltd. v. *Goldring* (*Murphy, Third Party*) [1957] 2 Q.B. 600; [1957] 3 W.L.R. 237; [1957] 2 All E.R. 525, C.A., and dictum of Diplock J. in *Lowe* v. *Lombank* [1960] 1 W.L.R. 196, 206; [1960] 1 All E.R. 611, C.A. distinguished.

APPEAL from Judge Nicholas sitting at Lambeth County Court.

The facts, as stated by Holroyd Pearce L.J., were as follows: The defendant, Gall, was introduced to one Boodof, the manager of a firm, Windsor Autos, which dealt in motor-cars. He believed that Boodof was a dealer on his own. He agreed with Boodof to buy a secondhand Vauxhall car for £265 on hire-purchase terms. The defendant paid a deposit of £65 in cash to Boodof. Unfortunately, at Boodof's request the

"clearly stated the cash price either "of the goods as a whole or of all "the different articles or sets of "articles comprised therein. (2) An "owner shall not be entitled to "enforce a hire-purchase agreement ". . . unless . . . (*a*) a note or "memorandum of the agreement is "made and signed by the hirer and "by or on behalf of all other parties "to the agreement . . ."

S. 5: "Any provision in any "agreement— . . . (*e*) whereby an "owner or seller is relieved from "liability for the acts or defaults of "any person acting on his behalf in "connection with the formation or "conclusion of a hire-purchase agree-"ment or credit-sale agreement, shall "be void."

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defendant signed one of the forms of hire-purchase contract of the plaintiff company, Campbell Discount Company Ltd., leaving the blanks unfilled for Boodof to complete. Clause 12 of the printed agreement provided that "the vendor is not the "owners' agent and the owners are not in any way responsible "for and shall not be bound by any representation made by the "vendor."

The defendant had been told by Boodof and expected that he would have to pay a further £200 by instalments not exceeding £2 per week spread over a period of 18 months to 2 years. Boodof inserted into the uncompleted hire-purchase agreement a false purchase price of £325. He also inserted into the hire-purchase agreement a provision that repayment was to be by 24 monthly instalments of £13 per month. He gave similar false particulars on the sales note. He sent the requisite documents to the plaintiff company, who bona fide accepted the transaction, and paid Boodof for the motor-car. The car was delivered to the defendant, but he never used it. Shortly thereafter the company sent him a copy of the agreement. The defendant said in evidence that he complained by letter and telephone that both the price and the instalments were too high, but the plaintiff company had no record of such a letter or telephone conversation.

In due course the company took possession of the car and sued the defendant for four monthly instalments—£52. The defendant, by his defence, contended that he had never agreed to hire the car on the terms set out in the copy agreement or on any terms save those agreed with Boodof, and that the terms on which the company claimed had been inserted in the agreement without his knowledge or consent. He claimed further that he would rely on the provisions of the Hire-Purchase Acts, 1938 and 1954, and in particular on section 2 of the Act of 1938, in that there had been breaches of the requirements (i) to state in writing to the defendant the cash price of the goods; and/or (ii) that he never made and signed a memorandum of the hire-purchase agreement, in that the memorandum signed by him was so signed in blank, did not contain a statement of the hire-purchase price or the cash price or any of the particulars in subsection (2) (*b*) of section 2; and/or (iii) that the notice referred to in subsection (2) (*c*) had not been completed by the insertion of the requisite amounts; and/or (iv) that the copy agreement was not sent to him within seven days of the agreement. He claimed further that the plaintiff company had wrongfully repossessed the car contrary to section 2 (2) of the Act of 1938; and he denied that he was indebted to the company in the whole or any part of the sum claimed or that the agreement was enforceable against him. By a counterclaim he claimed inter alia the return of the £65 deposit paid by him to Boodof under the purported agreement.

On June 26, 1960, the county court judge gave judgment for the plaintiff company. He made no finding as to whether the

defendant had communicated by letter or telephone with the plaintiff company; but he found that the defendant had clothed Boodof with authority to complete the form and by mistake or fraud Boodof had gone beyond what he was trusted to do; that the defendant's signature had his apparent authority; and that therefore the defendant was bound by the agreement, so that his only remedy was damages against Boodof and not against the plaintiff company. Accordingly, he gave judgment for the company and dismissed the counterclaim. The defendant appealed.

Denis R. M. Henry for the defendant.
Oliver S. Martin for the plaintiff company.

Polsky v. *S. & A. Services*[2] was referred to in addition to the cases referred to in the judgments of the court.

HOLROYD PEARCE L.J. This is a defendant's appeal from a judgment of Judge Nicholas who held that he was liable to pay certain instalments under a hire-purchase agreement, and dismissed his counterclaim for the return of a deposit of £65. The defendant contends, first, that the judge erred in that no agreement was ever made between the plaintiff company and the defendant. Secondly, he argues that if such an agreement was made, it was not enforceable since there was no sufficient note or memorandum of the agreement under section 2 (2) (*a*) of the Hire-Purchase Act, 1938.

The case involves the question whether the loss occasioned by the fraud (or just conceivably the mistake) of a motor-car dealer falls to be borne by the defendant or the plaintiff finance company. [His Lordship stated the facts as set out above, and continued:] The defendant contends that he never agreed to the hire-purchase agreement now sued on, and since the total hire-purchase price under the real agreement was less than £300 the transaction comes within the Hire-Purchase Acts, and is unenforceable owing to certain breaches of the statutory requirements. He counterclaims for the £65 deposit paid under the purported agreement made with Boodof. The question is whether the defendant is bound by, and also whether the plaintiff company can enforce, the hire-purchase agreement which by its terms is outside the Act since the total hire-purchase price thereunder is over £300 when in fact the true bargain that the defendant himself made was within the Act. If the Act is applicable there was plainly a failure to comply with section 2 (2) (*a*), since the signature by the hirer of the agreement in blank does not satisfy the statutory requirement: *Eastern Distributors* v. *Goldring*.[1]

[2] [1951] 1 All E.R. 185.

[1] [1957] 2 Q.B. 600, 612; [1957] 3 W.L.R. 237; [1957] 2 All E.R. 525, C.A.

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The position of Boodof, vis-à-vis the parties, is of vital importance. There are three possibilities: (1) that Boodof was either the plaintiff company's agent by authority or by estoppel; (2) that he was the defendant's agent by authority or by estoppel; and (3) that he was not the agent of either party.

Both counsel have put their arguments very clearly and fairly. Mr. Henry puts forward as his main contention the proposition that Boodof was the agent of the plaintiff company. If that be right, the defendant must succeed, for he made an oral agreement with the plaintiffs through their agent, and that agent fraudulently (or just conceivably by mistake) filled in the form so that it purports to embody an agreement that was never in fact made. In that event, quite apart from the Act, they cannot successfully sue on the agreement produced. Their attempt to do so is a repudiation of the original oral agreement, with the result that the deposit becomes repayable to the defendant.

Mr. Martin took the preliminary point that parol evidence is not admissible to show that the written agreement is other than it appears to be. I do not think that point is good. It was not put forward on a cross-notice, and therefore Mr. Henry was taken by surprise and has not had time to deal with the matter fully. Had we been against him on this point we must have granted him an adjournment. "Parol evidence cannot be received," to use the words of Lord Morris in *Bank of Australasia* v. *Palmer*,[2] "to contradict, vary, add to or subtract "from the terms of a written contract, or the terms in which "the parties have deliberately agreed to record any part of their "contract." But parol evidence can be used to show whether a written contract is void for mistake—see cases cited in Cross on Evidence, 1st ed., p. 477)—or was signed subject to a condition precedent. Moreover, in certain cases parol evidence is admissible when it is relevant for the court to find the true nature of the transaction.

The Hire-Purchase Act, like the Bills of Sale Acts and the Rent Acts, cannot in my judgment be excluded by documents which, though purporting to be outside the Act, represent a transaction which is in truth within it. Under the two latter Acts parol evidence has always been admissible to show the true nature of a written transaction which appears to satisfy or exclude the Act although that evidence varies or contradicts the documents. Such evidence is admissible here for the purpose of showing that the true bargain was within the Hire-Purchase Act (although the written document is outside it) unless the defendant is estopped from so contending. But even if Boodof was the defendant's agent, I feel considerable doubt whether the Act can be excluded by such an estoppel.

Clause 12 on which the judge relied says that the dealer is not the agent of the hire-purchase company, and that they are

[2] [1897] A.C. 540, 545, P.C.

not in any way responsible for, and shall not be bound by, any representations made by such vendor. If in truth this transaction comes within the Act, then the provisions of section 5 (*e*) apply, and "Any provision in any agreement— . . . (*e*) whereby "an owner or seller is relieved from liability for the acts or "defaults of any person acting on his behalf in connection with "the formation or conclusion of a hire-purchase agreement or "credit-sale agreement, shall be void." If, therefore, Boodof was acting for the hire-purchase company, clause 12 of the hire-purchase agreement would be void. But that still leaves the question intact whether he was in fact so acting.

The following facts are said to show that Boodof was acting as agent for the hire-purchase company. First, it is said, he decided what the total price and what the rates of repayment were to be. But in my view that was not a decision by Boodof on behalf of the hire-purchase company; it was merely Boodof's definition of the proposition which he proposed to put up to the company. Then it is said that the dealer receives a commission on this transaction from the hire-purchase company; but that in my view is no indication that he was, before the transaction became effective, the agent of the hire-purchase company.

Reliance was placed on section 2 of the Hire-Purchase Act which provides that the owner shall state in writing what is the price of the goods to be hired; and it is argued that since the price of these goods was given to the defendant by Boodof, he must have been the hire-purchase company's agent for that purpose. But the proviso to section 2 shows that if the hirer has accepted the goods, and the price is shown on the goods, the requirements of section 2 (1) shall be deemed to be satisfied. So in my view there is nothing in that section which compels the plaintiff company to do something through the agency of the dealer. Unless certain things have been done by the dealer the agreement is unenforceable, but that does not constitute the dealer their agent.

Then it is said that the dealer receives the initial rental on behalf of the hire-purchase company. That is a matter which becomes very relevant on the consideration of the counterclaim; but in my judgment the position cannot be said to be so clear as to throw any light on the position of Boodof for the purpose of deciding whether he was the company's agent. It is true that the documents act on the assumption that if the hire-purchase agreement becomes effective, the money paid to the dealer shall be a payment of rent under that agreement to the hire-purchase company. But at the stage which we are considering, the agreement had not become effective, and it cannot be said that Boodof was receiving the deposit as agent for the hire-purchase company. For the hire-purchase company were not then concerned at all. They were wholly ignorant of the transaction. Undoubtedly Boodof was receiving the initial payment in order to hold it and give credit to the hire-purchase

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company for it if and when it accepted the transaction; but there was no certainty that they would accept it. The dealer had no general agreement with the hire-purchase company, and no general course of dealing with them. They had had some previous transactions with his firm, Windsor Autos, but there was nothing in the circumstances before this transaction to constitute Boodof or Windsor Autos the plaintiff company's agent. It is urged that the mere provision to dealers of hire-purchase forms for transactions with the plaintiff company showed that all such dealers were acting as their agents. I cannot agree. The plaintiff company provides forms to any dealers from whom it hopes for business. But that hope does not constitute an agency. Reliance was placed on the dictum of Diplock J. in *Lowe* v. *Lombank*.[3] But that dictum did not express a concluded view, and the estoppel envisaged in it was based on different documents in different circumstances from those in the present case.

I find no sufficient evidence to show that the dealer was the agent of the hire-purchase company. Both the dealer and the hirer were concerned to bring the finance company into a deal whereby it will buy the car from the dealer and rent it to the hirer. They both play their part in trying to secure that result. They are both equally concerned to obtain the hire-purchase company's acceptance. The fact that the dealer is habitually so concerned, whereas the hirer is only occasionally so concerned, does not make the dealer any more an agent than the hirer.

The plaintiff company on the other hand contends that the dealer is the hirer's agent. In normal circumstances the dealer does not, in my judgment, act as agent for the hirer. Mr. Martin argues forcibly that the fact that a hirer arms a dealer with a signed hire-purchase document in order that the dealer may induce the hire-purchase company to enter into the transaction indicates that the dealer is acting as agent of the hirer. I do not accept that argument. In order to sell his car to the hire-purchase company he must get a signed hire-purchase agreement from the would-be hirer. It is in pursuance of his own interests that he procures and hands that document to the hire-purchase company: I see no reason to deduce that, in addition to acting on his own behalf, he is also the agent of the hirer for that purpose.

It is contended for the plaintiff company that there was apparent authority, or estoppel by negligence, which would disentitle the defendant to disclaim liability for the contract. Mr. Martin relies on *Eastern Distributors Ltd.* v. *Goldring* (*Murphy, Third Party*).[4] There the facts were complicated and different from those in the present case. A dealer and a car owner had agreed that the dealer should sell the car owner's car to a hire-purchase company, the owner agreeing to take back his car on hire-purchase. Sufficient money was thereby provided to enable him to obtain enough to pay a deposit on the hire-purchase of a second

[3] [1960] 1 W.L.R. 206; [1960] 1 All E.R. 11, C.A.

[4] [1957] 2 Q.B. 600.

car, which was the real object of the transaction. The dealer sold the first car to the hire-purchase company, but it refused to enter into a transaction over the second car. The owner tried to repudiate as against the hire-purchase company the transaction relating to the first car by saying that the dealer's authority was limited to selling either two cars or none. In this court Devlin J. said[5]: "But equally it is clear that as against Murphy—that is "the owner—the plaintiffs acquired a good title to the Bedford. "Coker—that is the dealer—represented that the car was his, and "Murphy was privy to that representation being made; so neither "can be heard to say that Coker had not a good title to transfer "to the plaintiffs. Or, if the matter be looked at as one of "principal and agent, the plaintiffs, being ignorant of the limita-"tion placed on Coker's authority, are not affected by it."

That case is wholly different from the present case. Here the defendant, by signing the hire-purchase agreement, was not clothing Boodof with any authority or any agency. Nor were the hire-purchase company misled into believing that he had any authority from the defendant. They merely believed that it was a genuine document. They did not know the defendant's signature or anything about the defendant, save what the document told them. They did not know that he had let Boodof fill in the form afterwards. There was no more apparent authority in this case than in any normal honest case.

The suggestion that the defendant is liable through his negligence and is estopped from denying the truth of the contract which he allowed to be put forward is met, I think, by the cases to which Mr. Henry referred. Even if the dealer were his agent, there was no duty in the defendant to use care towards the plaintiffs: see *Wilson and Meeson* v. *Pickering*,[6] where Lord Greene M.R. said: "But it is sufficient for present purposes to say that "this type of estoppel can only arise where there is some duty "toward the person who seeks to rely on it." Moreover, the doctrine of estoppel by negligence applies only to negotiable instruments. In the same case the Master of the Rolls said[7]: "The view, which so far as my researches go, appears to me to "have the weight of judicial opinion behind it is that, apart, of "course, from some specific representation of authority or some "holding out or some special character of the agent from which "his authority would naturally be inferred, the rule that a person "who signs an instrument in blank cannot be heard as against a "person who has changed his position on the faith of it, to assert "that the instrument as filled in is a forgery or that it was filled "in in excess of the agent's authority, is confined to the case of "negotiable instruments."

Further, it is argued (rightly, I think) that the negligence of the

[5] Ibid. 606.

[6] [1946] 1 K.B. 422, 425; 62 T.L.R. 223; [1946] 1 All E.R. 394, C.A.

[7] [1946] 1 K.B. 422, 427.

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defendant was not the proximate cause of the loss, that the cause was the fraud of Boodof, which was not to be anticipated: see *Swan* v. *North British Australasian Co. Ltd.*[8] I doubt whether, even if the defendant would, apart from the agreement, be bound by estoppel, an agreement unenforceable under the Hire-Purchase Act can by estoppel be rendered valid and enforceable. However, in my judgment the defendant is not bound by the purported hire-purchase agreement. It was not the contract that he made. The dealer was neither agent for the plaintiffs nor for the defendant, and no estoppel arises. The plaintiffs' claim, therefore, fails.

But the defendant has not made out his counterclaim for a return of the deposit. The dealer received the deposit, it being intended that it should go towards the first instalment of rent when the hire-purchase transaction became effective. If it had become effective, he would have received it as an instalment of rent as agent (quoad the defendant) of the plaintiff company. But no contract was ever made. Therefore, in my judgment, the dealer held that money not on behalf of the plaintiff company but on behalf of the defendant, who could undoubtedly have sued the dealer for money had and received.

It is argued that the plaintiff company has obtained the benefit of the initial payment of £65 in that, when it sent its cheque to the dealer for the purchase price of the car, the £65 was deducted from the price as an amount for which the dealer gave it credit. But, in my view, that fact raises no implications. So far as the merits are concerned, the defendant by his foolish and careless conduct has undoubtedly caused some loss to the plaintiff company. What the extent of that loss is I know not; but it seems to me that he cannot complain as a matter of justice that he does not recover from it the £65. As a matter of law, in my judgment his claim to do so fails. I would therefore allow the appeal by dismissing both the claim and the counterclaim.

Harman L.J. In order that either side should wholly succeed in this appeal it was necessary for them to show that there was an agency involved either as between the discount company and the dealer, or between the defendant and the dealer. My Lord has reached the result that there was no agency involved in either direction, and I agree with him. It follows that neither side can wholly succeed. The discount company cannot enforce the so-called agreement because there never was a valid agreement. The defendant cannot get back his deposit, which never reached the discount company through its agent (the dealer), because he was not its agent. It is, therefore, to some extent a drawn battle.

The primary ground, in my judgment, on which the claim of the discount company fails is that there never was in fact an agreement between them and the defendant at all. There was no

[8] (1863) 2 H. & C. 175, Ex.Ch.

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consensus ad idem; and once you come to the conclusion that my Lord does (and so do I), that the agent—that is to say, the dealer—was not authorised to make an agreement, but was in fact acting on his own behalf and in furtherance of his own business, and using this blank form which the defendant filled up in his careless way as an adjunct to his own trade, then you can see that there never was any consensus, and nothing on which the plaintiff company could sue. Having treated the agreement as a nullity, neither can the defendant sue as the result of any breach of it; and, therefore, each party is left to bear its own loss. That means allowing the appeal.

DAVIES L.J. I agree for the reasons which my Lords have stated.

Appeal allowed.
Claim and counterclaim dismissed.
No order as to costs.
Leave to appeal granted.

Solicitors: *Lovell, White & King; Vizard, Oldham, Crowder & Cash.*

M. M. H.

[COURT OF APPEAL.]

DINGLE *v.* ASSOCIATED NEWSPAPERS LTD. AND OTHERS.

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1960 *Nov.* 30; *Dec.* 1, 2, 5.
1961 *Feb.* 8.
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[1958 D. No. 1084.]

Libel and Slander — Damages for libel — Libel published elsewhere — Irrelevance.
Libel and Slander—Damages for libel—Mitigation—Reputation—No settled bad character — Defamatory matter in Select Committee report—Subsequent newspaper article.
Damages—Joint tortfeasors—Liability of one for full damages—Libel—Application of principle—Defamatory report in several newspapers.

On March 17, 1958, the "Daily Mail" and other newspapers published a report of a Select Committee of Parliament containing matter defamatory of the plaintiff. On June 16, the "Daily Mail" published an article relating to the same matter in unprivileged form. On June 26, it published a further article stating that all interested parties had been cleared of any deliberate intent to defraud. In assessing the damages for the libel contained in the article of June 16, the judge mitigated the amount awarded by taking into consideration the effect on the plaintiff's reputation of the same libel appearing in a privileged form previously to, or contemporaneously with, the publication of the libel in suit, and which had been put in evidence by the defendants to refute malice:—

Held, (1) that the judge wrongly took into account the effect of the other publications of the libel, and the damages should be awarded on the basis of the full damage done to the plaintiff's reputation as a result of the publication of the libel.

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Saunders v. *Mills* (1829) 6 Bing. 213; *Hobbs* v. *Tinling (C. T.) & Co. Ltd.* [1929] 2 K.B. 1; 45 T.L.R. 328, C.A. and "*Truth*" (*N.Z.*) *Ltd.* v. *Holloway* [1960] 1 W.L.R. 997, P.C. applied.

Per Sellers L.J. It has not been the law that a man pays less for his defamatory remarks which he cannot justify merely because someone else has published previously or concurrently the same libel. If it were otherwise a defamed man might have no adequate redress, for the full range and extent of publication or republication can rarely, if ever, be traced and established (post, p. 528).

Per Devlin L.J. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury, whether or not those others had or had not a good defence (post, p. 542). The fact that a passage in the defamatory article is protected by privilege is irrelevant in the assessment of damages in this case. Privilege attaches to form or occasion but not to substance. A report of a judicial or parliamentary proceeding may be privileged, but if the substance of the matter be cast into another form, the publication is subject to the ordinary law (post, p. 542).

(2) That the damages should not be reduced on the ground that the plaintiff had acquired a bad reputation by reason of the publication of the Select Committee report.

Per Sellers L.J. It cannot be said that a man's reputation has to be judged on the basis that what he has disproved in a court of law has still be to be regarded as damaging to his reputation (post, p. 528).

Per Holroyd Pearce and Devlin L.JJ. That reputation in this context meant a settled reputation for bad character (post, pp. 536, 549 et seq.).

Scott v. *Sampson* (1882) 8 Q.B.D. 491, D.C. considered.

Appeal from Pearson J.

The plaintiff, Philip Burrington Dingle, Town Clerk of Manchester, brought an action for defamation in respect of two articles in the issues of the "Daily Mail" newspaper for June 16 and 26, 1958. The first defendants were Associated Newspapers Ltd., proprietors of the "Daily Mail," the second defendant was the editor of the paper, and the third defendant was one Michael Kelly, a journalist employed by the first defendants.

The articles were published during the passage through Parliament of the Manchester Corporation Act, 1958, which concerned, inter alia, the corporation's acquisition of the Ardwick Cemetery. The first article related to Dingle's conduct in writing a letter to the shareholders of the company owning the cemetery on December 2, 1957. That letter had been written after the Bill had been deposited. The article was headed "Cemetery chairman "accuses" and had another heading "Shares were worth twice "what corporation paid for them . . . letter went out while we "were still negotiating." Under the sub-heading "By Michael "Kelly," the article began: "The chairman of Ardwick Cemetery "Ltd., Manchester, the company now the centre of a parliamen- "tary storm, told me yesterday that in his view shares in the "company were worth more than double the £1 each that "Manchester Corporation paid for them. He also alleged that a "letter signed by the town clerk, Mr. Philip B. Dingle, which

"led to the sale of the shares was sent out while negotiations "were going on with the corporation for a better offer."

The second article on June 26 was headed: "No prosecutions "after cemetery deal probe." It had a sub-heading: "By "'Daily Mail' reporter." The first paragraph said: "No prose-"cutions will follow Scotland Yard's investigations into the take-"over bid for Ardwick Cemetery by Manchester Corporation." The article ended: "All interested parties have been cleared of "any deliberate attempt to defraud."

Pearson J. held that the first article was untrue and unprotected by any defence, that the allegation that the letter went out while negotiations were still pending was justifiable, although this was a minor matter, and he held that the second article was not defamatory. He assessed the damages at £1,100 in respect of the first libel. In assessing the damages Pearson J. took into account the publication on May 17, 1958, in the "Daily Mail," and in other newspapers throughout the country, of a report of the Select Committee of Parliament which was to the same effect as the libel of June 16, which was protected under the Parliamentary Papers Act, 1840.

The plaintiff appealed from the decision of Pearson J., contending that the damages awarded were inadequate and that the judge was wrong in finding that the second article was not defamatory.

Geoffrey Lawrence Q.C. and *W. D. T. Hodgson* for the plaintiff.

Neville Faulks Q.C. and *David Hirst* for the defendants.

The following cases, in addition to those cited in the judgments, were referred to in argument: *Lionel Barber & Co. Ltd.* v. *Deutsche Bank (Berlin) London Agency*[1]; *Talbutt* v. *Clark*[2]; *Sim* v. *Stretch*.[3]

Cur. adv. vult.

Feb. 8, 1961. SELLERS L.J. stated the facts and continued: I would, therefore, uphold the judge in respect of two out of the three attacks made on the judgment on the issue of liability. He was justified in holding that negotiations were still pending and that the second article relied on by the plaintiff was not actionable. But with respect I agree with the submission for the plaintiff that the judge either disregarded or attached too little importance to the innuendo of the first article that the plaintiff had committed an offence under section 12 of the Prevention of Fraud (Investments) Act, 1939. There would, I think, be many informed readers to whom this would appear a serious matter, and

[1] [1919] A.C. 304; 35 T.L.R. 120, H.L.
[2] (1840) 2 Mood. & R. 312.
[3] (1936) 52 T.L.R. 669; [1936] 2 All E.R. 1237, H.L.

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this omission will have to be taken into assessment when the amount of the damages is later considered.

The damages have to be assessed on what has been established as the actionable defamation contained in the first libel with its innuendoes, and the real issue on the appeal has been what matters, if any, have to be taken into consideration in their mitigation.

The submissions of the plaintiff were that in assessing the damages on the basis of the defamation which he found to be actionable (limiting, as it would appear that he did, the full extent of the pleaded innuendo) the judge (a) wrongly took into consideration the effect on the plaintiff's reputation of defamatory statements which had appeared previously and contemporaneously in many other newspapers as well as in the "Daily Mail," which it was submitted were inadmissible as evidence for this purpose and which did not, in any event, affect the defendants' liability for damages, and (b) wrongly held that there had been a complete clearance and vindication of the plaintiff's reputation which limited the damage done to the plaintiff's character to a period of approximately a fortnight following June 18, 1958.

As I read the judgment, the judge did take both these matters into consideration with the undoubted effect that they greatly reduced the damages awarded. Before considering whether the judgment was right or not in these matters it will be necessary to refer as briefly as possible to the circumstances which arose.

When the sections of the Manchester Corporation Bill dealing with the Ardwick Cemetery came up for consideration in Parliament there was a report of the select committee criticising the Town Clerk's letter. This was given wide publicity on May 17, 1958, not only in the "Daily Mail" but in many other papers throughout the country as well. The "Daily Mail" article of that date had large headlines "M.P.s Censure Town Clerk over "Shares" and contained these passages: "The Town Clerk of "Manchester, Mr. Philip Dingle, has been censured by an all-"party group of the M.P.s which investigated share-buying "methods of the City Council. A select committee yesterday "expressed 'unanimous strong disapproval' of a letter written "by Mr. Dingle to shareholders of a cemetery. It added: 'They "'now draw the attention of the House of Commons to the "'facts.' This means there will probably be a debate on the "Town Clerk's action in the Commons after Whitsun. According "to the committee's report, this is what happened: Mr. Dingle "wrote to shareholders owning an old cemetery at Ardwick, "Manchester, saying the corporation wanted to use the land as "playing fields. The corporation offered to pay £1 a share in "compensation. Said Mr. Dingle: 'This is considered a generous "'offer.' Evidence taken by the committee revealed, however, "that the break-up value of the shares was more than £1 each. "Mr. Dingle did not disclose this. Manchester Corporation has "since bought most of the shares. The committee stated: 'The

" ' corporation obtained the shares by presenting a one-sided view
" ' which failed to disclose the true position of the company on a
" ' break-up.' "

Quotations of some part of the committee's report were repeated on June 12, 1958, and on several subsequent occasions including the article complained of in the first libel alleged.

In so far as the article was an extract from the select committee's report all the defendants satisfied the judge that they had acted without malice, and they established protection under the Parliamentary Papers Act, 1840. Therefore, there was in the article complained of defamatory matter which was not actionable because privileged, a little defamatory matter which was justified, and substantial defamatory matter to which there was no defence.

There had been published in other newspapers as well as the "Daily Mail" on May 17, 1958, and June 12, extracts from the report of the select committee, and many other newspapers had been put in evidence by the defendants in the course of the trial to refute the plaintiff's allegation that the defendants acted maliciously, and that they were campaigning against him. The same articles were sought to be used in mitigation of damages.

The judge regarded other articles in the "Daily Mail" before the article complained of and prior and contemporary articles in other newspapers as having a bearing on the assessment of damages. He says that "in so far as the making of the report "and the printing of extracts from it in various newspapers "caused damage to the plaintiff's reputation the defendants are "not responsible for that damage." Another passage in the judgment reads: "As one expects, one finds that this report of "the select committee, which expressed a strong view and strong "disapproval of a local government officer, received substantial "publicity. That must have done substantial damage to the "plaintiff's reputation. For that damage the defendants are not "responsible, and the plaintiff cannot recover for it, therefore, in "this action." And again: "As regards the proper measure of "damages one has to remember that a good deal of damage had "already been done by the publication of the report."

Put in that way, that the defendants are not responsible for damage done by the publication of the report or by other newspaper articles, the statement is unobjectionable, but apart from the harm done by all the criticism over the Ardwick Cemetery transaction, there is nothing at all against the character or reputation of the plaintiff, and the position is, that the judgment has completely vindicated the plaintiff of the imputations against him and there is no evidence remaining of anything to besmirch his character and no evidence at all of bad reputation.

It would be a regrettable situation if a man who has cleared his character of the allegations made against it is to have his damages assessed on the false basis that his reputation is to be regarded, inferentially, as bad on the ground of the very allegations which the action has successfully refuted.

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In the recent case of "*Truth*" (*N.Z.*) *Ltd.* v. *Holloway*[1] the Judicial Committee referred to a passage from Gatley with approval and acceptance as follows[2]: "Gatley opens his chapter "on Republication and Repetition with the quotation: 'Every "'republication of a libel is a new libel, and each publisher is "'answerable for his act to the same extent as if the calumny "'originated with him': see Gatley on Libel and Slander, 4th "ed., p. 106. This case is a good instance of the justice of this "rule." So I think is the present case before us.

It has not been the law that a man pays less for his defamatory remarks which he cannot justify merely because someone else has published previously or concurrently the same libel. If it were otherwise a defamed man might have no adequate redress, for the full range and extent of publication or republication can rarely if ever be traced and established and every offender brought to justice. A national newspaper such as the "Daily Mail" penetrates to many readers over a wide area, some of whom may, most of whom probably will not, read any other paper broadcasting matter stated in a report of a select committee of Parliament.

The press properly have the freedom, if they wish to exercise it, to inform the public of the contents of such a report provided it is done in the public interest and not in any way maliciously, but I see no ground for excusing or benefiting those who publish such matter if they repeat it or the defamatory substance of it in a form which is unprotected, still less if they enlarge and embellish the publication with falsehoods which are highly defamatory and completely untrue.

When the libellous matter is held to be untrue then I fail to see how in justice or good sense it can be said nevertheless that a man's character or reputation has to be judged on the basis that what he has disproved in a court of law has still to be regarded as damaging to his reputation.

In Gatley on Libel and Slander (5th ed., p. 620), the general rule is thus stated: "The defendant cannot prove in mitigation "of damages that some other person or persons have on previous "occasions published the same libel, for the fact that others have "defamed the plaintiff is wholly irrelevant." This rule is derived from *Saunders* v. *Mills*.[3] On that authority the other newspapers, though no doubt rightly introduced by the defendants as evidence to rebut malice, were not admissible in mitigation of damages, and were not at the trial contended to be. The general rule so stated is established law and I see no ground for acceding to the request of the defendants' counsel to hold that *Saunders* v. *Mills*[3] should be reversed, even if it were possible so to do with an authority so old and so frequently applied over the years.

[1] [1960] 1 W.L.R. 997, P.C.
[2] [1960] 1 W.L.R. 997, 1002.
[3] (1829) 6 Bing. 213.

At common law a defendant could not in mitigation of damages give evidence to show that the plaintiff had already commenced an action or recovered damages against some other person or persons for other publications of the same libel. It was irrelevant.

By the Law of Libel (Amendment) Act, 1888, s. 6, liberty was given to newspapers to give evidence in mitigation of damages that the plaintiff had already recovered (or had brought actions for) damages, or had received or agreed to receive compensation in respect of a libel to the same purport or effect for which the action being tried had been brought. By the Defamation Act, 1952, s. 12, similar provision is made for all and not only for newspapers.

These statutory provisions only emphasise the existence of the general rule of *Saunders* v. *Mills*,[4] and in no way serve to prevent a plaintiff from receiving the full compensation for the wrong done to him but only to prevent him being paid the full damage more than once, or at least to avoid an overlapping of damages, taking into consideration that the matters for assessment may not always have common features affecting the amount of damages, some defendants may have apologised at once most generously, or may have made the publication complained of in excusable circumstances, whereas others may have acted maliciously and sustained their allegation to the end. Damages for libel of the same purport would clearly from the nature and extent of a publication not necessarily be the same against all defendants against whom liability was established, except in the case of joint tortfeasors.

Libel is a tort, but the damage it may do does not from its nature resemble damage by physical injury to the body. In physical injury the damage and loss actually inflicted is constant and should be the same in amount whether one person is liable for it or more. It is not so in libel. What A has published may never have been seen by B's readers, and as the law stands no one could be called in mitigation of damages to say that he had read precisely or the substance of what B had said either on the same day or on some prior occasion. It seems to me to be a salutary and practical rule without which it might be difficult or impossible for a plaintiff to get adequate redress for the wrong done him.

I find much force in the argument of plaintiff's counsel that a previous publication of the same libel cannot be used to establish a bad reputation. Indeed, as the law stands, it is not possible to adduce evidence of particular acts of conduct which could adversely affect a plaintiff's reputation.

Ever since *Scott* v. *Sampson*[5] in 1882 a defendant has been allowed to give evidence of a plaintiff's general bad character only, and not of specific facts and circumstances which a judge or jury might think should establish his character to be bad. Whether

[4] 6 Bing. 213.

[5] (1882) 8 Q.B.D. 491, D.C.

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this is logical or desirable or not it is long established, and it serves at least to show that any specific allegation which might be said to be detrimental to a man's character could not be used to condemn him—as it is sought to be used here—if it was proved in the course of the trial to be untrue. Where evidence of general bad reputation is called, a plaintiff may, I apprehend, refute it if he can by evidence of general good reputation, and a judge or jury has to decide. This particular allegation of misconduct is refuted and the plaintiff's character and reputation stand where they did.

Scott v. *Sampson*[6] has stood since 1829 and was approved in this court a hundred years later in *Hobbs* v. *Tinling (C. T.) & Co. Ltd.*,[7] where Scrutton L.J. said that the judgment of Cave J., concurred in by Matthew J., has been accepted as an accurate statement of the law. Certainly this court must so regard it. Scrutton L.J. continued[8]: "On the other hand, the defendant "may not give evidence of rumours at the time of the publication "to the same effect as the libel, nor may the defendant give "evidence of specific facts and circumstances to show the dis-"position of the plaintiff, as distinct from general evidence that "he has that reputation. If those specific facts are to the same "effect as the libel, which he has not justified, he cannot justify "under the plea of mitigation of damages."

In *Hawkins* v. *Express Dairy Co. Ltd.*[9] Stable J. took into consideration a bad reputation which the plaintiff himself had revealed in evidence showing[10] "misconduct during his "term of service with his employers closely connected with "the subject-matter of the libel." The evidence showed fraud by the plaintiff known to and indeed participated in by a number of servants of the company with whom he worked. I see no reason to differ from Stable J. There the bad character or reputation was established by the plaintiff and could not be overlooked. The present case is almost the converse of that. Here the substance of the libel has been disproved and nothing remains against the plaintiff's character and reputation.

The only support for the view taken by the judge cited to us on behalf of the defendants was a passage in the judgment of Lord Hanworth M.R. in *Chapman* v. *Lord Ellesmere*,[11] where the Master of the Rolls said[12]: "For these reasons, it seems "that the right course will be to direct a new trial as to para-"graphs 3 and 4. The jury should be directed that they cannot "impeach the decision which was reached that the publication "was in the ordinary course of the news agencies' and news-"papers' business; and was a matter which must in any case "have become known to a very large circle through the protected "publication of the Racing Calendar on October 2."

[6] 8 Q.B.D. 491, D.C.
[7] [1929] 2 K.B. 1; 45 T.L.R. 328, C.A.
[8] [1929] 2 K.B. 1, 18.
[9] (1940) 63 L.T. 147.
[10] Ibid. 149.
[11] [1932] 2 K.B. 431; 48 T.L.R. 309, C.A.
[12] [1932] 2 K.B. 431, 457.

I am not clear, with respect, as to what the Master of the Rolls had in mind. He cannot be held to have thought that at the future trial the protected publication of the "Racing "Calendar" could be put in evidence, for that would be contrary to established authority which was not, it would appear, challenged or argued in the case. I think it was an obiter dictum and but little guide in the circumstances to the decision in the present case.

In the course of the argument reference was made to *Speidel* v. *Plato Films Ltd.*,[13] an interlocutory appeal recently before this court and now on appeal to the House of Lords. The case raised points of pleading and, I think, ultimately of substance, which do not in any way arise in the present case. The defendants here did not seek to give in evidence any specific facts or circumstances outside the libel alleged or the substance of it to show the plaintiff's true character or to call evidence of bad reputation. All that is said, as I understand it, is that having regard to what was published of the Parliamentary report, both contemporaneously in the protected part of the offending article in the "Daily "Mail," and in articles prior thereto in the "Daily Mail" and other newspapers, which was the substance of the libel and nothing independent of it, the judge had to infer and was justified in inferring that the plaintiff's reputation had been lowered thereby and, therefore, in awarding damages, he had to be treated as a man with a sullied reputation.

For the reasons I have already given I do not think any such inference can be relied on. The plaintiff in this action has proved the foundations of any such inference to be false.

I do not think either that the question of the character or reputation which a man has or ought to have and which of these is the relevant consideration in an action of defamation calls for consideration here. No one suggests anything against the plaintiff except the facts and circumstances which here have been in controversy in this case.

I am prepared to say, as I think should be said, in justice to the plaintiff, that he has cleared his character. It is much less satisfactory to an aggrieved man merely to say that he has cleared his reputation for that in itself might be said to give rise to an innuendo.

I am therefore of opinion that there was no evidence, when the time came for the damages to be assessed, that the plaintiff had either a bad character or a bad repuation so as to limit in any way the damages to be awarded to him for the wrong done by the defendants' statements which defamed him. He had, no doubt, been personally hurt and outwardly damaged by assertions of others, but the action has established that they were false and did not impeach his character or his reputation.

If this is right then the plaintiff's submission that the judge

[13] [1960] 3 W.L.R. 391; [1960] 2 All E.R. 521, C.A.

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misdirected himself in this respect in assessing damages succeeds and it fundamentally affects the amount to be awarded.

I think, too, with respect, that the judge went too far in favour of the defendants when he held that there had been clear and complete vindication of the plaintiff by July 2. It would have been of real benefit to the plaintiff if on or about that date there had been a full and frank apology by the defendants and a retraction of all of which the plaintiff could legitimately complain. Merely to say: "There will be no prosecution in the case of the "neglected graveyard," and to head the article "Town Clerk "Cleared," and to set out what the Attorney-General and the Manchester Corporation said, still leaves open the question: "Yes, but what do you say?" Even the mind of a newspaper—which may be made up of the minds of several individuals—could not overlook the hurt which the statements, true or untrue, must have done to the plaintiff, his anguish of mind and distress, and yet there appeared not a word of reinstatement or of regret, nor an indication that it gave them pleasure that one in so important a position had been restored to the position of respect and confidence which his important office required.

On behalf of the defendants it can be said that they acted without malice in publishing extracts from the report of the select committee, and it was that report which brought the matter into the news, and that the judge has found that the reporter, the third defendant, "did not doubt Mr. Bromley's [a director of the "cemetery company] word in the least," and that he, the judge, had no doubt that "what the defendants reported was what "Bromley had in fact said, but there were many untrue state-"ments."

Against them is the absence of any apology until very belatedly when, of little avail, one was inserted by counsel in the defence, and this notwithstanding that the matter had been kept in the news in the "Daily Mail" in one way or another over a prolonged period beginning on May 17, 1958, until November 13, 1958, altogether on some 17 different dates with reference often on more pages than one.

But these and perhaps other matters of a minor character complained of by the plaintiff were for the judge, and this court would not intervene merely because it thought the amount low. For the reasons which I have stated, I would hold that the judge failed in the assessment of damages to take adequately into account the second part of the innuendo which alleged that the plaintiff had committed a criminal offence; that he concluded that the period of damage was much less than it was; and above all, that he assessed damages on the basis that the plaintiff had a bad reputation prior to the publication complained of by reason of the publicity given to the report. These are, in my opinion, vital matters. We were properly referred to what was said by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries*

Ltd. (*No. 2*),[14] and by Lord Simon in *Nance* v. *British Columbia Electric Railway Co. Ltd.*[15] on the direction by which an appellate court should be guided in reviewing damages.

If the damages were assessed on a wrong basis at least in part, as I, with every respect, have had to conclude, then there is no doubt that they call for reassessment. Damages in such a case as this are hard to assess. I should have thought a jury would have been, with their respective viewpoints, the right tribunal for the task. My two brethren have assessed the damages at £4,000, which I accept, although my own unaided assessment would have been somewhat higher, based perhaps on a view of the innuendo more favourable to the plaintiff's claim, but primarily on the injury done to one holding the high and important office of town clerk of a great city by the defendants' readiness to exploit the matter in the way they did, and then their unwillingness or at least failure to see and to redress the wrong they had done.

I would, therefore, allow the appeal and substitute a judgment for £4,000.

HOLROYD PEARCE L.J. Mr. Lawrence contends first that the judgment was wrong in holding that the second libel was not defamatory. It is conceded that the question depends largely on first impression. I, too, share the judge's view of it.

Secondly, it is argued that the judge wrongly mitigated the damages by reason of injury to the plaintiff's reputation by the publication in the "Daily Mail" and in other newspapers of the report of the select committee.

The judge dealt with this question in the following passages. He said: "The defendants put in evidence more or less contemporaneous articles in other newspapers. Those have been read and they are, I suppose, mainly relevant to the assessment of damages and, indeed, they are important on one element of the assessment of damages, as I will endeavour to explain later." Then he said: "Finally, on the issue as to the assessment of damages, here again the report of the select committee is an event which happened, and, in so far as the making of the report and the printing of extracts from it in various newspapers caused damage to the plaintiff's reputation, the defendants are not responsible for that damage, and, again, any amount of comment would have very little if any materiality." He continued: "How much damage is attributable to so much of the libel as is neither privileged under the Act nor true? So far as the article contained extracts from the select committee's report, if they were doing that bona fide, without malice, that is privileged and, in so far as what was said was true, that is, of course, justified. One has to isolate the indefensible part of the libel from the rest." Later he said: "As one expects, one

[14] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657, H.L.

[15] [1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448, P.C.

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"finds that this report of the select committee, which expressed "a strong view and strong disapproval of a local government "officer, received substantial publicity. That must have done "substantial damage to the plaintiff's reputation. For that "damage the defendants are not responsible, and the plaintiff "cannot recover for it, therefore, in this action." Then he said: "This very serious stigma had been cast on the plaintiff and "added a lot, in my view, to the damage flowing from the "original report of the committee. I would say that probably "the report of the committee, while it caused much damage— "there are various ways of putting it—one way of putting it is "that the article of June 16 put the meat on the bones, in this "way, that the committee merely reported that the shares were "acquired under value, but this article in the 'Daily Mail' added "the meat to it by saying that the true value was more than "twice what was offered." And finally he said: "As regards "the proper measure of damages, one has to remember that a "good deal of damage had already been done by the publication "of the report."

It is argued with force that the evidence of other newspapers which published the report was not admissible in mitigation of damages. They were only (and quite properly) put in evidence on the question of malice to show that the "Daily Mail" was not maliciously conducting an individual campaign. They could not properly be proved in mitigation of damages: see *Saunders* v. *Mills* [16] and *Hobbs* v. *Tinling*,[17] per Scrutton L.J.

If the judge's observations above mean that he was doing no more than isolating the publication of the report in the "Daily "Mail" and other newspapers from the actionable matter in respect of which he had had to give damages, and leaving the former out of account when he did so, he was admittedly dealing correctly with the matter. If, however, he was mitigating the damages on account of injury done to the plaintiff by the publication of the report he was not, in my judgment, entitled to do so.

In *Harrison* v. *Pearce*,[18] a case of libel, Martin B. said: "The plaintiff has a right to recover against this defendant "all the damage which the jury think arose from *his* "wrongful act." It is only in respect of the wrongful act that the damages are assessed. But the defendant in a libel action cannot rely on the argument that since others have thrown mud at the plaintiff he, the defendant, has caused very little harm by throwing some extra mud. The case of "*Truth*" (*N.Z.*) *Ltd.* v. *Holloway*,[19] to which my Lord has referred, makes this plain.

The fact that other persons on previous occasions have published the same libel has been held irrelevant: *Saunders* v. *Mills*.[20] Such evidence is inadmissible, even when coupled with evidence

[16] 6 Bing. 213.
[17] [1929] 2 K.B. 1, 18.
[18] (1858) 1 F. & F. 567, 569.
[19] [1960] 1 W.L.R. 997.
[20] 6 Bing. 213.

that the plaintiff took no steps to contradict the libel: *Pankhurst* v. *Hamilton*[21] Nor can the existence of rumours corresponding to the libel be proved: see *per* Cave J. in *Scott* v. *Sampson*,[22] and the cases there cited.[23] "It would seem," said Cave J., "that on principle such evidence is not admissible, as only "indirectly tending to affect the plaintiff's reputation. If these "rumours and suspicions have, in fact, affected the plaintiff's "reputation, that may be proved by general evidence of reputa-"tion. If they have not affected it they are not relevant to the "issue . . . both the weight of authority and principle seem "against the admission of such evidence."

Cave J. goes on to make it plain that it is for injury to his reputation that a plaintiff obtains damages, and if his reputation is bad he recovers smaller damages since the injury is less. The judge does not specifically differentiate between reputations that are deservedly or undeservedly bad. He is dealing with the generality of cases where a man, as a rule, has approximately the reputation that he deserves. Nevertheless the general reasoning of the judgment makes it clear that it is reputation, not disposition, that is to be considered. He says[24]: "As to the third head "of evidence of facts and circumstances tending to show the "disposition of the plaintiff, both principle and authority seem "equally against its admission. At the most it tends to prove "not that the plaintiff has not, but that he ought not to have, "a good reputation, and to admit evidence of this kind is in "effect, as was said in *Jones* v. *Stevens*,[25] to throw upon the "plaintiff the difficulty of showing a uniform propriety of conduct "during his whole life. It would give rise to interminable issues "which would have but a very remote bearing on the question "in dispute, which is to what extent the reputation which he "actually possesses has been damaged by the defamatory matter "complained of." From that judgment it is plain that it is the evidence of the plaintiff's bad reputation and not the evidence of rumours or incidents that might make it bad which is admissible in mitigation.

That judgment has been uniformly treated as accurate in the Court of Appeal as well as in courts of first instance: see *Hobbs* v. *Tinling*[26] and *Speidel* v. *Plato Films Ltd.*[27] And it is not open to this court to take a different view.

Can it here be said that there was some evidence of the plaintiff's bad or partially bad reputation? In my judgment there was none. Evidence of bad reputation must be properly proved. It is a grave matter. One is not entitled to assume without evidence that the plaintiff's reputation must have changed in the four weeks following the publication of the report. As the months went by such report if uncontradicted would, no doubt, have its

[21] (1887) 3 T.L.R. 500.
[22] (1882) 8 Q.B.D. 491, 504.
[23] Ibid.
[24] Ibid. 504, 505.
[25] (1822) 11 Price 235.
[26] [1929] 2 K.B. 1.
[27] [1960] 2 W.L.R. 391.

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effect on his reputation, especially if it was succeeded by other similar matters; and the plaintiff's reputation might in due course become bad and be proved against him. No doubt the public unmasking of a villain or a conviction in a court of law will have a more immediate effect. But when the defendants' libel was published the plaintiff was a man of good reputation who had recently had something damaging attributed to him. A man's reputation in the sense in which the word is used in civil or criminal courts does not alter daily as good or bad deeds are ascribed to him. It is the judgment of his fellows on his general life over a period.

Any man is presumed on general principles to have a good reputation until the contrary is proved. Here the contrary was not proved and there is no evidence on which we should be entitled to say that the plaintiff had acquired a bad or partially bad reputation by the date of the libel.

In *Speidel's* case [28] there was a consideration of matters on which, under the machinery of litigation the defendants may lead evidence in mitigation. But a consideration of when and in what circumstances the defendants can introduce evidence to mitigate their damages is not to the point in the present case. The publication of the report was fairly and squarely before the court. The plaintiff presented the history of the facts to the judge and asked for damages for the wrong that the defendants had done him. That history included the publication of the report. But, nevertheless, the defendants are not thereby entitled to rely on that publication for the purpose of mitigating their damage. It is for such purposes irrelevant.

In my opinion the judge was influenced in some degree by a view that in comparison with the publicity given to the report the defendants did not add a great deal; and that the damages should be thereby diminished. As a result, he estimated the damages at a figure which I respectfully think was too low.

The plaintiff further complains that the judge wrongly failed to decide whether the innuendo in the first libel was made out. But, in my judgment, he was entitled to say, as he did: "The "broad effect of the libel . . . is that the plaintiff while he was in "negotiations with the directors of Ardwick Cemetery Ltd. went "behind the backs of the directors and sent a false or, at any rate, "misleading letter to the shareholders and thereby induced them "to part with their shares at a price which was less than their "true value, and perhaps it can be said also thereby implied that "there was an offence under section 12 which is so to speak the "serious section of the Prevention of Fraud (Investments) Act, "1939." When, as here, the words in their ordinary meaning are defamatory and unjustifiable, the question of whether the innuendo is made out is only relevant to damages. The imprecise finding of the judge on the question of the innuendo is adequate

[28] [1960] 2 W.L.R. 391.

for that purpose and is probably truer than a more precise finding one way or the other would be. In general, the innuendo was not made out, but it might well be that to some of the readers the libel conveyed the effect pleaded in the innuendo.

Fourthly, the plaintiff argues that the judge in dealing with the part which the defendants sought to justify, wrongly severed the allegation that the parties were still in negotiation, holding that it had been justified, and failed sufficiently to take into account that the real gist of the libel, namely, all the rest of the libel dealing with the value of the shares and Bromley's various exaggerations and untruths had been the subject of an unsuccessful attempt to justify. In my judgment that point is not made out.

[His Lordship considered the judgment of Pearson J. in respect of the allegations that negotiations were still pending.] I find nothing of substance to criticise on this point, nothing that would justify any interference by this court.

Finally, Mr. Lawrence argues that the judge misapprehended the facts in holding that on July 2 there was "complete" or "ample" vindication and that, therefore, he had only to award substantial damages in respect of a period of a fortnight. I venture to think that the judge was not justified in considering the article of July 2 to be an "ample" or "complete" vindication. The article was headed "Town Clerk Cleared." And a perusal of the details showed that the plaintiff was cleared of the threat of prosecution under section 12. The article starts in heavy type—"There will be no Prosecution in the Case of the "Neglected Graveyard." There follows the fact of the Attorney-General's announcement; and the article sets out his statement to the effect that "there is no ground for concluding that the "letter contained any false misleading or deceptive statement or "that there was any dishonest concealment of material facts. "Consequently there are no grounds for a prosecution for an "offence against section 12 of the Act." The article also sets out the corporation's defence as given in their booklet. But the corporation were clearly concerned to put the best face on their town clerk's action on their behalf and their view could hardly be thought by readers to be impartial.

Therefore it is not correct to say that the plaintiff had been completely vindicated on July 2. He had been acquitted of dishonesty which would render him liable to prosecution, and it had been made clear that his own council were saying that their offer for the shares was generous. But readers were reminded in that same article that the Board of Trade alleged that the break-up value of the shares was greater than £1 each, and that "some "shareholders said later that the stock was worth more than £2." An important matter was left undecided, namely, whether he had without actual dishonesty succeeded in getting shares from the shareholders behind the chairman's back for a sum less than their true value. Such behaviour would be sharp practice. Though

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not unknown in some circles, it would be deplorable in a town clerk acting for a very large and important corporation.

That article of July 2 gave an opportunity for the "Daily "Mail," as the unbiased person who had put forward the accusations of the plaintiff's critics, to assess whether the defence put forward by the corporation in their booklet had been made out. It would have been easy (but perhaps distasteful) for the defendants to say that there was no sharp practice, that the accusations of the critics had all been successfully dispersed, that the figures put forward by them had been inaccurate, that the offer had been generous, and to add, for good measure, an apology to the plaintiff. But they did not do so, and thereby at their own risk they allowed a serious part of the damage they had done to continue. There has never been any apology for the untruths or any recantation of them. Indeed, the fact that the defendants attempted to justify them was the antithesis of recantation. The partial apology in a pleading which attempted to justify a large amount of defamatory untruths was no apology at all. It is inevitably, in such a context, mere faux bonhomie.

It is argued by the defendants that the error with regard to "complete" vindication is not a matter which would justify altering an assessment of damages which is compounded of so many factors of varying importance. But the question of vindication is a very important matter. It affects the plaintiff in the extent of his injury and the defendants in an assessment of their conduct. They were acquitted of malice; but, nevertheless, they should have taken all reasonable steps to counteract the damage that they had caused and to prevent it from continuing. No valid grounds are put forward for their failure to do so. As a result, the damage continued long after July 2. Not until the judge gave judgment was there any pronouncement by any impartial person that the plaintiff had not unworthily behind the directors' backs obtained the shares for less than their true value, but had in fact made "a generous offer to the shareholders which they "were very fortunate to get."

I agree with my Lord's judgment and I would, accordingly, substitute for the figure of £1,100 the figure of £4,000.

Devlin L.J. The main argument in this appeal has been devoted to Mr. Lawrence's submission that Pearson J. was wrong in taking into account the fact that the plaintiff's reputation would in any event have been injured by the report of the select committee (the publication of which by the "Daily Mail" was privileged and which did not therefore sound in damages), and by reason of this diminishing the damages which he would otherwise have awarded to the plaintiff. I think that the judge did diminish the damages on this ground and it does not appear that he was ever asked to do otherwise. Mr. Faulks has not contended that the point is not open to Mr. Lawrence; but the omission

means that we have not got the benefit of the judge's conclusion on a difficult point.

The argument for limiting the damage can be put in two ways. First, it can be said that looking at the defamatory article by itself and without regard to what had gone before, it consisted of Bromley's story, much of which was indefensible, and for which the defendants have to pay, and of a statement from the select committee's report, which was defensible and for which, therefore, the defendants have not got to pay. The judge appears to be looking at the matter in this way where he says in his judgment: "How much damage is attributable to so much of the "libel as is neither privileged under the Act nor true? . . . One "has to isolate the indefensible part of the libel from the rest." On this view it is not a question of mitigating the damage but simply of ascertaining for how much of the damage done the defendants are responsible.

The other way is to treat the question as one of mitigation of damage and to assert, as the defendants do, that on the date when the libel was published the plaintiff already had a tarnished reputation which must be taken into account as diminishing the damages that would have been awarded if his reputation had been unblemished. Under the first head, the prior publication of the report is irrelevant, and can be conceded as inadmissible, under this head it is essential and involves going back to the date when the committee's report was first published, that is May 17, and relying upon the fact that it received widespread publicity not only in the "Daily Mail" but also in all the other national newspapers. The contents of the other national newspapers are summarised by the judge in his judgment. He concludes that the report of the committee received substantial publicity which must have done substantial damage to the plaintiff's reputation: "for "that damage the defendants are not responsible and the plain-"tiff cannot recover for it therefore in this action." He says the same thing again in his judgment; and in the paragraph in which he fixes the damages he begins: "As regards the proper measure "of damages, one has to remember that a good deal of damage "had already been done by the publication of the report." Mr. Lawrence says that he had to accept the other newspapers as admissible on the issue of malice because they were being properly used to show that the "Daily Mail" was not conducting a special campaign of its own against the plaintiff; but he disputes that they were admissible on the issue of damage.

Before considering separately these two limbs of the argument, it is convenient to refer to *Saunders* v. *Mills*,[29] because that was the authority on which Mr. Lawrence chiefly relied as supporting his argument as a whole. In this case, the plaintiff, as attorney, claimed damages for a libel published in a newspaper. At the trial the defendant tendered evidence that he had copied the libel

[29] 6 Bing. 213.

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in substance from "The Observer" newspaper and that many other journals had published the same statement. Tindal C.J. admitted "The Observer"[30] "as showing there was less of "malice than if the defendant had been the original composer," but declined to receive evidence of a similar publication having "been made in other newspapers. This ruling was upheld by the Court of Common Pleas in Banc.[31]

Mr. Faulks has submitted that we should not approve *Saunders* v. *Mills*.[32] I think we ought to do so, not only because it is a decision of long standing, but because Parliament has treated it as being good law and has passed enactments which are insensible except upon the hypothesis that the principle on which it is based is part of the law of the land. I shall refer later in this judgment to the statutes of 1888 and 1952 which, subject to certain limitations, permit evidence to be given of other publications of the same libel.

At first sight it looks as if *Saunders* v. *Mills*[32] introduced into the law of libel a sort of extension of the rule applicable to joint tortfeasors. Separate publications of the same libel are of course separate torts, but the principle in *Saunders* v. *Mills*,[32] it may be thought, is that, notwithstanding that they are separate torts, one defendant is liable for the whole of the damage flowing from the libel just as he would be if he were one of several participators in a joint tort.

But that is not, I think, the reasoning behind *Saunders* v. *Mills*,[32] nor its effect. In the first place, one publisher will not be liable for all the damage done by another. If a libel is published simultaneously in the national Press and in a parish magazine, the damages payable by the latter will not be assessed on the basis of the circulation of the former as it would in the case of a joint tort. This is shown by *Harrison* v. *Pearce*.[33] In this case a certain writer composed a statement defamatory of the plaintiff and had it published as a placard and also as an advertisement in the defendant's newspaper. The defendant contended that part of the plaintiff's damage was due to the publication in the placard for which the plaintiff was bringing another action. Martin B. said that the jury could not take into account the other action; the plaintiff had a right to recover against this defendant all the damage which the jury thought arose from *his* wrongful act. But he goes on to say that the jury is not to assume that all the damage necessarily arose from the defendant's publication.

The reasoning behind *Saunders* v. *Mills*[34] and *Harrison* v. *Pearce*[35] is, I think, simply that the damage done by other publications is deemed to be irrelevant. So in one sense it is. If each publisher is thought of as having his own circle of readers or listeners, he will be made responsible for the publication to

[30] 6 Bing. 213, 220.
[31] Ibid. 220–224.
[32] 6 Bing. 213.
[33] 1 F. & F. 567.
[34] 6 Bing. 213.
[35] 1 F. & F. 567.

them but not beyond, and it is irrelevant to say that some other publisher will be responsible for another publication of the same libel to another circle. But in defamation the damage goes beyond the harmful effect upon the minds of those who receive the publication at first hand. There has to be taken into account as well, for example, the element of mental distress which does not increase proportionately with the extent of the publication. More important, there is the slow spread of the libel beyond the immediate circle; and if eventually the whole public mind is permeated, no one can identify each separate source of infection. The damage due to mental distress and to widespread repetition constitute, it may be said, an indivisible injury for which the damages cannot be separately assessed as between different publications of the same libel, and therefore each wrongdoer whose act is a substantial cause of the injury must pay for the whole. "... each publisher is answerable for his act to the same extent "as if the calumny originated with him." This statement of the law in Gatley (5th ed., p. 101), has recently been approved in *Cadam* v. *Beaverbrook Newspapers Ltd.*[36] and in "*Truth*" (*N.Z.*) *Ltd.* v. *Holloway*.[37]

Thus, where a libel was published by several defendants, the common law permitted the plaintiff to recover damages several times over in respect of those elements of damage that were common to each libel. Each jury had to be directed to consider such elements as mental distress and the spread beyond the immediate circle as if the libel under consideration was the only one in the field. (Obviously, therefore, it would not be permissible mitigation of damage to say that some of the distress and some of the spread whose source could not be identified would or might be due to some other privileged publication.) The common law position has been partly alleviated by legislation which foreshadowed to a limited extent the solution that was later applied for joint torts in 1935 [Law Reform (Married Women and Tortfeasors) Act, 1935]. The Law of Libel Amendment Act, 1888, s. 5, provides that where actions are brought in respect to the same or substantially the same libel against two or more defendants, the actions may be consolidated and tried together and the damages given in respect of the libel apportioned between the defendants. By the Defamation Act, 1952, s. 12, enlarging the scope of a similar provision previously made in section 6 of the Act of 1888, the defendant is permitted to give in evidence in mitigation of damages that the plaintiff has recovered damages or brought actions for damages or received or agreed to receive compensation in respect of publications to the same effect as that sued upon. The distinction between this form of relief and that which is now granted to joint tortfeasors is that the joint tortfeasor has the right to initiate a claim for contribution while the

[36] [1959] 1 Q.B. 413; [1959] 2 W.L.R. 324; [1959] 1 All E.R. 453, C.A.

[37] [1960] 1 W.L.R. 997, 1003.

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defendant under the Acts of 1888 and 1952 cannot get any relief at all unless the plaintiff chooses to sue more than one publisher.

I turn now to consider specifically the first limb of the argument, which I think really amounts to a contention that the damage done by the defamation ought to be notionally apportioned and that the defendants should pay only for so much of it as was caused by the unprotected part of the publication. In my judgment the fact that a passage in the defamatory article is protected by privilege is irrelevant in the assessment of damages in this case. The foundation for this conclusion is that the report and Bromley's story are as a piece of defamation essentially one and the same. The defamatory essence of them both is that the plaintiff was guilty of sharp practice. The story is worse than the report because it goes further, but in substance they contain the same libel.

Privilege attaches to form or occasion but not to substance. What a Member of Parliament says in the House of Commons is privileged; the repetition of the very same words outside is not. A report of a judicial or parliamentary proceeding may be privileged, but if the substance of the matter be cast into another form, the publication is subject to the ordinary law. The object of the privilege is so that the public can obtain a fair report of what is said and decided in Parliament and in courts of law; it is not to confer a licence on anyone to handle the subject-matter thereafter in whatever way he wishes.

If Bromley's story had been printed by itself (and I shall assume for this purpose that it goes no further than the report) it would be no answer to an action for libel to say that the same thing had already been said in the report any more than it would be an answer by a Member of Parliament who spoke slander at a public meeting to say that he had said or could say the same or worse with impunity in the House of Commons. If Bromley's story by itself is unprotected, it cannot alter or diminish the defendants' liability if they publish with it as part of the same article an extract from a protected report.

This conclusion appears to me to be in accordance with, and indeed to exemplify, a fundamental principle in the law of damage. Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another

and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly.

These are elementary principles and readily recognisable as such in the law of damage for physical injury. It is not so easy to distinguish and apply them in the law of damage for loss of reputation. It may be easier to do so, I think, if one takes as an illustration separate publications to one man only and a piece of special damage flowing from them. If a master during the course of a morning hears the same slander about the plaintiff, his servant, from four different defendants, he may after he has heard them all decide that coming from four sources it must be true and he may dismiss the plaintiff in the afternoon. Subject to any defence he may have, each defendant is severally liable for the whole of the financial loss which the plaintiff suffers from the dismissal. If one defendant has no defence, it will not help him at all that the other three can make out a good case on the grounds of qualified privilege.

The same principle must apply to general damage for loss of reputation. If a man reads four newspapers at breakfast and reads substantially the same libel in each, liability does not depend on which paper he opens first. Perhaps one newspaper influences him more than another, but unless he can say he disregarded one altogether, then each is a substantial cause of the damage done to the plaintiff in his eyes. A fortiori, when a reader of the "Daily Mail" picked up the issue for June 16 and read the article complained of, it is not possible to say how much damage was done by the privileged extract from the report and how much by Bromley's story; all that can be said is that they combined to injure the plaintiff's reputation

In the application of these general principles to damage done by a libel there are two qualifications to be borne in mind. Each of them is illustrated by an authority relied upon by Mr. Faulks. The first is that damage done by two distinct libels is separately measurable and it is immaterial that the two libels form part of the same publication. The second is that the damage done by the publication of a libel must be measured, albeit roughly, in accordance with the number of people to whom the publication is made. A man's reputation is in the keeping of others and

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it is by words uttered to those others that it is injured; the larger the number to whom the publication is made the greater the injury. If the libel is spread from mouth to mouth by a series of utterances, the damage done by each must be separately assessed; if the publication consists of only one utterance to a large number, there can be only one assessment but it must be made in accordance with size.

The first of these two points is illustrated by a dictum of Earl Loreburn in *Adam* v. *Ward*,[38] on which Mr. Faulks relied. His Lordship said[39]: "I will only add that when one part of a libel "is held to be protected by privilege and the other part not "protected the jury ought to be told that they cannot give "damages in respect of the first part at all, unless they are satis-"fied that it was malicious. . . ." It does not appear from the facts in this case that the libel was divisible and I think that his Lordship's observation must have been directed to an argument advanced by Sir John Simon in the following terms[40]: "A "case might conceivably arise in which a document contained "two subject-matters, both containing defamatory statements, "so wholly divorced from one another that the judge might rule "that the occasion was privileged as regards one subject-matter "but not as regards the other, but the point has never arisen for "decision, although it has been mooted in several cases. . . ."

When, as in this case, the libel is essentially one and the same, the position is illustrated by an old case. In *Lewis* v. *Clement*[41] the plaintiff was an attorney who had brought proceedings in the Insolvent Debtors Court. In the course of the proceedings the judge[42] "deprecated in strong language the "conduct of plaintiff." The defendant's newspaper published the report of the proceedings under the heading "Shameful "conduct of an attorney." The plaintiff brought an action for libel against the defendant. Abbott C.J. held, delivering the judgment of the Court of King's Bench, that without deciding whether the report of the proceedings was privileged, the claim succeeded because the defendant had not confined himself to what actually passed in court but had prefaced the statement with the words "Shameful conduct of an attorney," and therefore taken upon himself to make that allegation concerning the plaintiff. The court awarded a writ of inquiry to assess the damages, and as a result of the inquiry judgment was entered for £500. The defendant brought a writ of error in respect of this assessment, and in 1822 the matter came before the Court of Exchequer Chamber, where it is reported under the heading of *Clement* v. *Lewis*.[43] The first argument advanced on behalf of the defendant was[44] "that the heading of the libel imputed

[38] [1917] A.C. 309; 33 T.L.R. 277. H.L.
[39] [1917] A.C. 309, 321.
[40] Ibid. 316.
[41] (1820) 3 B. & Ald. 702.
[42] Ibid. 703.
[43] (1822) 3 Brod. & Bing. 297, Ex.Ch.
[44] Ibid. 298.

"no misconduct beyond that which was developed in the ensuing "statement." The argument failed, the court on this point affirming the judgment of the court below.

The other point is illustrated by a dictum in *Chapman* v. *Lord Ellesmere*,[45] on which Mr. Faulks also relied. In this case the plaintiff, a horse trainer, sued in respect of the publication of a decision of the stewards of the Jockey Club which was a libel upon him. The plaintiff sued the stewards (and their agents, Messrs. Weatherby) and "The Times," the stewards in respect of three publications and "The Times" in respect of one. The first publication was the publication by the stewards of their decision to the press agencies on September 29; the second publication was that in "The Times" on September 30 and the stewards and "The Times" were alleged to be jointly liable for this; and the third publication was in the "Racing Calendar" on October 2 for which the stewards as proprietors of the "Racing "Calendar" were held to be responsible. The publication in the "Racing Calendar" was held to be privileged but that to the news agencies and in "The Times" was held not to be privileged. The Court of Appeal considered that the damages awarded in respect of the first and second publications were excessive and ordered a new trial. Lord Hanworth M.R. referred to the directions which should be given to the jury in the new trial and said[46]: "The jury should be directed that they cannot "impeach the decision which was reached that the publication "was in the ordinary course of the news agencies' and news-"papers' business; and was a matter which must in any case "have become known to a very large circle through the protected "publication of the Racing Calendar on October 2."

This is in the nature of an obiter dictum, though one made by a careful and learned judge, because the point did not strictly arise at that stage and does not appear to have been argued. I think with great respect that it is incorrect in form. To admit evidence about the contents of the "Racing Calendar" would be contrary to what was decided in *Saunders* v. *Mills*,[47] an authority that was not considered or overruled; moreover, the "Racing Calendar" was published after "The Times." But I am far from saying that in substance the proposed direction would not be correct. Lord Hanworth must have meant that the damages should be reduced in consideration of the fact that a number of the readers of "The Times" would also be readers of the "Racing Calendar"; if so, they were persons to whom a protected publication could be made. The vehicle of publication, whether it is the "Racing Calendar" or "The Times," is immaterial. As I have said, the law requires and permits that

[45] [1932] 2 K.B. 431; 48 T.L.R. 309, C.A.

[46] [1932] 2 K.B. 431, 457.

[47] 6 Bing. 213.

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damages should be measured by the extent of the publication. A jury can properly be directed to give less damages against a paper which has a circulation of 100 than against one that has a circulation of 1,000. It may be therefore that if a proportion of readers of "The Times" could properly have received the news anyway as a privileged communication to them, they can be counted out when the extent of the circulation is being considered. Whether this is so or not—and it is unnecessary for me to offer any firm opinion upon it—it raises a different point from the one which we have to consider in this case. In this case the privilege depends upon form, and if in amplification there is a loss of form, there is a total loss of privilege. There is no scope for a division into "privileged" and "unprivileged" readers.

Accordingly, the defendants are liable to pay for the whole of the damage to the plaintiff's reputation caused by the publication in the "Daily Mail"; and on that issue—I am still not considering the effect of antecedent damage to reputation—no evidence is admissible of other publications of the same libel whether privileged or not. The defendants are liable for what was said in Bromley's story, neither more nor less; since the story contains the whole libel, they must pay the whole damage that flows from it. The extent of the damage done is to be measured in accordance with the circulation that the "Daily "Mail" is presumed to have. The damage is limited to readers of the "Daily Mail" who received the libel direct from the defendants and to those others to whom those readers may be assumed in due course to pass it on. That is the extent of publication which has to be considered. The trial judge had evidence before him that the same libel reached a number of other readers by means of publication in other newspapers. That evidence he would be right to ignore; the defendants have not to pay for that; the damages assessed against any one national newspaper are to be assessed on the basis of its circulation and not on the basis of the circulation of all national newspapers combined. Mr. Faulks has submitted that this is all that the judge was doing—that he was taking note of the fact that the plaintiff's reputation had been injured by other publications and was saying that the defendants were not responsible for the total injury done by all the publications put together. I have set out the relevant extracts of the judgment. It is difficult to be sure of interpreting them accurately, since the point was never argued before the judge, but I think he is doing more than merely directing himself to ignore irrelevant evidence. I think he is assessing the defamatory excess in Bromley's story over and above the defamation in the report. If he is not doing that, then I think with respect the figure of £1,100 is inordinately low and ought to be altered.

All that I have said hitherto is based upon the supposition that the report and Bromley's story were published contemporaneously. They were published together in the article complained of and I have been dealing with the legal position on the supposition that that is the only publication that can be looked at. I must now turn to consider the second limb of the argument, that is, that at the time of the publication complained of the plaintiff already had a tarnished reputation because of the publicity given in the national Press, including the "Daily Mail," to the report of the select committee a month earlier.

Here again we are concerned with a fundamental principle of the law of damage which has to be applied with modifications to damage done by libel because injury to reputation is slippery to handle compared with bodily injury. In cases of bodily injury the principle is simply applied. Where there is not one indivisible injury but two separate injuries, the second wrongdoer—at any rate in cases where the legal consequences of the first injury are complete and ascertained before the second injury is done—is liable only for the excess of damage done by the second injury. That excess is not necessarily smaller than the damage done by the first injury. The earning capacity of a man who has lost an eye may be diminished by perhaps 10 per cent. If he loses his other eye, his earning capacity will probably disappear altogether. A defendant who is responsible for the loss of the second eye will have to pay for much more than half of the consequences of total blindness. In the example I have taken, he will have to pay for 90 per cent. of the loss of earnings; but he will not have to pay the full 100 per cent. because he can properly plead that the plaintiff's earning capacity was already damaged.

In a libel action the plaintiff is seeking to recover compensation for loss of reputation; and it is well established and in accordance with the general principle applicable to all torts that it is open to the defendant to show that, at the time when he inflicted his injury on the plaintiff's reputation, it was already damaged. There is nothing in *Saunders* v. *Mills*[48] to dispute this; there is indeed nothing to show that the other publications in that case were not contemporary. In cases of defamation evidence of previous bad reputation is usually considered as evidence in mitigation of damage, whereas in cases of bodily injury the same effect is obtained simply by measuring the consequences of the second injury. But, as Mr. Faulks submits, the principle in both cases is the same. In each case you have to take, as you find it at the time when the second injury was done, the state of the plaintiff's bodily fitness or the state of his reputation, as the case may be.

The modern law on mitigation of damage of libel is contained in the judgment of Cave J. in *Scott* v. *Sampson*.[49] Much of

[48] 6 Bing. 213.

[49] 8 Q.B.D. 491.

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that judgment was approved in *Hobbs* v. *Tinling*,[50] particularly by Scrutton L.J., and the case itself was recently followed in this court in *Speidel* v. *Plato Films Ltd.*[51] In the latter case my recollection is that *Scott* v. *Sampson*[52] was accepted as good law. In the present case Mr. Hodgson for the defendants has argued that we ought not to approve the whole of Cave J.'s judgment in *Scott* v. *Sampson*,[52] and in particular that we ought not to hold that "character" for the purpose of mitigation of damage in the law of libel means reputation and not quality or disposition.

In view of this submission I have carefully considered the judgment of Cave J. and have looked at a number of the authorities which he cites. They are, as he says, conflicting; his judgment settled a number of disputed points in a way which seems to me to be full of good sense and that has stood unchallenged for nearly 80 years. In my opinion we should not depart from it now. I refrain from elaborating this because the judgment in *Speidel* v. *Plato Films Ltd.*[53] is at present being considered in the House of Lords; their Lordships will doubtless express their view of *Scott* v. *Sampson*,[54] and thereafter no opinion of mine will be of any value. Moreover, the proposition that "character" means reputation and not quality or disposition does not depend solely upon the authority of *Scott* v. *Sampson*[54] and is not peculiar to the law of libel; it applies throughout the civil and criminal law when the character of a witness or prisoner is in issue: see *Reg.* v. *Rowton*,[55] *per* Cockburn C.J., and *Rex* v. *Gunewardene*,[56] *per* Lord Goddard C.J.

The rule is therefore that evidence of character in mitigation of damage for defamation must be evidence of general reputation only. But in the application of this rule it is necessary to consider just what is meant by "character" in the sense of reputation. Leaving aside for the moment all questions as to the form of proof of bad character, it may be thought that the plaintiff in this case is in a dilemma. How can he say that Bromley's story gravely injured his reputation if in the same breath he asserts that the weightier censure by the committee did him no harm? A closer understanding of what is meant by "character" in this branch of the law will help to show whether the dilemma is more than superficial.

I desire to adopt a definition or description of "character" which was given by Mr. Erskine in the course of his submission in *Rex* v. *Hardy*,[57] and which has since been cited in argument in *Reg.* v. *Rowton*[58] and in *Rex* v. *Gunewardene*.[59] In the course of his submission he reviewed many earlier authorities[60]

[50] [1929] 2 K.B. 1.
[51] [1960] 3 W.L.R. 391.
[52] 8 Q.B.D. 491.
[53] [1960] 3 W.L.R. 391.
[54] 8 Q.B.D. 491.
[55] (1865) 34 L.J.M.C. 57, 60, 62.
[56] [1951] 2 K.B. 600, 606; [1951] 2 T.L.R. 315; [1951] 2 All E.R. 290, C.C.A.
[57] (1794) 24 State Tr. 199.
[58] 34 L.J.M.C. 57, 58.
[59] [1951] 2 K.B. 600, 604.
[60] 24 State Tr. 199, 1066.

and gave some interesting illustrations of the way in which questions designed to obtain evidence about reputation should properly be put; and he said [61]: "Character is the slow-spreading "influence of opinion, arising from the deportment of a man in "society; as a man's deportment, good or bad, necessarily pro-"duces one circle without another, and so extends itself till it "unites in one general opinion, that general opinion is allowed "to be given in evidence."

In my opinion it is only a settled bad character of this sort that ought to be taken into account in mitigation of damage. Where it exists, it shows that the permanent injury to a man's character done by a libel upon him is less grave than it would otherwise have been. There are other elements besides permanent injury to character to be taken into account in the assessment of damages for defamation. There is mental distress, the pain caused by those who doubt, even if they hold final judgment in suspense, and maybe financial loss also if they hold business in suspense as well. There is the malice of the defendant if it is proved; the presence or absence of an apology and his conduct and that of his counsel before and during the trial. If the innocence of a plaintiff was after a short period conclusively established, if the defendant was held up to universal execration so that it could be said that there was no possibility of anyone ever thereafter believing his falsehoods, still the plaintiff might obtain a verdict for heavy damages. Now, it cannot be said that in these respects a man with a bad character will necessarily suffer less. If he is a hardened sinner, he may not be much distressed and may not care about the doubts of others. But if he is a good man who has fallen once he may suffer all the more because of it. His distress will be the greater because he knows himself to be more vulnerable; the doubts about him will be more easily aroused and less easily borne than by a man who has had hitherto an unsullied reputation. Whether he be a hardened sinner or not, there is no reason why his defamers should pay a penny the less for their malice or misconduct. It is only really when one comes to consider permanent injury to reputation that it can be said that less is taken from a man who has already lost a part than from one who has preserved the whole. Thus it is fair and right that it is only when a man's bad reputation has formed and settled that it should be used against him.

So treated, the rule covering mitigation of damage in libel does not differ materially from that applicable in the ordinary law of tort. If a man is injured a second time while he is still recovering from his first injury and before the effect of that injury on his earning capacity can properly be ascertained, the second

[61] 24 State Tr. 199, 1079.

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wrongdoer will be liable for the whole loss of earning capacity partly caused by his act. Just as in physical injury it takes time to ascertain what the degree of disablement will be, so the state of a man's reputation cannot fairly be assessed the moment after a slander is spoken. There can of course be cases when a man's reputation is ruined overnight just as he may be clearly disabled by a single blow. If, for example, a man pleads guilty to a charge of dishonesty, there is not much room left for question. But otherwise the loss of reputation is a slow process. Men wonder, doubt, ask questions, say at first they really do not know where the truth lies; and it is only when the dust has settled that the extent of the damage is revealed.

If the rule as to mitigation of damage is applied in this way, injury done to reputation by tales, true or untrue, will be ignored until, in Mr. Erskine's words, they have united to produce one general opinion, and then that general opinion will be allowed in evidence. This interpretation of the rule meets many of the objections that can be urged, and have been urged on behalf of the plaintiff in this case, against this form of mitigation of damage. Time is given for unfounded rumour and unjust accusation to be dispelled; they cannot at once be seized upon in diminution of damage. The danger of injustice inherent in the rule that a man's character depends upon what others believe about him and not upon his true disposition is much lessened; a false accusation can easily be made and may temporarily prevail, but it is not often that a man's settled reputation is founded upon untruth. Under this rule there is no danger of tomorrow's newspaper saying what it likes in the expectation that yesterday's will have to pay most of the bill. There is no danger that what is said in the House of Commons on one day can be repeated the next day with comparative impunity outside the House. It is indeed highly unlikely that an earlier publication of the same libel can be used to diminish the damage for a repetition of it; it is not impossible, for the libel may be an old one that has come to be generally believed.

Accordingly, I come to the conclusion that what is relevant when character is in issue, whether in a criminal or a civil case, is established reputation. Mr. Lawrence has submitted that there is no admissible evidence in this case to show that at the time of the libel the plaintiff's reputation had been damaged in this sense, so I turn to consider the way in which established reputation should be proved. Customarily the evidence is that of men who live in the community where the plaintiff is known and in which the libel has circulated and who have heard the plaintiff discussed. But I do not think that an inference from facts can or should be excluded. If it can be proved that a man has been convicted of theft and that that fact has received wide

publicity, I think it can be inferred that his reputation for honesty has suffered. There may be exceptional cases in which such an inference could be rebutted, but it is at least a prima facie inference. It is unnecessary to call a witness to give formal proof of what must be obvious; but when the inference is at all doubtful, it is important that it should be put to the test of what the neighbours actually think.

It is common practice in criminal cases to accept proof of convictions without more as evidence of bad character. The point does not appear to have been much discussed in relation to libel, but Mr. Faulks has found one case which supports his submission that the court can act on inference. In *Hawkins* v. *Express Dairy Co. Ltd.*[62] Stable J. reduced to a farthing the damages of £750 which he would otherwise have given to the plaintiff for a libel on his honesty, because the plaintiff in his evidence-in-chief volunteered the information that he was guilty of a systematic deception known to the men among whom he worked. Stable J. said[63]: "The plaintiff has said that in this yard, among "his associates even up to the area manager, everyone knew that "he was pursuing this dishonest practice. . . . It seems to me "that I am not only entitled, but bound, to consider the reputa-"tion which has been injured." I think that Stable J. was entitled in principle (I do not, of course, concern myself with the correctness of the inference) to act upon an inference that in the circles where the libel was effective the plaintiff had already lost his reputation.

Finally, I must consider what has been put forward by the defendants as evidence of bad character. They called no witnesses to give direct evidence of it. They put some questions in cross-examination to the plaintiff about the effect of the other newspapers which carried the report of the select committee, but (even if it be conceded, which I doubt, that a man is competent to give evidence about the esteem in which he is held by others) they got no answers from him which could amount to a concession that already within the month his established reputation had been permanently injured. There is left the inference to be drawn from the admitted facts; and this was the strongest way in which Mr. Faulks put his case. For this purpose he was willing that the contents of all newspapers other than the "Daily "Mail" itself should be excluded from consideration. He relied solely on the fact that the plaintiff put in as part of his case the article in the "Daily Mail" of May 16 which published the report of the select committee, and he invited us to infer, which I do, that the report would also have been given wide publicity in other papers. This publicity, he contended, must have injured the plaintiff's reputation.

[62] (1940) 163 L.T. 147.

[63] Ibid. 147, 149.

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I agree that the publicity must have caused the plaintiff immediate serious injury, but I am not prepared to infer that within a month his established reputation was lowered. I agree that a finding by a select committee must carry very great weight with the ordinary man and that some might have thought it conclusive and felt that they wanted to hear no more. But the proceedings before the committee are not like those at a trial where the whole matter is thrashed out in public and the whole story is known. There may well have been influential people in Manchester putting about another point of view. Many members of the corporation may have known the truth. Professional men who had advised the shareholders to accept the offer may well have known something of the true value of the shares. Many men might have preferred to wait until they heard the town clerk's side of the question before passing judgment. In my opinion this is not a case in which in the absence of direct evidence it would be safe to draw the inference that in a short period of a month and while the whole affair was still being agitated the plaintiff's character in the estimation of his fellow-citizens had been changed.

For these reasons I think that the judge was wrong in taking into consideration in mitigation of damage the publication, whether in the "Daily Mail" or elsewhere, of the report of the select committee. It follows that we must ourselves assess the proper figure to award to the plaintiff. For this purpose we have had to consider other criticisms that were made of the summing-up. I agree broadly with the views on these matters expressed by Sellers and Pearce L.JJ. and I do not think that it is necessary for me to deal with each criticism in my own words. I think that the figure of £4,000 is fair compensation for the damage sustained by the plaintiff; I agree that this figure should be substituted in the judgment for the figure awarded by Pearson J., and that to that extent the appeal should be allowed.

Appeal allowed, with costs.
Leave to appeal to House of Lords.

Solicitors: *Stephenson, Harwood & Tatham for Grundy, Kershaw, Farrar & Co., Manchester; Swepstone, Walsh & Son.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

TOWERS & CO. LTD. *v.* GRAY.

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March 1, 2.

Lord Parker C.J., Winn and Widgery JJ.

Trade Mark—False trade description—"Possession for sale"—Frozen chickens—Weighing less than marked weight—Stored in cold store under agreement giving cold store company general lien for storage charges due—Available to owners on demand—Whether in owners' possession—"Possession"—Meaning—"Possession for sale or any "purpose of trade"—Whether mutually exclusive—Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *as amended by Merchandise Marks Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 48), *s.* 4.

Bailment—Possession—Possession of bailor—Goods stored subject to lien—Whether bailor in "possession"—Merchandise Marks Act, 1887, *s.* 2.

A farmer supplied to the appellant company a quantity of frozen chickens, each wrapped in a cellophane bag inside which the weight of the chicken was marked. On receipt of the chickens, the appellant company directed them into a cold store belonging to another company under an agreement which provided, inter alia, for storage charges to be paid by the appellant company, and which gave the cold store company a general lien on the goods for all charges due, and the appellant company a right to withdraw the goods on demand during specified hours on the presentation of a voucher and an indent. It came to the knowledge of the appellant company that the weights marked on the chickens were inaccurate as the farmer's scales were faulty, and they instructed their manager to weigh them in bulk before sending them off to their customers, but no arrangements were made for individual reweighing. On June 10, 1960, an inspector of weights and measures check-weighed some of the chickens, and by agreement the weighing took place at the cold store, the chickens being returned to the refrigerators after being weighed. A number of chickens were found to weigh less than the marked weights and the appellant company was charged with having in their possession for the purpose of trade 39 chickens to which a false trade description applied contrary to section 2 (2) of the Merchandise Marks Act, 1887,[1] as amended by section 4 of the Merchandise Marks Act, 1953. Justices were of opinion that, although the cold storage company were in physical possession of the chickens, the appellant company was in constructive possession of them, and they convicted and fined the appellant company. On appeal by way of case stated:—

Held, (1) that "possession" must be given the popular and common-sense meaning in the particular context in which it was used, and that, as this was a penal statute dealing with sellers of goods, "possession" must be looked at both from the point of view of the criminal law and the commercial community in which it would cover a case such as the present where the goods were held by a bailee to the order of the seller on terms on which he could recover them at once on demand.

Dictum of Earl Jowitt in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A.* [1952] A.C. 582, 605;

[1] Merchandise Marks Act, 1887, s. 2 (2) (as amended): "Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, . . . shall, unless he proves . . . (*c*) that . . . he had acted innocently; be guilty of an offence against this Act."

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[1952] 1 T.L.R. 541; [1952] 1 All E.R. 572, H.L.; *City Fur Manufacturing Co. Ltd.* v. *Fureenbond (Brokers) London Ltd.* [1937] 1 All E.R. 799, and dictum of Cockburn C.J. in *Reg.* v. *Sleep* (1861) 8 Cox C.C. 472, 480, C.C.R. applied.

(2) That it could not be said that the information was improperly laid on the basis that it charged the appellant company with having the goods in their possession for the purpose of trade, whereas they were in the company's possession for sale, as the words "has in his possession for, sale, or any purpose of trade" in section 2 (2) of the Act were not mutually exclusive.

(3) That the appellant company was not entitled to rely on the defence that it had acted innocently provided by section 2 (2), and, accordingly, the appeal would be dismissed.

Slatcher v. *George Mence Smith Ltd.* [1951] 2 K.B. 631; [1951] 2 T.L.R. 272; [1951] 2 All E.R. 388, D.C. applied.

Case stated by Leicester justices.

On July 6, 1960, an information was preferred by the respondent, William Gray, an inspector of weights and measures, against the appellant company, Towers and Co. Ltd., that the company on June 10, 1960, at its branch depot at East Street, Leicester, did have in its possession for the purpose of trade certain goods, namely, 39 pre-packed frozen chickens to which a false trade description was then applied, namely, each of the wrappings within which was a frozen chicken was marked with the net weight of the chickens within the wrapper whereas in fact the actual weights of the chickens were in every case less than the weight marked on each wrapper, contrary to section 2 of the Merchandise Marks Act, 1887, as amended by section 4 of the Merchandise Marks Act, 1953.

The justices heard the information on October 4, 1960, and found the following facts. The appellant company leased premises for the purpose of its business as wholesale butchers from the Leicester Pure Ice and Cold Storage Co. The leased premises were adjacent to but separate from premises used as a public cold store or refrigeration plant operated by the cold storage company, the leased premises and the cold store being part of the same property. The conditions under which goods were accepted by the cold storage company for deposit in the cold store were printed on the back of its invoices and receipts.

The conditions relevant to this report were as follows:

"1. All goods stored are received at owner's risk . . .

"2. Goods are only received subject to a general lien for all "charges accrued or accruing against the storer and/or owner of "the goods or for any other monies due from the storer and/or "owner of goods, and if such lien is not satisfied after seven "days' notice in that behalf has been given to the storer and/or "owner . . . , the goods or any part of them may be sold to "defray the lien and all expenses incurred. . . .

"8. Production of this voucher will be deemed sufficient "evidence of ownership to authorise delivery of goods to the "bearer thereof."

Certain hours of the day were fixed for the deposit and removal of goods from the store.

The appellant company from time to time in the course of its business used the cold store for the purpose of depositing therein perishable goods bought and sold in the course of its business but leased no specific space therein. On May 26, 1960, a consignment of frozen chickens was received into the cold store from an independent carrier for the appellant company. The consignment consisted of 60 cartons, each of which contained eight chickens, each being packed in a tray and wrapped in cellophane. Receipts signed by employees of the cold storage company were given to the carrier and the appellant company. (On the back of each receipt were the conditions set out above.) The chickens were consigned by the head office of the appellant company to its Leicester depôt and receipt thereof was duly signed for by the company's depôt manager on May 26, 1960. Thereafter the chickens were immediately placed in the cold store and signed for. The producer who had supplied the appellant company with the chickens had marked the net weight of each chicken on its container. His scales were inaccurate. In order to take away goods from the cold store an indent system was used whereby the owner of goods gave a chit to the cold storage company specifying the goods to be collected. The cold storage company kept the chit and gave the owner a delivery note onto which the contents of the chit had been copied. On May 27, 1960, the appellant company notified its Leicester manager of reported shortages of weight of the chickens and instructed him to weigh all the deliveries rather than work on the marked weights, to keep a note of any shortages, and to put forward a report so that the appellant company could claim on the supplier. The Leicester manager gave instructions that each carton of chickens or any smaller quantity ordered be weighed in bulk before sale and that customers be warned to weigh individually and mark the correct weight on each container before retail sale. The appellant company's London manager gave instructions for random check weighing of chickens but at no stage in the handling of the poultry by the appellant company was provision made for each chicken to be weighed individually before sale. The appellant company distributed about 2,000 cases of frozen poultry each week.

On June 10, 1960, an inspector of weights and measures visited the premises of the appellant company at Leicester and asked to check weigh frozen chickens. The manager made arrangements with the cold storage company for the chickens to be produced to the inspector for check weighing. The arrangements were made orally and no indents were made out. The inspector weighed six cartons and of 48 weighed 39 were of less weight than that marked on them, the others being correct or overweight. The weighing took place in the ante-room to the cold store, which was part of the premises of the cold storage company. From time to time the chickens were removed from

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the deep freeze. Until returned after the weighing, an employee of the appellant company was present and no employee of the cold storage company was present all the time, though one was present at intervals.

It was contended on behalf of the appellant company (a) that there was no evidence that on the material date the appellant company had the chickens in their possession at their branch depot or at all, and that, accordingly, the submission made on the company's behalf that there was no case to answer ought to have been upheld and the information dismissed; (b) that in any event the evidence proved that on the material date the chickens were not in the possession of the appellant company but in the possession of the cold storage company under a contract of bailment which gave the cold storage company not only actual custody and control but also legal possession as well as a possessory lien; (c) that even if the chickens were in the possession of the appellant company they were not so for the purpose of trade because the appellant company did not intend to sell them as and where they were, but only after they had removed them from the cold store, weighed them by the carton and delivered them with an invoice showing the true weight of the chickens in bulk and with an oral caution that they should be weighed individually and the labels altered as necessary before retail sale; (d) that the appellant company had acted innocently within the meaning of section 2 (2) (*b*) of the Merchandise Marks Act, 1887 (as amended).

It was contended on behalf of the respondent that on the facts, even if the chickens were bailed to the cold storage company, nevertheless the appellant company had the right to their possession (which was, indeed, exercised when the inspector asked the company's manager if he could weigh his chickens). It was further contended that on the facts the appellant company could not rely upon section 2 (2) (*b*) of the Act.

The justices were of opinion, inter alia, that the chickens were immediately available on demand made by the appellant company to fulfil orders given by its retail customers and that the company used the cold store not merely as a place in which to preserve the goods but as a warehouse in which to store them; and that, if the chickens were not to be regarded as actually in the possession of the company, they were in its constructive possession for the purpose of its trade. If wrong, they were of opinion that at the time of weighing the chickens were in the actual possession of the appellant company for the purpose of trade. They were further of opinion that the defence under section 2 (2) (*b*) that the appellant company had acted innocently was not satisfied. They convicted and fined the appellant company.

That company appealed by way of case stated.

Joseph Dean for the appellant company.
Paul Wrightson for the respondent.

The following cases (other than those referred to in the judgment) were cited in argument: *Manders* v. *Williams* [2]; *Cairns* v. *Linton* [3]; *Wieland* v. *Buller-Hogan* [4]; *Christie Manson & Woods* v. *Cooper* [5]; *Spurling (J.) Ltd.* v. *Bradshaw*.[6]

LORD PARKER C.J. This is an appeal by way of case stated by justices for the City of Leicester, before whom an information was preferred by the respondent against the appellant company that on a certain day in June of last year it "did have in its "possession for the purpose of trade certain goods, namely, pre-"packed frozen chickens to which a false trade description was "then applied, namely, each of the wrappings within which was "a frozen chicken was marked with the net weight, as hereinafter "stated, of the chickens within the wrapper, whereas in fact "the minimum net weight of each of the said chickens was as "hereafter stated contrary to section 2 of the Merchandise Marks "Act, 1887, as amended by section 4 of the Merchandise Marks "Act, 1953." The justices, having dealt with the matter with great care, came to the conclusion that the offence was proved and they fined the appellant company. [His Lordship stated the facts and continued:]

The real point in this case concerns the question whether the chickens while in the refrigerators belonging to the cold storage company were in the possession of the appellant company. The section of the Act in question, section 4 of the Merchandise Marks Act, 1953, inserted a new subsection (2) in the Merchandise Marks Act, 1887, and the relevant words for this purpose are as follows. [His Lordship read the subsection and continued:]

The justices came to the conclusion on the facts of this case that although the chickens were in the physical possession, if I may use that word, of the cold storage company, they were immediately available on demand to the appellant company and that the appellant company were in constructive possession of them for the purposes of its trade. Alternatively, they found, if they were wrong on that, that at the time when the Inspector of Weights and Measures came and weighed the chickens, those chickens were at that point of time in the possession of the appellant company.

The term "possession" is always giving rise to trouble. As Earl Jowitt said in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A. and Bank of England* [1]: "The "person having the right to immediate possession is, however, "frequently referred to in English law as being the 'possessor' "—in truth the English law has never worked out a completely "logical and exhaustive definition of 'possession.'"

[2] (1849) 4 Ex. 339.
[3] (1889) 16 R.(J.) 81.
[4] (1904) 73 L.J.Q.B. 513; 20 T.L.R. 419, D.C.
[5] [1900] 2 Q.B. 522; 16 T.L.R. 442, D.C.
[6] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121, C.A.
[1] [1952] A.C. 582, 605; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572, H.L.

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For my part I approach this case on the basis that the meaning of "possession" depends upon the context in which it is used. Thus its meaning was dealt with in connection with the Bills of Sale Act, 1854, in *Ancona* v. *Rogers*.[2] Again, in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A. and Bank of England*,[3] to which I have referred, the meaning of "possession" was dealt with in connection with the law of foreign sovereign immunity. In each case it must depend, in my judgment, on the context in which it is used. In some contexts, no doubt, a bailment for reward subject to a lien, and where perhaps some period of notice has to be given before the goods can be removed, could be of such a nature that the only possession that there could be said to be would be possession in the bailee. In other cases it may well be that the nature of the bailment is such that the owner of the goods who has parted with the physical possession of them can truly be said still to be in possession.

In the present case we are dealing with a penal statute dealing with the sellers of goods, and it is to be observed that at any rate possession in the eyes of the commercial community is a word perfectly apt to cover an owner of goods who has those goods warehoused or in the hands of some third person. That appears from the judgment of Branson J. in *City Fur Manufacturing Co. Ltd.* v. *Fureenbond (Brokers) London Ltd.*[4] The facts of the case do not matter. The question was what was meant by "possession" in the Sale of Goods Act, 1893, section 25. Branson J. in that case refers to the fact that the Factors Act, 1889, had defined "possession" as including possession by another person on behalf of the person whose possession was material. He took the view that in dealing with the Sale of Goods Act, 1893, there was no reason why the same meaning should not be given to the word "possession." He said this[5]: "Possession by an agent, possession by a warehouseman or "mercantile agent, is a perfectly well known form of possession "in the business world, and I can see no reason for confining "the meaning of it to personal possession or actual possession "of the person who has sold the goods." There one has a meaning put on the word "possession" that is common in the commercial world.

Dealing with the criminal aspect of the matter, we have been referred to *Reg.* v. *Sleep*.[6] In that case the prisoner was charged with being in possession of naval stores marked with the broad arrow. He was an ironmonger and brazier of Plymouth, and he delivered on the quay for the captain of a coasting vessel a cask containing copper to be carried from Plymouth to Helston in Cornwall. In order to prove the offence it was necessary to prove, first, that he was in possession of the

[2] (1876) 1 Ex.D. 285, C.A.
[3] [1952] A.C. 582.
[4] [1937] 1 All E.R. 799.
[5] Ibid. 802.
[6] (1861) 8 Cox C.C. 472, C.C.R.

contents, which were copper bolts, and secondly, that he knew that the copper was marked with the broad arrow. The matter was put in the form of separate questions to the jury. The jury found that he was in possession, but they said they had not sufficient evidence to show that he knew the copper had the broad arrow on it. The case was reserved for the opinion of the court consisting of Cockburn C.J., Pollock C.B., Martin B., Crompton J. and Willes J. It is to be noted that the Chief Justice began his judgment by saying that he felt bound to say that "there was evidence upon which the jury might well and "reasonably have been called upon to conclude, that the "prisoner knew that the copper bolts were marked with the "broad arrow while in his possession."[7] He then goes on to say that the jury, however, had not so found and that on the findings of the jury the prisoner ought not to have been convicted. Pollock C.B. was of the same opinion, but when Martin B. came to deliver judgment he went further; he said[8]: "I think "it [the verdict] was wrong in two particulars. First, I "think the goods were not found in the prisoner's possession "at all. In my judgment the 9 and 10 Will. 3, c. 41, s. 2, "means that the goods must be found in the possession of the "individual on his trial. If he has parted with possession of "them, and they are found, as in this case, in the custody "of the captain of a vessel, I do not think he could be found "guilty upon this enactment." Crompton J. referred to that point which had been taken by Martin B., and he clearly doubted the validity of the point. However, he found it unnecessary to give any opinion as to whether "the possession of "a bailee, like a ship's captain, is the possession of the prisoner."[9] Willes J. went further and said that in his view "'Possession' means not merely manual possession, but a "property in the thing, though in the custody of another "person."[10] There having been that division of opinion, the Chief Justice added to his judgment by saying[11]: "I certainly "understood that the question whether the possession was "sufficiently proved to be in the prisoner in this case was not "part of the matter submitted or to be adjudicated upon by us. "Lest I should be considered as sharing in the opinion of my "brother Martin, I must say that I hold a diametrically opposite "opinion upon it, and I do so because the point has been already "expressly decided by this court in the case of *Reg.* v. *Sunley*,[12] "which was precisely similar to this in all its circumstances, "and in which it was held by this court that where the stores "were in the possession of a railway company to which they "had been sent by the prisoner for the purpose of being con-"veyed to another place, the possession of the railway company

[7] 8 Cox C.C. 472, 478, C.C.R.
[8] Ibid. 479.
[9] Ibid.
[10] Ibid. 480.
[11] Ibid.
[12] (1859) 8 Cox C.C. 179, C.C.R.

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"was the possession of the prisoner, and that he was rightly "convicted under this statute."

I have referred to those two cases because it seems to me that both in the commercial world and in connection with the criminal law, "possession" has been given a broad interpretation covering something more than actual physical possession, covering cases where, at any rate, a man has the right on demand to recover goods from a bailee.

We have been referred to other cases, in particular to two decisions of this court. In *Webb* v. *Baker*,[13] this court had to consider the position of a seller of goods which had been rejected by the buyer and remained on the buyer's premises. The goods in question were rabbits, and the sellers were charged with having in their possession food which was diseased or unsound. The question was whether the sellers on rejection while under an obligation to remove the rabbits were in possession of them, and Viscount Reading, C.J., in giving the judgment of the court, said this[14]: "Upon the second point we have come to "the conclusion that there was no evidence to justify the "finding that the rabbits were at the material time in the "possession of the appellant. There is no doubt considerable "force in the contention, based upon a strict and somewhat "narrow construction of the word 'possession,' that there was "sufficient evidence to support the justices' finding; but in our "view the word 'possession' in section 117 [of the Public Health "Act, 1875] should be given a popular, and not a narrow, "construction, and, giving the word that construction, we can-"not say that the rabbits were in the possession of the appel-"lant within section 117 during the period that they remained, "under clause 4 of the conditions of the contract, with the "guardians after their rejection, with merely an obligation on "the appellant to remove them within that period." That, clearly is quite a different case, but it is to be observed that Viscount Reading says that the word should be given its popular construction. Its popular construction, no doubt, for the purposes of that case would involve that a man who was miles away and who delivered goods to a purchaser was not in possession of those goods when they were rejected. It is an authority, for what it is worth, for saying that you should give to the word its popular and common-sense meaning in the particular context.

We were also referred to one of the milk cases, *Oliver* v. *Goodger*.[15] The question in that case was whether a farmer was in possession of a churn of milk which, pursuant to arrangements made with the Milk Marketing Board, he had taken off his farm and put at a point beside a road where it was to be collected. It is true that that case was based to some extent on the fact that

[13] [1916] 2 K.B. 753, D.C.
[14] Ibid. 758, 759.
[15] [1944] 2 All E.R. 481, D.C.

the farmer no longer had actual possession of the milk; but again it is to be observed that Viscount Caldecote C.J.[16] said that "possession" was not a term of art, and he referred to the statement made by Viscount Reading C.J. in *Webb* v. *Baker*[17] that it should be given a popular construction. In that case the farmer had done all that he had to do under the contract. He had taken the milk off his farm and had, as it were, done all he could to divest himself of possession of the milk. In a popular sense he no longer had possession.

It seems to me that in the present case in the context in which it appears, both looked at from the point of view of the criminal law and from the point of view of the commercial community, "possession" in its popular sense would cover a case such as this, where the goods are held to the order of the seller on terms on which he can get them back at once.

Accordingly, it becomes unnecessary, in my judgment, to deal with the second point raised by the justices, that any rate the appellant company had possession when the inspector came to weigh the chickens. Mr. Dean, for whose argument the court is indebted, has taken other points of a minor character with which I can deal very briefly. He says, in the first place, that the information was bad in that the possession was laid as being at the branch depôt at East Street, Leicester, whereas, I suppose, he would say it ought to have been laid that possession was in the cold store of the cold storage company. In my judgment, there is nothing in that objection, and the matter is covered by section 100 of the Magistrates' Courts Act, 1952. He then says that the information was laid on the basis that they had these goods in their possession for the purpose of trade, whereas he says that if they did have them in their possession, they had them in their possession for the purposes of sale, and again he says that the charge was wrongly laid. For my part, I have found it a little difficult to see what is exactly meant by having goods in your possession for the purposes of trade as opposed to having them in your possession for the purposes of sale or of manufacture. It may be that it was designed to cover some such case as samples which, though not themselves for sale, would be used for the purposes of trade, but, in my judgment, the words "has "[goods] in his possession for, sale, or any purpose of trade" are not mutually exclusive, and I could not say that this charge was wrongly laid.

Finally, he maintains that the appellant company were entitled to a defence under the section, the particular defence being that "otherwise they had acted innocently." Those words have come before this court on many occasions. I find it unnecessary to go through the cases, of which the latest is *Slatcher* v. *George Mence*

[16] [1944] 2 All E.R. 481, 482, D.C. [17] [1916] 2 K.B. 753, 759.

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Smith Ltd.[18] It is sufficient, in my judgment, to say that I am satisfied that the appellant company could not avail themselves of that defence.

Lastly, I would like to say that I have every respect for the manner in which the justices dealt with this case. It was not an easy one to decide, in particular because it is not a case where any moral blame could conceivably be attached to the appellant company. We are not told what they were fined, but I hope it was very little. In my judgment this appeal should be dismissed.

Winn J. I agree.

Widgery J. I also agree.

Appeal dismissed with costs.
Certified that a point of law of general public importance involved.
Leave to appeal refused.

Solicitors: *Linklaters & Paines; Field, Roscoe & Co. for Town Clerk, Leicester.*

E. M. W.

[18] [1951] 2 K.B. 631; [1951] 2 T.L.R. 272; [1951] 2 All E.R. 388, D.C.

[PRIVY COUNCIL.]

J. C.*

1961 *March* 7.

AUSTIN RICHTER COLEMAN . . . Appellant;

AND

EMMA KWALEY SHANG alias EMMA KWALEY QUARTEY . . . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL, GHANA.

Ghana—Administration—Grant of representation—Issue of Marriage Ordinance marriage—Widow of marriage by native customary law—Joint grant—Statutory application of English legislation—"Wife"—"Widow"—Meaning—Marriage Ordinance (Laws of the Gold Coast, 1951, *c.* 127), *s.* 48 (1)*—Courts Ordinance (Laws of the Gold Coast,* 1951, *c.* 4), *s.* 83*—Interpretation Ordinance (Laws of the Gold Coast,* 1951, *c.* 1), *s.* 3 (31) (45)*—Statute of* 21 *Hen.* 8 (1529), *c.* 5, *s.* 2*—Statute of Distribution,* 1670 (22 *&* 23 *Car.* 2, *c.* 10), *s.* 3.

Husband and Wife—Marriage—Polygamous marriage system—Succession to personal property—Marriage valid in locus domicilii—Death of first wife—Marriage to second wife under native law—Ghana.

Privy Council—Fact, question of—Statement in judgment that fact not in dispute—Whether challengeable.

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* *Present*: Lord Tucker, Lord Hodson, the Rt. Hon. L. M. D. de Silva.

By the Marriage Ordinance (Ghana), s. 48 (1): " . . . where any " person who is subject to native law or custom contracts a mar- " riage . . . in accordance with the provisions of this Ordinance . . . " and such person dies intestate . . . the personal property of such " intestate . . . shall be distributed or descend in manner following, " viz.—Two-thirds in accordance with the provisions of the law of " England relating to the distribution of the personal estates of " intestates in force on the 19th day of November, 1884, . . . and " one-third in accordance with the provisions of the native " customary law . . ."

By the Court Ordinance (Ghana), s. 83: " . . . the statutes of " general application which were in force in England on the 24th " day of July, 1874, shall be in force within the jurisdiction of the " courts."

By the Interpretation Ordinance (Ghana), s. 3 (31): " 'Ordin- " 'ance' shall include . . . an Act of the Imperial Parliament, " applicable to the Gold Coast and in force . . . (45) Words in the " singular include the plural and vice versa."

The appellant, the sole surviving child of a marriage under the Marriage Ordinance between his mother and his father, an Osu man, who died intestate, claimed that he alone was entitled to the grant of letters of administration of the intestate's estate to the exclusion of the respondent, who, after the death of the appellant's mother, had married the intestate in accordance with native customary law:—

Held, that there must be a joint grant to the appellant and the respondent.

The effect of the Courts Ordinance and the Interpretation Ordinance was that the Statute 21 Hen. 8, c. 5, which provided by section 2 that in the case of a person dying intestate administration should be granted to the widow of the intestate, and the Statute of Distribution, 1670, which enacted that the wife of an intestate was entitled to one-third of the personal estate, were included in the definition of "Ordinance" and in force in Ghana. Those statutes were therefore to be construed in their application to Ghana so that words in the singular included the plural unless there was something in the subject or context repugnant to such construction, which was not so here, the subject and context being the distribution of the personal property of an intestate validly married by native law and custom of Ghana which recognised the existence of more than one wife or widow.

Cheang Thye Phin v. *Tan Ah Loy* [1920] A.C. 369, P.C.; *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, P.C. and *Bamgbose* v. *Daniel* [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C. considered.

Further, apart from the Interpretation Ordinance, in dealing with personal property in Ghana of an intestate domiciled and validly married in that country in accordance with its laws the courts of Ghana, in the application of the above-mentioned Imperial statutes to that country, would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana.

In re Goodman's Trusts (1881) 17 Ch.D. 266, C.A.; the *Sinha Peerage Claim* [1946] 1 All E.R. 348 (note) and *Baindail* v. *Baindail* [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A. considered.

There would, accordingly, be a joint grant to the appellant and the respondent on the footing that the latter was the widow of the intestate. She was entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining

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one-third to which she might be entitled by the relevant native customary law.

While there might be cases in which special circumstances existed which necessitated a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage, there were no such special circumstances in the present case, and there was no valid reason for distinguishing in principle between the children and the widow of the marriage by native customary law.

When the court from whose judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before the Board would go behind such a statement in a judgment.

Judgment of the Court of Appeal, Ghana, affirmed.

Appeal (No. 40 of 1960) from a judgment of the Court of Appeal of Ghana (Van Lare J.A. as C.J., Granville Sharp J.A. and Ollennu J.) (November 23, 1959) allowing an appeal from a judgment of the High Court, Eastern Judicial Division (D. E. Gwira, Commissioner of Assize and Civil Pleas) (March 23, 1959), in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The High Court had made a grant in favour of the appellant who was the plaintiff in the action. The Court of Appeal revoked the grant and ordered that letters of administration be granted jointly to the present appellant and the respondent, who was the defendant in the action. The appellant now sought to restore the judgment of the High Court.

The following statement of the relevant facts is taken from the judgment of the Court of Appeal. The deceased, Stephen Coleman, an Osu man, first married a woman called Adeline Johnson and had three children by her, all of whom survived him. Later he married the present appellant's mother, Wilhelmina, under the Marriage Ordinance and had five children by her, of whom the appellant was the sole survivor, Wilhelmina having died in 1940. During the lifetime of Wilhelmina the deceased lived and cohabited with the present respondent and had 10 children by her. After the death of Wilhelmina the deceased married the respondent in accordance with customary law.

The above recital of facts could be accepted for the purpose of deciding the important question which arose in this appeal, namely, whether the respondent was entitled either solely or jointly to a grant of letters of administration. They were described in the judgment as facts which were not in dispute. The accuracy of this statement was challenged on this appeal by counsel for the appellant, but, as already stated, the Board accepted them for the purpose of construing the relevant Acts and Ordinances which require to be considered.

The issue for determination at the trial was settled on the summons for directions as follows: "Whether the plaintiff or

"the defendant is the proper person entitled to the grant of "letters to administer the estate of the above named deceased." The contest was therefore between the sole survivor of the deceased's marriage under the Marriage Ordinance and the woman whom he had married under customary native law on the death of his former wife.

Section 48 of the Marriage Ordinance, c. 127, was as follows: "(1) Subject to the provisions of the succeeding subsection where "any person who is subject to native law or custom contracts "a marriage, whether within or without (Ghana), in accordance "with the provisions of this Ordinance or of any other enactment "relating to marriage, or has contracted a marriage prior to the "passing of this Ordinance which marriage is validated hereby, "and such person dies intestate on or after the 15th day of "February, 1909, leaving a widow or husband or any issue of "such marriage; (Amended by 13 of 1951, s. 2).

"And also where any person who is issue of any such marriage "dies intestate on or after the said 15th day of February, 1909, "the personal property of such intestate, and also any real "property of which the said intestate might have disposed by "will, shall be distributed or descend in manner following, viz.—

"Two-thirds in accordance with the provisions of the law of "England relating to the distribution of the personal estates of "intestates in force on the 19th day of November, 1884, any "native law or custom to the contrary notwithstanding; and one-"third in accordance with the provisions of the native custom-"ary law which would have obtained if such person had not been "married under this Ordinance: Provided—

"(i) That where by the law of England, any portion of the "estate of such intestate would become a portion of the casual "hereditary revenues of the Crown, such portion shall be distri-"buted in accordance with the provisions of the native customary "law, and shall not become a portion of the said casual "hereditary revenues;

"(ii) That real property, the succession to which cannot by "the native customary law be affected by testamentary dis-"position, shall descend in accordance with the provisions of "such native customary law, anything herein to the contrary "notwithstanding."

1961. January 26, 30, 31; Feb. 1. *Ralph Millner* for the appellant.

Joseph Dean and *Miss E. Aryee* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Engman* v. *Engman* [1]; *Bamgbose* v. *Daniel* [2]; *In re Otto* [3]; *In re the Estate of*

[1] Gold Coast Divl.Ct.Judgmts. (1911–1916) 1.
[2] (1952) 14 W.A.C.A. 111.
[3] Gold Coast Divl.Ct.Judgmts. (1926–1929) 84.

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Somefun[4]; *Re Adadevoh*[5]; *Belshah* v. *Majid*[6]; *Choo Eng Choon, Choo Ang Chee* v. *Nee Chan Neo*[7]; *Khoo Hooi Leong* v. *Khoo Chong Yeok*[8]; *Cole* v. *Cole*.[9]

March 7. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts set out above and continued: The first submission of counsel for the appellant was to the effect that on the proper construction of the Ordinance the only persons entitled to any portion of the two-thirds share of the personal estate of a deceased person dying intestate are his widow whom he had married under the Ordinance or the issue of such marriage, and any persons claiming under a marriage contracted by native customary law are relegated to such share of the remaining one-third as they can establish under that law.

This is the construction which appears to have been put upon the section in some decisions of the courts in Ghana from time to time and would seem to have been adopted by the trial judge towards the end of his judgment where, referring to the present respondent, he said: "her status being that of a wife married "according to native custom cannot override the claim of the "plaintiff."

Their Lordships are unable to accept this construction of the section. In the case of intestacy of a person married in accordance with the Ordinance there are two conditions precedent to the application of the law of England relating to the distribution of the personal estates of intestates in force on November 19, 1884. They are (1) a valid marriage under the Ordinance, (2) the survival of a widow or husband or any issue of such marriage. Once these conditions are satisfied it remains only to see how the two-thirds portion was distributable under English law in 1884. In the present case there was a valid Ordinance marriage between the deceased and Wilhelmina and there is surviving issue of that marriage, viz., the appellant. Wilhelmina had died during the lifetime of the deceased. We find both conditions precedent satisfied and it remains only to apply the provisions of the Statute of Distribution (1670) which provides that if a man dies intestate leaving a wife and issue the wife is entitled to one-third of the personal estate and the children to two-thirds. The question then arises whether on the facts in this case the respondent, who was married under customary native law, qualifies as "a wife" within the meaning of that word in the Statute of Distribution as applied to marriages in Ghana which are lawful in that country but were not contracted in accordance with the provisions of the Marriage Ordinance and are potentially polygamous. This leads to the second submission by counsel for the appellant to the

[4] (1941) 7 W.A.C.A. 156.
[5] (1951) 13 W.A.C.A. 304.
[6] The Times, Dec. 17, 18, 1926; Jan. 14, 1927.
[7] (1908) 12 Str.Settlmts.Rep. 120.
[8] [1930] A.C. 346, P.C.
[9] (1898) 1 Nig.L.R. 15.

effect that the words "wife" and "widow" in an English statute cannot be construed as including the plural as this would be repugnant to the legal conception of marriage in England which does not recognise a potentially polygamous union as a marriage.

Before proceeding to consider this submission it will be convenient to set out parts of the relevant statutes and Ordinances, and it may be observed at this stage that the most immediately relevant statute is 21 Henry 8, c. 5, as this is the statute which provides for the proper person to whom administration should be granted as distinct from the persons entitled to share in the distribution, but it raises precisely the same question, namely, whether the "widow" referred to in the Statute of Henry 8 or the "wife" mentioned in the Statute of Distribution in the application of these statutes to Ghana includes a "widow" or "wife" of a potentially polygamous marriage.

Section 2 of 21 Hen. 8, c. 5, provides: "in case any "person die intestate . . . then the said ordinary . . . shall grant "the administration of the goods of the . . . person deceased, to "the widow of the same person deceased, or to the next of his "kin, or to both, as by the discretion of the same ordinary "shall be thought good." In England prior to the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, the court in exercise of its discretion granted administration to the widow of the intestate, to the exclusion of the next-of-kin or heir-at-law, except for good cause shown. (See Mortimer on Probate Law and Practice (second edition), p. 293.)

The Statute of Distribution, 1670 (22 and 23 Car. 2, c. 10, s. 3), enacts that "all ordinaries and every other person who by this "Act is enabled to make distribution of the surplusage of the "estate of any person dying intestate, shall distribute the whole "surplusage of such estate or estates in manner and form "following: that is to say, one third part of the said surplusage "to the wife of the intestate."

The Courts Ordinance (Chap. 4 of the Laws of the Gold Coast) provides: Section 83. "Subject to the terms of this or any "other Ordinance, the common law, the doctrines of equity, "and the statutes of general application which were in force "in England on the 24th day of July, 1874 shall be in force "within the jurisdiction of the Courts."

Section 85. "All Imperial laws declared to extend or apply to "the jurisdiction of the Courts shall be in force so far only as the "limits of the local jurisdiction and local circumstances permit, "and subject to any existing or future ordinances of the Colonial "Legislature; and for the purpose of facilitating the application "of the said Imperial laws, it shall be lawful for the said Courts "to construe the same with such verbal alterations, not affecting "the substance, as may be necessary to render the same appli-"cable to the matter before the Court; . . . ."

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The Interpretation Ordinance (Chap. 1 of the Laws of the Gold Coast) provides: Section 3. "The following words and expressions shall, if inserted in any ordinance, order, proclamation, rule, regulation, or bye-law, be understood as hereinafter defined or explained, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such definition or explanation, that is to say:—

"(31) 'Ordinance' shall include . . . an Order of Her Majesty in Council or an Act of the Imperial Parliament, applicable to the Gold Coast and in force . . .

"(45) Words in the singular include the plural and vice versa."

It is no doubt true that Lord Brougham's Act (13 and 14 Vict. c. 21) applied only to enactments after 1850 and so did not include the Statute of Distribution and that the English Interpretation Act, 1889, was not in force in 1874, so that for the purpose of construing the Act of Henry 8 and the Statute of Distribution in an English court prior to 1889 it would not have been permissible as a matter of construction or in accordance with the common law as applied to the distribution of property within the jurisdiction of the English court to read "wife" or "widow" as including "wives" and "widows." But it seems to their Lordships that entirely different considerations arise by reason of the provisions of the Courts Ordinance and the Interpretation Ordinance referred to above, the effect of which is that the Act of Henry 8 and the Statute of Distribution are included in the definition of "Ordinance" as being "Acts of the Imperial Parliament applicable to the Gold Coast and in force." Those statutes, therefore, are to be construed in their application to Ghana so that words in the singular include the plural unless there is something in the subject or context repugnant to such construction, which is clearly not the case, the subject and context being the distribution of the personal property of an intestate validly married by the native law and custom of Ghana which recognises the existence of more than one wife or widow.

Their Lordships would not, however, desire to rest their decision solely upon the language of the Interpretation Ordinance, more especially as this was not referred to in the judgment of the Court of Appeal in Ghana, who decided the case in favour of the present respondent on broader grounds with which their Lordships are in general agreement. They do not think, however, that the Privy Council judgments referred to in the Court of Appeal, i.e. *Cheang Thye Phin* v. *Tan Ah Loy* [1]; *Khoo Hooi Leong* v. *Khoo Hean Kwee* [2] and *Bamgbose* v. *Daniel*,[3] can be regarded as authorities conclusive in favour of the respondent. In the last mentioned case the Board was dealing only with the position

[1] [1920] A.C. 369, P.C.
[2] [1926] A.C. 529, P.C.
[3] [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C.

of children and in their judgment it was expressly stated that they proposed to say nothing as to what rights, if any, widows would have in the event of a claim being made in a case such as that with which they were then concerned, and the following observations of Lord Phillimore in *Khoo Hooi Leong* v. *Khoo Hean Kwee* [4] were quoted: "In deciding upon a case where the "customs and the laws are so different from British ideas a "court may do well to recollect that it is a possible jural con-"ception that a child may be legitimate, though its parents "were not and could not be legitimately married. This principle "was admitted by the canon law which governed western con-"tinental Europe till about a century ago and governed still "later, if it does not govern still, the countries of Spanish "America."

In the case of *Cheang Thye Phin* v. *Tan Ah Loy* [5] the position of secondary wives (called t'sips) as contrasted with principal wives (called t'pais) was the only issue and at the outset of the judgment, delivered by Viscount Finlay, he said [6]: "With regard "to Chinese settled in Penang, the Supreme Court recognises "and applies the Chinese law of marriage. It is not disputed "that this law admits of polygamy. By a local Ordinance the "Statute of Distributions has been applied to Chinese successions, "and the courts have treated all the widows of the deceased "as entitled among them to the widows' share under the "statute. No question has been raised on the present appeal "as to the propriety of this practice; the only question is "whether Tan Ah Loy was one of the widows."

Nonetheless, having regard to the attitude of the courts of this country to the status of parties validly married by the laws of the country of the domicile as exemplified by such cases as *In re Goodman's Trusts* [7]; *The Sinha Peerage Claim* [8] and *Baindail* v. *Baindail*,[9] their Lordships are of opinion that in dealing with personal property in Ghana of an intestate domiciled in Ghana, and validly married in that country in accordance with its laws, the courts of Ghana are not precluded from making a grant of letters of administration to a lady who was validly married to the intestate at his death by reason only of the use of the words "widow" and "wife" in the singular in the Act of Henry 8 and the Statute of Distribution. Apart from the Interpretation Ordinance their Lordships would hold that in the application of those statutes to Ghana the courts of that country would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana. In this connection reference may be made to the following observations by Lord Greene M.R. in *Baindail* v. *Baindail*.[10] Referring to a man married by Hindu law in India he said: "what was his

[4] [1926] A.C. 529, 543.
[5] [1920] A.C. 369.
[6] Ibid. 372.
[7] (1881) 17 Ch.D. 266, C.A.
[8] [1946] 1 All E.R. 348n.
[9] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.
[10] [1946] P. 122, 127.

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"status on May 5, 1939? Unquestionably, . . . it was that of a "married man. Will that status be recognised in this country? "English law certainly does not refuse all recognition of that "status. For many purposes, quite obviously, the status would "have to be recognised. If a Hindu domiciled in India died intes- "tate in England leaving personal property in this country, the "succession to the personal property would be governed by the "law of his domicile; and in applying the law of his domicile "effect would have to be given to the rights of any children of "the Hindu marriage and of his Hindu widow, and for that pur- "pose the courts of this country would be bound to recognise "the validity of a Hindu marriage so far as it bears on the title "to personal property left by an intestate here."

Later on he said[11]: "The practical question in this case "appears to be: Will the courts of this country, in deciding upon "the validity of this English marriage, give effect to the status "possessed by the respondent? That question we have to decide "with due regard to common sense and some attention to reason- "able policy. . . . I think it is certainly a matter to bear in "mind that the prospect of an English court saying that it will "not regard the status of marriage conferred by a Hindu cere- "mony would be a curious one when very little more than a "mile away the Privy Council might be sitting and coming to "a precisely opposite conclusion as to the validity of such a "marriage on an Indian appeal."

Their Lordships recognise that there may be cases in which special circumstances exist which necessitate a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage as indicated in the passage referred to above in the judgment of the Board delivered by Lord Phillimore, as well as in the passage towards the end of the judgment delivered by Lord Keith of Avonholm in *Bamgbose* v. *Daniel*.[12] There are no such special circumstances in the present case, and their Lordships can find no valid reason for distinguishing in principle between the children and the widow of the marriage which is in question in the present appeal. Difficulties may no doubt arise in the application of this decision in cases where there are more than one widow, both in dealing with applications for the grant of letters of administration and in the distribution of the estate, but they can be dealt with as and when they arise. Their Lordships are, for the reasons indicated above, in agreement with the decision arrived at by the Court of Appeal in making a joint grant to the appellant and the respondent upon the footing that the latter is the widow of the deceased. They would, however, observe that the Court of Appeal appears to have gone rather further than was necessary for the decision of the application for a grant of letters of administration in setting out in some detail the shares of those who will be entitled in the

[11] [1946] P. 122, 129.

[12] [1955] A.C. 107, P.C.

distribution. Such matters are more appropriate to administration proceedings, and the appellant contends that there was no evidence or admission that the children of the deceased's first marriage to Adeline are now surviving. Their Lordships do not think that any persons entitled in the distribution should be precluded by the judgment of the Court of Appeal from contending in the appropriate proceedings that their shares of the personal estate are larger than those indicated in the judgment, provided that it must be accepted that the respondent is entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining one-third to which she may be entitled by the relevant native customary law.

Their Lordships made reference earlier in this opinion to the challenge by the appellant to some of the facts which were stated as being "not in dispute." It was said that there was no proper proof of either of the marriages by native customary law, or that the deceased was an Osu man, or that the respondent was validly appointed to represent the family. When the court from whose judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before their Lordships would be disposed to go behind such a statement in a judgment, or to judge of its accuracy merely from a perusal of the notes taken in the courts of the country from which the appeal comes. There is nothing in the present case to justify their Lordships questioning the accuracy of this statement, subject only to the reservation referred to above as to the effect, if any, of such findings on the shares of those proved to be entitled to participate in the distribution.

For these reasons their Lordships will report to the President of Ghana as their opinion that this appeal should be dismissed, and that the appellant should pay the costs thereof.

Solicitors: *T. L. Wilson & Co.; A. L. Bryden & Williams.*

C. C.

[COURT OF APPEAL.]

ROYAL COLLEGE OF MUSIC *v.* CANE (VALUATION OFFICER) AND ANOTHER.

[LVC/1367/1958.]

Rating—Science, literature or fine arts—Exemption—"Annual voluntary contributions"—College instituted for purposes of musical instruction and encouragement of music—Annual receipts of donations, gifts in kind, conditional and unconditional legacies, funds

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from trusts, government grants—Scope of "annual voluntary contributions"—Whether percentage of total income constituting "support" decisive in relation to society within spirit and letter of statute—"Supported . . . in part"—"Annual"—"Voluntary"—"Contributions"—Meaning—Government grants not annual voluntary contributions—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

Judicial Precedent—Ratio decidendi—Two reasons for decision—Both binding (post, p. 589).

A college founded by Royal Charter in 1883 for the promotion of musical instruction and the encouragement of music as an art was supported throughout its history by an annual flow of benefaction of divers kinds. In each year there was a flow of subscriptions; cash donations; conditional and unconditional legacies; gifts in kind; covenants for or gifts of money donated to form a fund the interest on which was to be used as a prize or scholarship; funds from trustees under the terms of a deed to make payments to the college or under trusts giving the trustees a discretion to devote the funds at their disposal to one or other named institution or institutions within a generally described class; and government grants.

In 1898 the college was held to be exempt from rating as a society instituted for purposes of the fine arts exclusively, within section 1 of the Scientific Societies Act, 1843 [1]; but in 1956 the rating authorities sought to have its hereditament assessed, on the ground that the society was not "supported wholly or in part by "annual voluntary contributions" in satisfaction of the proviso to section 1.

The Lands Tribunal, construing "annual" in relation to the contributor and not the receiver, excluded from the total income of the college, as not constituting "annual voluntary contributions," all legacies; lump sums donated to form a fund, the interest on which was to be used as a prize or scholarship; scholarships for the maintenance of a pupil (as distinct from those to pay holder's fees to the college); prizes which a pupil could spend as he chose; payments by trustees under a trust deed to make a payment to the college; all gifts in kind; and government grants. The tribunal further added to the total annual income the proceeds of catering for collateral purposes, and of concerts held at the request of the local authority on the basis of indemnity and reimbursement. In the result the tribunal found, on its construction, that "annual "voluntary contributions" for the "support" of the college accounted for less than 2 per cent. of the total income, and held that that insignificant proportion could not be regarded as even partial support for the purposes of section 1 of the Act of 1843, and that the college was accordingly not entitled to exemption from rating. On appeal by the college:—

Held, allowing the appeal, (1) that "annual" contributions within the meaning of the section included gifts on the recurrence of which year by year the donee could reasonably rely, even though the donor might be in every case different (post, pp. 582, 594).

(2) That a contribution was "voluntary" if it was gratuitous,

[1] Scientific Societies Act, 1843, s. 1: " . . . no person or persons "shall be assessed or rated . . . in "respect of any land, houses, or "buildings . . . belonging to any "society instituted for purposes of "science, literature, or the fine arts "exclusively, . . . provided that such "society shall be supported wholly or "in part by annual voluntary contri-"butions . . ."

notwithstanding that it issued from a trust where the trustees were not free agents (post, pp. 585, 594).

(3) That "contributions" did not include the interest thereon accruing in subsequent years (post, pp. 585, 595).

(4) That "support" of such a society included all benefaction which enriched it or furthered its objects or powers, or relieved it of a burden, or enabled it to perform its purposes in a more dignified manner; and, accordingly, gifts in kind, and scholarships or prizes not earmarked to pay the holder's college fees, constituted "support" (post, pp. 586, 595).

(5) That, accordingly, the society was supported in significant part by annual voluntary contributions, since a sufficient number of the items excluded by the tribunal (with the exception of government grants) could properly be treated, from the receiver's point of view, as "annual voluntary contributions." In particular, all gifts in kind; the capital sums of legacies, conditional or unconditional, and gifts or donations which came to the college with sufficient regularity to entitle it to rely on them as a source of revenue were in the year of receipt annual voluntary contributions, as were also grants from funds in the hands of trustees with discretionary powers, as and when such grants were received by the college.

Per curiam. If the nature of government grants were res integra, there would be much to be said for the view that they were annual voluntary contributions within the spirit and letter of the Act of 1843 (post, pp. 589, 595).

Per Holroyd Pearce L.J. In relation to a society so wholly within the spirit, intention and literal wording of the Act of 1843 as this college, the question whether it was supported in part by annual voluntary contributions was not to be decided by percentages (post, pp. 590 et seq.).

London Library v. *Cane* [1960] 1 Q.B. 373; [1959] 3 W.L.R. 929; [1959] 3 All E.R. 726, C.A.; *Bradford Library Society* v. *Bradford Churchwardens* (1858) 1 E. & E. 88; *Savoy Overseers* v. *Art Union of London* [1896] A.C. 296; 12 T.L.R. 377, H.L.; *Battersea Borough Council* v. *British Iron and Steel Research Council* [1949] 1 K.B. 434; 65 T.L.R. 183, C.A. and *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21, C.A. applied.

APPEAL by case stated from a decision of the Lands Tribunal (Mr. Erskine Simes Q.C.).

The valuation officer appealed from a decision of a local valuation court for Central London on May 5, 1958, directing that the hereditament described as the Royal College of Music, Prince Consort Road, London, S.W.7, should be entered in the valuation list for the City of Westminster as "Exempt." The valuation officer contended that the college was not entitled to exemption from rating under the Scientific Societies Act, 1843, and that the hereditament should be assessed at values of £10,000 gross value and £8,330 rateable value; and on July 30, 1958, it was ordered that there should be a preliminary hearing on the point of law as to whether the college was so exempt. Accordingly, no evidence as to values was given at the hearing.

It was admitted that the last three of the five conditions necessary to claim exemption under section 1 of the Act of 1843

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were satisfied. The first, that it must be a society constituted for purposes of the fine arts exclusively, had been determined in favour of the college in *Royal College of Music* v. *Westminster Vestry* [2]; but the valuation officer formally reserved the right to question that decision if the present appeal reached the House of Lords. The sole issue argued was whether the college was supported wholly or in part by annual voluntary contributions.

The college was created and incorporated by Royal Charter in 1883 and its purposes as defined by the charter were as follows:

"First, the advancement of the art of music by means of a "central teaching and examining body charged with the duty "of providing musical instruction of the highest class, and of "rewarding with academical degrees and certificates of proficiency "and otherwise persons, whether educated or not at the college, "who on examination may prove themselves worthy of such "distinctions and evidences of attainment: and, secondly, the "promotion and supervision of such musical instruction in schools "and elsewhere, as may be thought most conducive to the cul-"tivation and dissemination of the arts of music in the United "Kingdom; and, lastly, generally the encouragement and pro-"motion of the cultivation of music as an art throughout our "Dominions."

The buildings stood on land demised to the college by the Commissioners for the Exhibition of 1851 for 999 years from June 24, 1890, at a nominal annual rent of £5, were originally erected from funds provided by one, Fox, and had since been enlarged and improved at the expense of private benefactors.

The college received each year gifts of books and music, instruments, pictures and miscellaneous articles connected with its activities, but following the decision of the President in the *London Library* case [*London Library* v. *Cane* [3]] [in the Lands Tribunal] in respect of gifts of books to that Institution, the tribunal was satisfied that the value of such gifts in kind could not be treated as "annual voluntary contributions" within the statute.

The income of the college as shown in the balance-sheet for the year ended August 31, 1956, amounted to £72,155 and was derived, inter alia, from:

Annual subscriptions	£648
Donations and legacies	£300
Dividends and interest	£9,636
Fees from pupils	£32,406
Transfers from Astor Fund	£381
,, ,, Leverhulme A/c	£480
,, ,, Miscellaneous trusts fund	£10
,, ,, Ernest Palmer Fund	£240
Government grant	£14,125

[2] [1898] 1 Q.B. 809; 14 T.L.R. 351, C.A.

[3] (1958) 51 R. & I.T. 571, 576.

Cash for prizes and maintenance	£113
Sundry receipts	£402
Junior Exhibitions fees	£1,922
Associated Board of Royal Schools of Music	£9,000
Grant from Palmer Fund for opera study	£200
Amount received for L.C.C. concerts	£77
Amount transferred from Patron's Fund	£80

That revenue account and that of the years from 1951 to 1957 both inclusive were analysed in tables appended to the college's reply.

There was no dispute before the tribunal that the annual subscriptions were properly to be regarded as annual voluntary contributions and that government grants should be excluded, in the light of the judgment of Jenkins J. in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association* [4], but for the college it was formally submitted that the decision was wrong so that the point might be open to the college in subsequent proceedings.

It was clear from the evidence that the item donations and legacies in fact included legacies only, and in relation to that item the tribunal followed and adopted the view expressed by the President in the *London Library* case (supra) that "they "are the antithesis of an annual voluntary contribution."

In the tables attached to the college's reply, in addition to annual subscriptions and donations and legacies, two further items, namely, annual contributions specified in Table B (*a*) (iii) and receipts from trusts whose trustees had discretion to apply income outside the college (Patron's and Palmer Funds) were included as annual voluntary contributions.

Table B (*a*) (iii) set out a list of prizes, scholarships and exhibitions in respect of which moneys had been received during the years 1951 to 1957, in some cases to found a prize or scholarship, in some cases to augment the fund providing a prize or scholarship and in some cases annual or periodical gifts for some prize or scholarship.

Eleven of those items related to legacies for those purposes and in respect of those, Mr. Ronald Bell, counsel for the college, accepting that the tribunal should follow the president's decision in the *London Library* case, reserved the right to contend thereafter that that decision was incorrect. Certain of the items included in Table B (*a*) (iii) he did not seek to contend should be regarded as annual voluntary contributions, but he did seek to include a number, briefly described as follows:

1. The Parry Scholarship—an annual payment made by the trustees of the Parry Little Organ Book Fund of the royalties received by them in the year from the sale of a work entitled "A Little Organ Book," invested by the college and added to the foundation fund, which was used for the purpose of an open

[4] [1949] 1 K.B. 434, 457; 65 T.L.R. 183.

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scholarship known as the Hubert Parry Scholarship which covered the fees of the holder. 2. The Morrison Prize—an annual prize, to be awarded to the most distinguished pianist each year, of a sum representing the interest on £700 less 5 per cent. for administration and derived from two transactions both made on the same day: first, a straightforward covenant of £100 per annum for seven years, and secondly, an immediate loan to the college by the covenantor of £647 10s. free of interest repayable by annual instalments of £100 for a period of six years and a final instalment of £47 10s. 3. The McGown Prize, which consisted of a gift of £5,000 to be invested and the interest to be devoted to helping students of the college who were in need. 4. The Tankard Prize, derived from the interest on the sum of £500 which was given for the purpose. 5. The Somervell Prize—an annual prize of £10, representing the interest on £400 2½ per cent. Savings Bonds transferred to the college by the donor. 6. The Astor Fund—a sum of £16,700 given to the college in 1935 on trust to apply the income derived therefrom "for the benefit "and assistance of those of its pupils who in the judgment of "the director . . . it is desirable should receive financial assis-"tance in order to complete to the full advantage the courses "of instruction which they have commenced or of those who "having completed their courses of instruction the director . . . "considers it is desirable should receive financial assistance in "order to enable the full advantage of such courses to be obtained "when they leave the college." 7. The Blower Prize—the interest on the sum of £171 13s. subscribed and invested in the names of the trustees who under a declaration of trust made in 1915 were to apply the income in providing an annual prize for proficiency in singing to a pupil or pupils of the college. 8. The Chappell Prize—an annual sum of £5 5s. given to the college by Messrs. Chappell for a prize to a piano pupil. The prize-winner was also given a medal by Messrs. Chappell. 9. The Eldee Exhibition, derived from the interest on a sum of money invested in the names of trustees "to assist female vocalists to "study, develop and receive training in their art either in the "United Kingdom or abroad." The holder was to be nominated alternatively by the Royal Academy of Music and the college. 10. The Leverhulme Fund—a grant of £500 per annum by the Leverhulme trustees to provide scholarships at the college. Part of those scholarships were in discharge of college fees and part for the maintenance of scholars during the college term. 11. The Lyttleton Scholarship—a grant by covenant of £120 per annum to be applied in establishing and maintaining a scholarship. 12. The Maas Prize—an exhibition of £10 per annum paid by trustees to the pupil of a school of music selected by the examiners appointed by the trustees, the sum to be appropriated to the cost of a year's instruction in the selected institution. 13. The Stern Prize—a sum of £5 5s. given annually by the Court of the Musicians' Company as trustees to a student of the violincello at

the college to assist him in his studies. 14. The Warrender Prize—an annual gift of £5 from the Musicians' Benevolent Fund as trustees to be given to a student of the college "either "to help with music or towards travelling or other expenses at "the discretion of the Principal."

The two trusts of which the trustees had discretion to apply income outside the college were as follows: (1) The Patron's Fund, administered by the college as trustees under trust deeds of 1903, 1906, 1909 and 1912. The income of that fund was applicable to any of the purposes specified in clause 5 of the trust deed of 1912, which included the provision of concerts either at the college or elsewhere of works by selected British composers, the assistance of such composers in publishing approved works or obtaining performances of them, the assistance of British musical students by grants to aid them in advancing their musical education otherwise than by payments of fees at any musical college or academy in the United Kingdom. The deed provided that the fund was to be "primarily applicable for the benefit of . . . past "or present pupils of the college but the benefit thereof may be "extended to any other British subjects." The deed also provided that the income thereof was not to be brought into the general revenue account of the college.

(2) The Ernest Palmer Fund, similarly administered by the college as trustees under a trust deed of 1924. The income of that fund was applicable to all or any of the purposes specified in clause 3 of the trust deed, summarised as the maintenance of the opera theatre in the college and the performance of operas therein, and to the provision of exhibitions to be held by British subjects for opera training at the college, and the expenses of occasional rehearsals of opera for executive artists on the plan of the rehearsals held under the Patron's Fund.

The amounts appearing in the college accounts as from London County Council concerts and from catering represented the difference between the gross takings and the expenditure on those items.

For the valuation officer it was contended that the gross takings from those two last sources, which in 1956 amounted to £77 for London County Council concerts and £8,196 for catering, should be taken into account in considering the income of that college. He further contended that funds for prizes and scholarships were for the benefit of the students rather than in support of the college, and dealt with each of the specific funds referred to above, emphasising the necessity of seeing that the college was supported by annual voluntary contributions at or about the date of the proposal. In the case of the Chappell prize, he raised the question whether it was not given rather as a trading advertisement; in the case of those funds which assisted in the maintenance of scholars, he contended that they were clearly assistance to the scholars rather than support of the college; and that the Patron's Fund and the Palmer Fund differed in no way from other

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invested funds of the college such as had been excluded by the Divisional Court in *Royal College of Music* v. *Westminster Vestry*.[5] For the respondent rating authority, the Westminster Corporation, the argument for the valuation officer was adopted and it was contended that the intention of the Act of 1843 could be derived only from its wording, which should be construed in the light of the decisions on it. It was pointed out that in none of the cases prior to the appeals against the present list had donations or legacies been claimed as annual voluntary contributions; that the donations giving rise to the funds claimed by the college as annual voluntary contributions in Table B (a) (iii) were really capital receipts and once-for-all gifts and not annual voluntary contributions; that the word "annual" indicated a necessary quality of recurrence; and that prizes and scholarships, though devoted to the objects of the college, were not devoted to the support of the college.

For the college it was contended that, looked at broadly, the college came within the intention of the Act, since it was largely supported by public and private generosity; that in interpreting the Act regard must be had to the intention of the legislature, and that it should not be departed from through the organic growth of interpretation. It was contended further that a proportion of the total income derived from annual voluntary contributions which would be quite inadequate if the rest were commercial profits should be regarded in an entirely different light in a case where the remainder of the income was derived from sources which had their origin in public or private generosity; that "annual" should be read as meaning received year by year from the point of view of the receiver and not the contributor; that a government grant was a voluntary contribution by the Crown; and that gifts in kind included not only books, music, etc., but also the financial benefits resulting from the favourable terms of the lease and gifts of buildings. It was also contended that legacies should be included; and that gifts for scholarships and prizes supported the college as defined in its charter.

The tribunal was satisfied that certain general principles were to be derived from the decided cases, and proceeded to set those out and apply them to the various funds, etc., claimed by the college as annual voluntary contributions.

It held, first, following the decision of the Lands Tribunal in the *London Library* case, that "annual" in connection with voluntary gifts had to be construed in relation to the contributor and not to the receiver; and that it followed that all the cases in which a lump sum had been donated to form a fund, the interest on which was to be used as a prize or scholarship, must be excluded from the description of "annual voluntary contribu-"tions"; that such a gift was essentially a "once-for-all"

[5] [1898] 1 Q.B. 304, 311.

payment which fell into the same category as a legacy, similarly ruled out by the tribunal in the *London Library* case.

It held, next, that annual contributions which were themselves to be used as received for scholarships or exhibitions to pay the holder's fees to the college were to be regarded as "annual "voluntary contributions"; but it was not satisfied that any such scholarships or so much of any such scholarship as was to be devoted to the maintenance of the pupil fell into the same category, for they went to support the pupil rather than the college; and similarly, a prize which a pupil was free to expend in any manner he might choose, and which did not under the terms of the gift have to be devoted to payment of fees, could not be said to be a contribution by which the college was supported, but was a gift for the encouragement of the pupil rather than for the support of the college.

As to payments by trustees under the terms of a trust deed, the tribunal held that where a trust required a payment to be made to the college, the obligation took the payment out of the class which could be regarded as annual voluntary contributions, since it represented the interest on a once-for-all gift for the benefit of the institution and should be regarded in the same way as other dividends and interest. The tribunal distinguished the cases where the trustees were at liberty to devote the funds at their disposal at their own volition to one or other of named institutions, or to any institution falling within a generally described class, in which cases their contributions could be said to be voluntary.

The tribunal then applied those principles to the specific funds claimed as annual voluntary contributions by the college and in the result found that the only sums which were entitled to be regarded as annual voluntary contributions were items making a total of £1,130. The total income for 1956 being £72,115, the tribunal held that there must be added to it the gross receipts from catering, which in that year amounted to £8,196, so that the proportion of the total income represented by what the tribunal found to be annual voluntary contributions was something under two per cent. The tribunal concluded that, having regard to the proportion which the annual voluntary contributions bore to the gross income, it must, applying the construction of the section adopted by Jenkins J. in *Battersea Borough Council* v. *British Iron and Steel Research Association*,[6] find that that insignificant proportion could not properly be regarded as even partial support for the purposes of the section. The tribunal added that it was not without interest that the amount adopted by the Court of Appeal as annual voluntary contributions in the case of the college in 1898 was in excess of the sum which it found could now be so described, while the total income of the college was more than four times greater than it had been at that time.

[6] [1949] 1 K.B. 434, 457.

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In those circumstances the tribunal answered the preliminary question of law by saying that the college was not exempt under section 1 of the Scientific Societies Act, 1842.

The college appealed, and the valuation officer and the rating authority cross-appealed on the ground that the tribunal had wrongly included certain scholarships as annual voluntary contributions and that all should be disregarded as being directed to the pupil and not the college.

Ronald M. Bell for the college.

W. L. Roots Q.C. and *J. Raymond Phillips* for the valuation officer.

Reginald W. Bell for the rating authority, the Westminster Corporation.

H.R.H. Prince Ernest Augustus of Hanover v. *Attorney-General*,[7] in addition to those cases referred to in the judgments of the court, was cited during the argument.

Cur. adv. vult.

Holroyd Pearce L.J. The Royal College of Music is an educational charity. It was incorporated by Royal Charter in 1883. In 1890 Crown land was let to it at a nominal rent. The original building was erected from funds provided by a private benefactor, and it was afterwards enlarged and improved at the expense of other private benefactors.

The college appeals from a decision of the Lands Tribunal which deprives it of the exemption from rates which formerly it had enjoyed under section 1 of the Scientific Societies Act, 1843. That section, so far as is material to this appeal, is as follows: "no person or persons shall be assessed or rated, or liable to be "assessed or rated . . . in respect of any land, houses, or build-"ings . . . belonging to any society instituted for purposes of "science, literature, or the fine arts exclusively, . . . provided "that such society shall be supported wholly or in part by annual "voluntary contributions." The Lands Tribunal held that the college was not so supported wholly or in part.

The right of the college to exemption was challenged in this court in *Royal College of Music* v. *Westminster Vestry*,[1] where the rating authority unsuccessfully argued inter alia that the college was not a society instituted for the purpose of the fine arts exclusively. That point, therefore, is not open to the Revenue in this court, but it has been reserved for argument if the case reaches the House of Lords. That decision did not deal with the proviso to the section since no point was then taken on it.

[7] [1956] Ch. 188; [1955] 3 W.L.R. 868; [1955] 3 All E.R. 647, C.A.; [1957] A.C. 436; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49, H.L.

[1] [1898] 1 Q.B. 304, 809; 14 T.L.R. 351, C.A.

The Lands Tribunal held here that the only sums entitled to be regarded as annual voluntary contributions in 1956 amounted to £1,130. Against this it found that the total income was £80,357. The proportion of the total income, therefore, represented by the annual voluntary contributions was under two per cent. Following the construction of the section adopted by Jenkins J. in *Battersea Borough Council* v. *British Iron and Steel Research Association*,[2] it held that this was an insignificant proportion which could not properly be regarded as even partial support.

Mr. Ronald Bell for the appellant college seeks to attack the decision in three main directions. First, he seeks to show that the tribunal underestimated the amount of annual voluntary contributions by wrongly excluding various contributions or classes of contributions which should properly be included. Secondly, he seeks to show that the tribunal has inflated the total income of the college by including an item of £8,196 gross receipts for catering and a sum of £2,000 in respect of concerts conducted on behalf of the London County Council, both of which should for this purpose be disregarded. If either of these contentions is right, the proportion of annual voluntary contributions to total income must pro tanto increase.

Finally, he argues that in any event the final question is not one of percentage or arithmetic. One must apply the section in the light of the manifest intention of the legislature. The statute, he argues, clearly intended to exempt such a corporation as this which was instituted for the purpose of the fine arts exclusively and owes its origin and its lifeblood to public and private generosity.

There are various sources of benefit to the college which are set out with care and clarity in the decision. As one might imagine, some of those sources involve much detail and many figures. But in order to decide which of such sources can on principle be regarded as annual voluntary contributions, and which must be excluded, it is not necessary to investigate the details.

The tribunal, following a decision of the President of the Lands Tribunal in *London Library* v. *Cane*,[3] held that the word "annual" in connection with voluntary contributions must be construed in relation to the contributor rather than the receiver. The *London Library* case[3] was, however, subsequently taken to this court, which held that one should consider the receiver's point of view when deciding whether contributions were annual. Hodson L.J., giving the judgment of the court, said[4]: "In "our judgment, the receiver must be considered when deciding "whether contributions are annual. . . . it" [a society] "may

[2] [1949] 1 K.B. 434, 457; 65 T.L.R. 183, C.A.

[3] [1960] 1 Q.B. 373; [1959] 3 W.L.R. 929; [1959] 3 All E.R. 726, C.A.

[4] [1960] 1 Q.B. 373, 386.

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"look for support, not only to regular annual subscriptions, but "to the proceeds of street collections, and the many other ways "of raising money for charities and similar organisations. It "may well be that legacies of varying amounts are left to the "society from time to time. Clearly, a legacy will come only "once from a particular person, but legacies may come to a "society with sufficient frequency to justify it in looking to them "year by year as probable revenue. We are not, of course, con-"sidering legacies of large sums which the tribunal might think "should properly be regarded as capital endowment. Annual "voluntary contributions are, in our judgment, voluntary con-"tributions which the society may reasonably expect to receive "year by year, and upon which it may reasonably rely wholly or "in part for the provision of the necessary annual expenditure "of the society." Those remarks are obiter, but I entirely agree with them (save for the sentence dealing with legacies of large sums, as to which I feel doubt) and I adopt them for the purposes of the present case.

In that case the court used the annual figures of the preceding five years which "showed a reasonably consistent pattern." In the present case we have been provided with prepared schedules of the figures of the years 1951 to 1957. They, too, show a reasonably consistent pattern and enable one to come to a fair conclusion about the various sources of revenue. Although 1956 is the rating year in question, one can better form a true picture of the college's position by studying also a few years immediately preceding it, and the year that follows it. The statute was intending to benefit institutions of a certain class. Over a period of years those exempted by the section might cease to be within it, and those not within it might gain admittance. But it can never have been intended that one lean year in respect of voluntary contributions should cast out an institution which on its recent average accounts was hitherto within it, or that one fortunate and fortuitous year should bring it within an exemption to which in normal years it would have no right.

Applying that dictum of this court in the *London Library* case,[5] it follows that the tribunal was wrong in holding that legacies could not be annual voluntary contributions. It becomes a question of fact whether in the present case legacies which were not earmarked for particular funds or purposes came with sufficient regularity to justify the college in looking to them year by year as possible revenue. In my judgment they did. It is to be noted that the Government in granting annual aid to the college has insisted that these legacies should be treated in the accounts as revenue, and not as capital. The legacies are moderate in size and plainly come from the annual mortality among a wide class of benefactors.

Mr. Roots argues that a bequest producing a payment of

[5] [1960] 1 Q.B. 373.

£1,500 in 1955 and a further payment of £300 in 1956 was so large as to constitute a capital endowment, and should therefore not be considered among annual voluntary contributions. He relies on the sentence of Hodson L.J. in the passage which I have quoted[6]: "We are not, of course, considering legacies of "large sums which the tribunal might think should properly be "regarded as capital endowment." I feel some doubts about the validity of that sentence without some further qualification. But in my judgment there is in any event no reason for its application in this case.

The year 1956 was a lean year in comparison with those which went before and that which went after. In my judgment one can fairly for this purpose put the annual value of contributions by unconditional legacies in the region of £500.

The further question arose whether legacies with conditions attached, or funds given to trustees whose trust deed compelled them to make annual payments to the college for particular purposes, were annual voluntary contributions either as to the capital sums or as to the interest that came from them. The tribunal held that neither the capital payments nor the annual payments therefrom came within the words "annual voluntary "contributions." It is not an easy question.

In *Bradford Library Society* v. *Churchwardens of Bradford*[7] and in *St. Anne (Churchwardens)* v. *Linnaean Society*[8] the court took the view that, when an obligation to pay was incurred by a voluntary engagement, the payment was voluntary within the meaning of the section even if the payer no longer had the power to withdraw from the obligation.

In *Savoy Overseers* v. *Art Union of London*[9] the House of Lords laid down a wider approach to the problem. Lord Halsbury[10] takes the word as meaning not "voluntary" as opposed to "compulsory," but "voluntary" as opposed to something which involves valuable consideration: "It is manifest that if "used in the former sense every purchase is voluntary, since no "one can be compelled to buy; but if in the latter sense, there "are a great many institutions which the legislature may well "have intended to encourage, because if people gave their money "without receiving anything in return towards the encourage-"ment of objects which the legislature approved, there would be "a reason why the legislature should exempt such institutions "from rating, since they would pro tanto relieve the national "funds from burdens to which, but for such voluntary contribu-"tions, the legislature itself might be called upon to contribute "if such institutions were to exist at all. This consideration "would seem to show that it is in the latter sense that the word "is used, and, if so, it is fatal to the claim of the art union to "be relieved from the burden in question."

[6] Ibid. 386.
[7] (1858) 1 E. & E. 88, 95.
[8] (1854) 3 E. & B. 793, 804.
[9] [1896] A.C. 296; 12 T.L.R. 377, H.L.
[10] [1896] A.C. 296, 305–306.

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Lord Herschell said [11]: "The expression 'supported by voluntary contributions' has long been well known in connection with hospitals and other institutions; I think the essential idea conveyed by them is that the payments are a gratuitous offering for the benefit of others, and not the price of an advantage purchased by the contributor." Lord Macnaghten and Lord Shand [12] spoke to the like effect.

In *Institution of Mechanical Engineers* v. *Cane* [13] Lord Radcliffe said: "As I understand the matter, the major effect of the decision of this House in *Savoy Overseers* v. *Art Union of London* [14] was to put an end to the controversy that had persisted until then as to whether the emphasis of the word 'voluntary' turned on the distinction between 'voluntary' and 'compulsory.' It was held that that was not the point. Accordingly, any considerations that give weight to that distinction are now illegitimate." Therefore one may approach the problem by equating the word "voluntary" to "gratuitous." And in that sense all the payments with which this case is concerned were voluntary payments.

It is argued by the respondents that if one regards payments by independent trustees of a trust in favour of the college or some scholarship at the college as annual voluntary payments, one must also apply that principle to trusts where the college is the trustee, since it is, qua trustee, in no different position from independent trustees. If that be so, the income from all endowments comes within the section however old the endowments may be. That cannot, in my judgment, have been intended. The section was directing itself to contemporary beneficence. A society was only to be exempted if it commanded contemporary support from some part of the community. Moreover, it would be an abuse of language to say that various old foundations endowed by medieval benefactors are today supported by annual voluntary contributions.

On the other hand it offends one's common sense to hold that although there is an annual flow of money to the college (or to trustees) for the formation of trusts that help the college to perform its functions, they are to be disregarded altogether as contributions simply because the benefit is to accrue from interest in future years and not in the year in which they are received. The Lands Tribunal held that they could not be regarded as annual voluntary contributions either when they are received or in later years when they bear annual fruit.

Neither side has been able to find any case that is directly helpful on this point. Mr. Roots relies on the passage by Hawkins J. in the *Royal College of Music* case,[15] where, in referring to the item which represented the college's income from

[11] Ibid. 310.
[12] Ibid. 312, 314.
[13] [1960] 3 W.L.R. 978, 992–993; [1960] 3 All E.R. 715, H.L.
[14] [1896] A.C. 296.
[15] [1898] 1 Q.B. 304, 311.

dividends and interest which was largely made up of income from scholarship trusts and the like, he observed: "It can hardly be "said that the interests and dividends, £4,639, were annual "voluntary contributions, for they were interest and dividends "of moneys or securities already belonging to the society. Such "invested moneys were, however, in part made up of donations "made to the college upon trust for scholarships, exhibitions, "prizes and maintenance of scholars." But I do not think that very much weight can be put on those words which were not intended to be a pronouncement on any matter in dispute.

In my judgment it is wrong to exclude this continuing stream of beneficence as not coming within the words "annual voluntary "contributions." The payments are all voluntary. When the capital comes into the hands of the college it is in that year a voluntary contribution. When the capital remains in the hands of the trustees, and only its fruit comes into the hands of the college, that fruit is a contribution in each year of receipt. I see no reason why one should regard the college qua trustee as a technical separate entity for this purpose. When it receives a sum of money, whether with or without a trust, for its purposes, the college is receiving a voluntary contribution. But as capital contributions are counted when first they are given, the interest on such benefactions cannot again be counted as contributions in subsequent years. Thus past or ancient benefactions, unless in the hands of separate trustees, are disregarded for this purpose. In this case there are no ancient benefactions in the hands of separate trustees, and their existence is always very rare.

It follows that one should include as annual voluntary contributions the annual payments from independent trustees in account B (a) (iii) (2). Whether the capital benefactions listed in account B (a) (iii) (1) can be described as annual is a question of fact. If, looking at them from the college's point of view, one can reasonably say that they are an annual source of benefit, then they come within the words of the proviso. On the figures before us in account B (a) (iii) (1) there is, in my judgment, enough continuity of flow to constitute them "annual" contributions.

Moreover, I do not think that in order to hold that these are annual contributions one is compelled to scrutinise them separately as a distinct class. There is in this case a constant annual flow of moneys which comes from various sources, subscriptions, gifts, gifts for scholarships, legacies with conditions, legacies with no conditions. If one of the component tributaries should temporarily run dry, I see no reason on the facts of this case why when it flows again it should be disqualified from counting as part of the uninterrupted stream of other annual voluntary contributions. I would therefore include the capital sums set out in account B (a) (iii) (1) and the income sums in B (a) (iii) (2) in the year of receipt.

The tribunal rightly held that payments, whether for scholarships or otherwise, by trustees who were at liberty to devote their

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funds each year to one or other of named institutions, or to any institution within a generally described class, were voluntary contributions.

On a cross-notice it was argued that all scholarships must be disregarded, for they are directed to the pupil and not the college. Moreover, it is argued that support means only the provision of that which is strictly necessary to the functioning of a society and does not include benefits which enable it to function better. I cannot assent to that argument. It is admittedly a question of degree. But where, as here, a corporation has purposes of which quality and excellence are the key-notes, it cannot be that only those things constitute support which enable it to drag out a mediocre existence. The provision of that which will enable it to excel must also be within the meaning of support. I share the Lands Tribunal's view on that point, and the point raised in the cross-notice fails.

But the tribunal went on to hold that although scholarships used to pay the holder's fees to the college might be regarded as "contributions," scholarships (or some part of scholarships) devoted to the maintenance of a pupil cannot be so regarded. Moreover, prizes which a pupil is free to spend as he chooses were not, it held, a contribution to the support of the college, but a mere encouragement of the pupil.

With all respect I find myself unable to share that view. One of the essentials to the success of such a college is the provision of prizes and scholarships. A college needs to attract both quantity and quality of human material for its educational purposes. And incentives to the pupils are desirable and even necessary to any teaching establishment. The provisions in the charter "As to pupils" support this view. Nor must one forget the college's duty as laid down in the charter to promote the cultivation of music as an art. The fact that a scholarship provides for the pupil's maintenance which the college is not able to provide is part of its attraction. It is irrelevant that the college does not financially receive immediate benefit from that fact. Such scholarships would be a wise and proper provision out of the college's own funds. Their provision by a benefactor contributes to the support of the college. The argument that the scholarships are for the benefit and support of the pupil does not meet this point. Those who provide scholarships are no doubt moved by beneficence to both pupil and college. But from a practical point of view scholarships are necessary to the college. Their provision is in all but the narrowest sense support of the college not only in its educational duties but also in its duty to promote the cultivation of music as an art. In so far, therefore, as scholarships were excluded from or diminished in the tribunal's calculations by reason of the fact that they provided external maintenance for pupils, such exclusion or diminution was, in my judgment, incorrect.

All gifts in kind were excluded from consideration by the tribunal following the decision of the President of the Lands Tribunal in the *London Library* case.[16] On that point this court expressed a different view. Hodson L.J. said[17]: "We are "unable to see why gifts of this kind" (new books) "which help "the library year by year to fulfil its purpose, should not be "regarded as contributions because they are gifts in kind and "not in money. It may be, of course, that a gift might be made "to the library of a rare book of great value. . . . a gift in such "a case might in certain circumstances be regarded rather in "the nature of a capital endowment than a contribution to which "the society might look for its partial support year by year." Though these remarks are obiter, I agree with them and would adopt them in the present case mutatis mutandis.

The parties have very conveniently compiled a list of such gifts over seven years and agreed that their fair annual value is £600. These gifts could in a crisis be turned into money. But they are in their own identity useful for the purposes of the college. Some are valuable and rare. But the purposes of the college under its charter are not pedestrian. It aims specifically at the encouragement and promotion of the cultivation of music as an art. To possess valuable instruments, opera costumes, and even a valuable autograph letter of Beethoven is well within its purposes. Therefore the regular annual intake of such gifts clearly helps it in its task. Can that help be described as, in part, supporting the college? In spite of the argument of Mr. Roots I consider that it can. Support of an institution with high aesthetic purposes may extend to the provision of refinements which add value to its efforts and aid achievement of its aspirations.

The most important single contribution which is material is a Government grant of £14,125. When the college's accounts were under discussion in the courts in 1898 it was receiving an annual grant of £500 which was described in the case stated as "annual subscription from Her Majesty out of an annual grant "voluntarily voted to Her Majesty by Parliament" and available by the terms of the vote to Her Majesty for the purpose. This grant was included as a voluntary subscription in a list of items amounting to £1,632. Hawkins J. in the Divisional Court (*The Royal College of Music* v. *Westminster Vestry*[18]) said: "the "sum of £1,632 only was derived from annual subscriptions of "a purely voluntary character," and thereby he inferentially approved of the grant being so described.

Thereafter Government grants were held to be "annual volun-"tary subscriptions" by Divisional Courts in *Hornsey School of Art* v. *Edmonton Union*[19] (expressly following that dictum of

[16] [1960] 1 Q.B. 373.
[17] Ibid. 387.
[18] [1898] 1 Q.B. 304, 311.
[19] (1905) 70 J.P. 121, D.C.

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Hawkins J.); in *Westminster City Council* v. *Royal United Service Institution*[20] (following the latter case) and in *British Non-Ferrous Metals Research Association* v. *Borough Council of St. Pancras*.[21]

In one case, *Liverpool Corporation* v. *West Derby Union*,[22] it was held that the particular grant in that case was not a voluntary contribution. But I think it shows no exception to the principle. Ridley J., who was a party to the decision, explained (in the *Hornsey School of Art* case[23]) the particular facts on which it had turned, and the reason for the court's decision. Indeed it was a wholly different kind of case from the present.

Thus for 50 years the courts held that a Government grant could be and was (with that one exception) in particular cases an annual voluntary subscription. But in *Battersea Borough Council* v. *British Iron and Steel Research Association*[24] there is an expression of opinion to the contrary effect by Jenkins J., with whom Bucknill and Denning L.JJ. agreed. A similar opinion was expressed by Denning L.J. (with which Bucknill L.J. and Jenkins J. agreed) in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[25] which was decided immediately after the former case. Both those opinions might be said to be obiter in that the court before dealing with the proviso had already held that the respective societies were not within the section at all.

Jenkins J., having referred to the grant in that case as containing a number of stipulations which were relied on as excluding it from the category of voluntary contributions, said[26]: "But I "think the objection goes deeper. In my view, a grant out of "public funds, . . . at the expense of the general body of tax-"payers, is not a 'voluntary contribution' within the meaning "of the section or within any ordinarily accepted sense of that "expression."

That case was wholly different from the present. There were a number of stipulations to secure that the results of the council's researches were made available as public interest might demand. Here the grant is a gratuitous act of bounty.

Denning L.J., in the *British Launderers'* case,[27] having given the opinion that voluntary contributions are payments made without compulsion and without any view to recompense save the gratitude of one's fellow men said: "They are payments "made by private citizens for the public benefit, and out of a "sense of public duty, thus relieving the state of an expenditure "which otherwise it might have had to bear. They do not "include government grants. No ordinary person would regard "an institution which was supported only by government grants

[20] [1938] 2 All E.R. 545.
[21] (1932) 16 R. & I.T. 136.
[22] (1905) 21 T.L.R. 469, D.C.
[23] 70 J.P. 121.
[24] [1949] 1 K.B. 434, 459.
[25] [1949] 1 K.B. 462, 472; 65 T.L.R. 103; [1949] 1 All E.R. 21, C.A.
[26] [1949] 1 K.B. 434, 459.
[27] [1949] 1 K.B. 462, 472.

"as being supported by voluntary contributions." I do not think that Jenkins J. and Denning L.J. were envisaging such a case at the present. Trade research associations are very different from a body formed for the advancement of music by means of a central teaching and examining body and for generally encouraging the cultivation of music as an art.

Mr. Ronald Bell urges us to disregard those opinions. If the matter were res integra I see great force in his contention that in 1843 the words "voluntary contribution" would be understood as intended to cover an annual subscription given as an act of bounty by Her Majesty, with no conditions and no possible personal benefit, to a Royal Corporation for the promotion of one of the arts. It is true that government grants have increased enormously in scope, they are frequently hedged with conditions, and they are usually the instruments of ulterior motives which the government, for its own proper purposes, intends to achieve. To such grants the section would not apply. Familiarity with them may have changed our views of government grants in general, and they are spoken of in different terms from those in which they were spoken of one hundred years ago. But this grant which is still technically made in the old form is in its essence just such a grant as would have been made in 1843. To hold that it cannot be a voluntary contribution would seem to introduce into the section some words of limitation which are not there.

But in my judgment we are bound by the decisions on this point in the two cases which I have cited. The observations were clearly intended to be decisions and not mere dicta. In *Jacobs* v. *London County Council*,[28] Lord Simonds sets out clearly the rule which applies where a court has arrived at two conclusions either of which would have sufficed to decide the case. In the light of his opinion we must accept the deliberate conclusions of the court in the *British Iron and Steel Research*[29] and the *British Launderers' Association* cases[30] and hold that the government grant in this case was not a voluntary contribution.

Mr. Ronald Bell argues that the catering receipts should be omitted from the total income since the catering is a collateral activity of convenience on which the college attempts to balance income and expenditure and avoids all but a trifling loss. The catering receipts are not the college's real income. Had this college (as some do) entrusted the catering to a caterer, no item in respect of it would have figured in the accounts except perhaps for some trifling subsidy or profit. So, too, with the concerts which are almost entirely reimbursed by the London County Council.

[28] [1950] A.C. 361, 368; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737, H.L.

[29] [1949] 1 K.B. 434.

[30] [1949] 1 K.B. 462.

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The Court of Appeal, in a very different case, refused to disregard the receipts from the sale of refreshments in estimating the total income of a society whose principal object was the running of a theatre (*Nonentities Society* v. *Linley*[31]). Somervell L.J. made clear that he was not laying down a principal of law and continued[32]: "It may be that one could "cut out, as it were, some collateral item such as profits from "the sale of refreshments, but I am quite clear that one cannot "start cutting them down by setting against them the expendi-"ture necessary to earn them, because by that process one would "ultimately arrive at the net figure; whereas it is clear, from "the decision referred to," [the *British Iron and Steel Research Association* case[33]] "that prima facie one looks at the gross "figure and sees what proportion the voluntary contributions bear "to it."

In this case I do not think one is justified in wholly disregarding the catering receipts, but the fact that they are collateral and approximately self-balancing receipts and expenditure should be borne in mind, and could be a relevant consideration in a doubtful case. The London County Council concerts, however, should in my view be wholly disregarded. If the college undertook a project costing £80,000 a year on indemnity and reimbursement from a local authority, it would be absurd to say that thereby it had doubled its income.

In my view, however, this case does not fall to be decided by percentages. It is true that in approaching the problem the court will no doubt ascertain approximately the total income and the total amount arising from annual voluntary contributions. It may well think it desirable to find the percentage or the proportion that the latter bears to the former. It may use that percentage as the basis of its opinion that the voluntary contributions are too small to justify a finding that a society is "supported in part" by them. This has been the method of approach in cases dealing with trade societies. But it does not of necessity supply the answer to the problem in all cases.

The present case stands on a different footing. No case comparable to this has been reported or has been, so far as I know, before the court on this point. The *London Library* case[34] is the most comparable case; but the London Library was not within the section, and it was not a charity. Nor do I read the cases dealing with trade societies or the London Library as importing a gloss into the statute or doing other than suggesting a method of approach proper to the particular cases. In the *London Library* case,[34] Hodson L.J. there said[35] "Mr. Lawrence has submitted that the proviso is satisfied if "the contributions are not so small as to come within the 'de "'minimis' rule, and we think that a reasonable statement

[31] (1954) 47 R. & I.T. 426, C.A.
[32] Ibid. 428.
[33] [1949] 1 K.B. 434.
[34] [1960] 1 Q.B. 373.
[35] Ibid. 385.

"of the principle laid down by Denning L.J. and Jenkins J. "and accepted by Somervell L.J." That, as he there points out, may be a difficult question of fact.

As a result of the various views that I have expressed as to what may properly constitute annual voluntary contributions, the total amount of such contributions is substantially larger than that found by the tribunal. In the result the percentage relation of annual voluntary contributions to total revenue has been substantially increased. I have not calculated the exact percentage, since in my view that is not the deciding factor.

There is, I think, force in the approach of the local valuation court to this matter. It said: "We have referred closely to "each of those cases but find none which is at all comparable. "We are here considering a college which has been given its "buildings and virtually the land upon which to build them. "It has over the years been supported to the extent of some-"thing over a quarter of a million pounds in one way or another "and is continuing to receive some support year by year."

"This college, over the years, has received nearly a quarter "of a million pounds in cash in support of its objects; its "annual interest and dividends on that invested capital sum "amounts to nearly £10,000; its buildings were presented to "it and the land upon which the buildings stand is let to it at "£5 per annum. We note that the valuation officer, having "assigned a gross value of £10,000 to that land and buildings, "considers they are annually worth that amount, taking one "year with another."

"We consider that we would not be placing a reasonable "construction upon the section if we ignored those important "past and future considerations and decided this appeal purely "on the percentage relationship of the college's annual sub-"scriptions to its total revenue." It concluded: "In the light "of all these considerations we find that this college is supported "in part by annual voluntary contributions."

The college is devoted to the art of music. Its purposes under its charter are the giving of doctorates and degrees of distinction, the promotion of musical instruction, and the encouragement of the cultivation of music as an art. Its land was provided by benefaction, its buildings have risen from benefaction, a large and constant sustenance has come from benefaction. It lies clearly within the spirit and intention of the statute. It also lies clearly within the literal wording of the statute since it is supported in part by annual voluntary contributions. That part is not so small as to be negligible or derisory. It is a genuine and appreciable part of the total support of the college. To hold that the college is not within the statute is to defeat both the spirit and the letter of it.

In my judgment the college is entitled to the exemption and the Temple of Calliope is not a hereditament within the Rating and Valuation Acts.

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Harman L.J. This appeal is concerned with the Scientific Societies Act, 1843, of which the long title is "An Act to exempt "from . . . Rates, Land and Buildings occupied by Scientific and "Literary Societies." The Act recites that "it is expedient that "societies established exclusively for the purposes of science, "literature, or the fine arts should be exempt from . . . rates in "respect of land and buildings occupied by them for the trans-"action of their business, and for carrying into effect their pur-"poses." In the enacting part of the statute there is introduced the proviso which alone has concerned us here "that such society "shall be supported wholly or in part by annual voluntary con-"tributions."

A number of scientific societies such as the Linnaean Society, the Oxford Botanic Gardens, and the Jenner Institute, have brought themselves within the exemption, and so indeed has the Royal College of Music, with which we are here concerned.[36] Many other bodies have failed to qualify, such as the United Services Institution, the Russell Institution, the Zoological Society, and, most recently, the London Library.

The Royal College of Music was founded by a charter granted by Queen Victoria in the year 1883. That document recites that she was moved to do so by a petition presented to her by the Prince of Wales showing "that it is expedient that a Royal "College of Music should be formed on a more permanent and "extended basis than any existing musical institution." Her Majesty then states that "being desirous of promoting the "advancement of the art of music by the establishment of the "said college" she makes a grant creating a corporation, the purposes of which are stated as follows: "The purposes for which "the corporation is founded are, first, the advancement of the art "of music by means of a central teaching and examining body "charged with the duty of providing musical instruction of the "highest class, and of rewarding with academical degrees and "certificates of proficiency and otherwise persons, whether "educated or not at the college, who on examination may prove "themselves worthy of such distinctions and evidence of attain-"ment; and, secondly, the promotion and supervision of such "musical instruction in schools and elsewhere, as may be thought "most conducive to the cultivation and dissemination of the art "of music in the United Kingdom; and, lastly, generally the "encouragement and promotion of the cultivation of music as an "art throughout Our Dominions."

There are further provisions of the charter to which I call attention. "As to the pupils. The pupils shall consist of "scholars, exhibitioners, and students. The scholars and exhibi-"tioners shall be pupils who have obtained scholarships and "exhibitions entitling them wholly or partially to the privileges

[36] [1898] 1 Q.B. 809.

"of gratuitous education and maintenance, or one of such privi-"leges, or to some description of aid in their education. The "students shall be pupils who have obtained neither scholarships "nor exhibitions.

"A person becoming entitled to a scholarship or exhibition "who declines to accept the emoluments thereof by reason of his "being able to pay for his education or maintenance, may bear "the title of honorary scholar or honorary exhibitioner, or such "other title as may be determined by the Council. The Council "may cause medals, prizes, or other like rewards to be conferred "on deserving pupils. . . . As to the donors. Annual subscribers "to the funds of the college of £10 or upwards during the period "of their subscriptions, and contributors at one time of £50 or "upwards, or its equivalent, shall be deemed to be donors within "the meaning of this Our Charter."

Then a further passage: "The Council may establish scholar-"ships, exhibitions and fellowships. They may make terms with "any donors as to the appropriation of their donations for a "building fund, or the endowment of fellowships, scholarships, or "exhibitions, or otherwise as they may think expedient."

And in the regulations I find this: "While the finance com-"mittee recognise the propriety of excluding from capital or "permanent investment account annual subscriptions and other "moneys intended for the current maintenance of the college, "they are of opinion that no scholarship should depend on any "such temporary sources of revenue."

This then is clearly an educational charity. The land on which the buildings stand was the gift of the Commissioners of the Exhibition of 1851. The buildings which rose on that site owe their existence to beneficence. The college has ever since its foundation been actively carrying out its objects, and at any rate since the case in 1898 it has never been suggested that it is chargeable to rates until the present proposal.

The college provides a regular academic course for students of music. The teaching is provided free to scholars and partly free to exhibitioners. Fees are charged to ordinary students and amounted in the last year of which we have a record to £37,000, but this sum falls far short of the expenditures, which are between £70,000 and £80,000 a year. Against this is a government grant of about £14,000. Something over £9,000 is drawn from fees paid to the examining board for examination of outside students in conjunction with the Royal Academy of Music in Marylebone Road. For the rest the college depends on private munificence present and past, and it would seem on the face of it to be a shining example of an institution devoted to the furtherance of the fine arts—"All arts constantly aspire to the condition of "music"—and supported in part by voluntary contributions, and so to be clearly within the policy of Parliament in passing the Act of 1843 which is still maintained on the statute book. It is said,

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however, that the contributions are neither voluntary nor annual, and that, therefore, the college is excluded by the proviso.

I turn, therefore, to an examination of these three words and ask what are annual voluntary contributions. (a) Annual. Gifts qualify if from the point of view of the donee their recurrence year by year can be reasonably relied on, even though the donor be in every case different. In other words, whether a gift is annual does not depend upon whether one donor only makes the gift, but whether the donee annually receives such a regular flow of gifts as enables him to rely on them as a source of income. That was the opinion of this court in the *London Library* case,[37] with which I agree.

(b) Voluntary. A contribution is voluntary if it be gratuitous. This is clearly the law as laid down by Lord Halsbury in the *Art Union* case,[38] and confirmed recently by Lord Radcliffe in the *Institution of Mechanical Engineers* case.[39] It is, therefore, idle to argue on this topic that a gift is not voluntary because it issues from a trust where the trustees are not free agents. "Voluntary" here is not the antithesis of "compulsory," but is apt to exclude annual subscriptions even though made without compulsion, such as those to the Zoo or a professional society, or the Art Union[40] in Lord Halsbury's case, where the subscriber expects a return for his money not indeed in cash but in prestige perhaps, or some other more material form.

(c) Contributions. This comprises all gifts satisfying the first two conditions. Contributions are to be credited when the money or money's worth reaches the hands of the corporation or the hands of trustees for it.

Which of the sources of the corporation's income satisfy the above conditions? In my judgment on the facts and figures before us the following do: (1) Subscriptions whether paid yearly or in one sum so as to make the payer a donor within the terms of the charter. (2) Gifts in kind which can be converted into money and of which the corporation might dispose if it chose to do so. The value of these in recent years has been agreed between the parties at £600. I rely in this connection on the *London Library* case.[41] (3) Gifts of or covenants to subscribe money for the general purposes of the society, as and when received. (4) Testamentary benefactions for the like general purposes, no conditions being attached. These should be credited in the year of receipt. (5) Testamentary or other benefactions for specific purposes, conditions being attached whether indicating a particular object such as a prize or being earmarked as an endowment to provide out of income for general or specific purposes such as scholarships or the purchase of equipment or the like. In contributions in this category the capital sum should be counted to the college's credit in the

[37] [1960] 1 Q.B. 373.
[38] [1896] A.C. 305.
[39] [1960] 3 W.L.R. 978, 992.
[40] [1896] A.C. 305.
[41] [1960] 1 Q.B. 373.

year when received either by the college or trustees for it. (6) Grants by trustees of outside funds having discretionary powers, such as grants here made by the trustees of the will of the late Lord Leverhulme. Sums in this category should be credited when received by the college.

Under what conditions does a benefaction rank as being "in "support of" the corporation? One, I think, that enriches the corporation itself or relieves it of a burden or furthers its objects or powers. Having regard to the portions of the charter which I have read, it is clear that it is part of the college's business to establish scholarships, and to make terms with donors for their endowment. It is clear, too, that the college may reward deserving pupils as it chooses. In my opinion, therefore, not only a scholarship which pays or partly pays a student's fees, but one which or part of which is payable to him year by year to maintain himself while under tuition supports the college. There is, for instance, a scholarship known as the Octavia Scholarship which is a subvention to a scholar taking a course of musical instruction abroad. In my judgment this is clearly money spent in support of the college, for this is a kind of scholarship which the college itself could endow.

Logically there is much to be said for counting the income of endowment funds as received or applied year by year, for the very object of the donors of such funds was precisely to provide an annual income, but this would involve treating the income of all endowments in this way however far back their source, and the desire to contribute having arisen when the gift was made it seems to me right to treat a contribution as made in the year when it first became effective as a source of income. According to the tribunal, the college cannot be credited either with the capital or the income. This I reject; but I think the college cannot count both, and I prefer the view that the original gift and not its subsequent income should rank as a contribution.

I regard as altogether too narrow the tribunal's view that only gifts that go direct to the college in aid of fees should rank. In my judgment, scholarship moneys should rank, although a part, as in the Leverhulme case, or indeed the whole, is paid to the scholar for his own purposes.

As to the government grant, I desire to add nothing to what my Lord has said. I confess that if the matter were res integra I should hold this to be an annual voluntary contribution as it was held to be by Hawkins J. in the 1898 proceedings[42]; but I agree that the decisions of the Court of Appeal on this subject in the *British Iron and Steel Research* case[43] and the *British Launderers' Association* case[44] cannot be classed as obiter notwithstanding the fact that there were other reasons on which

[42] [1898] 1 Q.B. 304.
[43] [1949] 1 K.B. 434.
[44] [1949] 1 K.B. 462.

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the decisions rested. In my view, therefore, we are bound in this respect. For my part I much prefer the approach of the local valuation court to this matter to the cheeseparing and niggardly view of the Crown which was accepted by the Lands Tribunal.

Even if this is a matter of adding up percentages, the proportion contributed to this corporation by annual voluntary contributions, if I have rightly construed those words and applied them to the facts of the case, is far above the point where they can be disregarded as so minimal or unsubstantial as to be treated as nothing when considering the words "in part." For these reasons as well as for those given by my Lord, with which I altogether concur, I would allow this appeal.

Davies L.J. I agree that this appeal should be allowed.

Appeal allowed with costs against both respondents.
Cross-appeal dismissed.
Declaration that the Royal College of Music be entered in the valuation list as exempt.
Leave to appeal to House of Lords.

Solicitors: *Boodle, Hatfield & Co.*; *Solicitor, Inland Revenue*; *Allen & Son.*

M. M. H.

[COURT OF APPEAL.]

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Feb. 28; *Mar.* 1.
Holroyd Pearce, Harman and Davies L.JJ.

CAMPBELL DISCOUNT CO. LTD. *v.* BRIDGE.

[Plaint No. QO 1562.]

Contract—Penalty—Hire-purchase agreement—Sum payable for right to terminate—Whether penalty—Whether principle of equity applicable.

Hire-Purchase — Hire-purchase agreement — Penalty — Termination of agreement by hirer—Claim by owners under depreciation clause for two-thirds purchase price.

Judicial Precedent—Court of Appeal decision—Inconsistent with earlier decision—Earlier decision to be followed.

The hirer of a car under a hire-purchase agreement with a finance company, having made an initial payment equal to £105, paid one monthly instalment on the total hire-purchase price of £482 10s. and then informed the company in writing that he could not keep up the payments, and returned the car to them.

Clause 6 of the agreement provided that: "The hirer may at any "time terminate the hiring by giving notice of termination in "writing to the owners, and thereupon the provisions of clause 9 "shall apply." Clause 9 provided that, if the agreement was for

any reason terminated before the vehicle became the hirer's property, the hirer "shall forthwith . . . pay to the owners . . . "by way of agreed compensation for depreciation of the vehicle such "further sums as may be necessary to make the rentals paid and "payable hereunder equal to two-thirds of the hire-purchase price."

On the company's claim for £206 3s. 4d. under clause 2, the county court judge held that the sum was a penalty and dismissed the claim. On appeal by the company, the hirer cross-appealed on the ground that if the sum was not a penalty the bargain was harsh and unconscionable, and that the court in the exercise of its equitable jurisdiction should not enforce it:—

Held, (1) allowing the appeal, that, looking at the contract at the date of its creation, the amount claimed was not a penalty but was the sum payable as compensation to the owners for the hirer's exercise of his right under clause 6 to terminate the contract before the hiring period had expired.

Dunlop Pneumatic Tyre Co. Ltd. v. *New Garage and Motor Co. Ltd.* [1915] A.C. 79; 30 T.L.R. 625, H.L.; *Associated Distributors Ltd.* v. *Hall* [1938] 2 K.B. 83; 54 T.L.R. 433; [1938] 1 All E.R. 511, C.A. applied.

Cooden Engineering Co. Ltd. v. *Stanford* [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A. distinguished.

(2) Dismissing the cross-appeal, that even if the amount of compensation were penal, the hirer was not entitled to any equitable relief in the absence of any evidence as to the surrounding circumstances of this particular bargain and its results which would show that it was so harsh and unconscionable that it ought not to be enforced.

Dicta in *Stockloser* v. *Johnson* [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630, C.A. considered.

Per curiam. If the present state of the law as to penalties is such that the honest man who terminates his contract is in a worse position than the man who breaks his contract, that unsatisfactory position must be remedied by the legislature, for the courts cannot interfere on equitable grounds with ordinary contracts freely entered into which have turned out harshly for one of the parties.

APPEAL from Judge Bassett, sitting at Ilford County Court.

By an agreement dated July 20, 1958, a hire-purchase finance company, Campbell Discount Co. Ltd., let on hire to one Bridge a Bedford Dormobile vehicle with option to purchase. Clause 6 of the agreement provided: "The hirer may at any time ter-"minate the hiring by giving notice in writing to the owners, "and thereupon the provisions of clause 9 hereof shall apply." Clause 9 provided: "If this agreement or the hiring be ter-"minated for any reason before the vehicle becomes, under "clause 5 hereof, the property of the hirer, then the hirer shall "no longer be in possession of the vehicle with the owners' "consent and the hirer shall forthwith (a) at his own cost and "risk deliver up the vehicle in a proper state of repair and "condition together with all necessary licences, registration books "or certificates, insurance policy and other documents relative "to the vehicle to the owners at such address as they may direct; "and (b) pay to the owners all arrears of hire rent due and "unpaid at the date of termination of the hiring together with "interest thereon stipulated under clause 1 hereof and by way

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"of agreed compensation for depreciation of the vehicle such "further sum as may be necessary to make the rentals paid and "payable hereunder equal to two-thirds of the hire-purchase "price as specified in the schedule hereto; . . ."

Bridge under the agreement agreed to pay the hire-purchase price of £482 10s. by a deposit of £105 (consisting of £10 in cash and credit of £95 for a car traded in) on the signing of the agreement and 26 monthly instalments of £10 9s. 2d. each, beginning on August 20, 1959. He paid the equivalent of the £105 and the first instalment; but on September 3, 1959, he wrote to the company as follows: "owing to unforeseen personal "circumstances I am very sorry but I will not be able to pay "any more payments on the Bedford Dormobile. Will you "please let me know when and where I will have to return the "car. I am very sorry regarding this but I have no alternative"; and on September 14 he returned the vehicle to the dealers from whom he had obtained it and it came eventually into the possession of the company.

The company sued the hirer in the county court for £206 3s. 4d., being two-thirds of the hire-purchase price less payments already made by way of alleged agreed compensation under clause 9 of the agreement. By his defence the hirer admitted that he had terminated the agreement but denied that he was indebted to the company in the sum claimed or in any other sum. He alleged that the compensation for depreciation claimed was a penalty and was not recoverable. The county court judge (in a two-word note of his judgment) on May 3, 1960, held that the claim was a penalty and dismissed the company's claim. The company appealed. The hirer by a cross-notice asked that the judgment be affirmed both on the grounds relied on by the county court judge and also on the further and additional ground that in the exercise of the court's equitable jurisdiction the hirer should be relieved of all obligation and liability in respect of the company's claim.

Stanley Rees Q.C. and *John Alliott* for the company.
Neil Lawson Q.C. and *J. G. K. Shelton* for the hirer.

The following cases were cited in argument, in addition to those referred to in the judgments: *Landom Trust Ltd.* v. *Hurrell*[1]; *Alder* v. *Moore*.[2]

Holroyd Pearce L.J. This is an appeal from a judgment dismissing the plaintiffs' claim for £206 3s. 4d. The plaintiffs are a finance company from whom the defendant hired a motor-car under a hire-purchase agreement. The defendant, having exercised his right to return the motor-car, was liable under the terms of the agreement to pay a certain sum by way of agreed

[1] [1955] 1 W.L.R. 391; [1955] 1 All E.R. 839.

[2] [1961] 2 W.L.R. 426; [1961] 1 All E.R. 1, C.A.

compensation for depreciation of the vehicle. The judge held that that sum was a penalty, and was not recoverable. Mr. Stanley Rees for the plaintiffs contends that the judge erred in that no question of whether the sum was a penalty arose since there was no breach, for by returning the car the defendant merely exercised an option at a certain price. Moreover, even if the question of whether the sum was a penalty did arise and if it could be a penalty, it was not in fact a penalty, Mr. Rees argues, but is a genuine pre-estimate of damage in circumstances that are bound to contain many imponderables.

Mr. Neil Lawson contends that the judge decided rightly. He further argues on a cross-notice that even if the sum claimed is not a penalty, the court under its equitable jurisdiction should relieve the defendant of all obligations and liabilities in respect of the sum claimed, and dismiss the action. That point was never taken in the court below, nor was any evidence given as to the circumstances of the transaction. [His Lordship stated the facts set out above, read clauses 6 and 9 (supra) and continued:] Clauses 7 and 8 were referred to for the purposes of the argument. By clause 7: "If the hirer shall fail to pay any sum due here-" under or to observe any of the stipulations in clause 4 hereof " or any other stipulations on his part contained herein the owners " may thereupon and without notice terminate the hiring and/or " this agreement, and may . . . retake possession of the vehicle " whereupon the provisions of clause 8 hereof shall apply."

Clause 8 says: "Without in any way derogating from their " rights under clause 7 hereof, and without discharging or pre-" judicing any pre-existing liability of the hirer to the owners " (including the liability of the hirer under clause 9 hereof) this " agreement and the hiring hereunder shall forthwith and for all " purposes be determined absolutely and come to an end" on certain events including death of the hirer, distress, bankruptcy, liquidation and so forth.

The hirer exercised his option under clause 6 by giving notice. Clause 9 then applied. Under clause 9 (*a*) the hirer had to return the vehicle, which he has done. Under clause 9 (*b*) he has to pay such sum as will make up the rentals to two-thirds of the purchase price, namely, the sum here claimed. No breach of contract or damages are in question, for the hirer is simply exercising his right to return the car with all the incidents set out under clause 9 (*a*) and (*b*). Therefore, the doctrine relating to penalties does not apply.

A similar situation was considered in *Associated Distributors Ltd.* v. *Hall.*[1] There the hirer had hired a tandem bicycle under a hire-purchase agreement. By clause 5 of the agreement he was given an option of terminating the hiring at any time by returning the bicycle, but he remained liable for the rent up to the

[1] [1938] 2 K.B. 83; 54 T.L.R. 433; [1938] 1 All E.R. 511, C.A.

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date of the return and for all other sums payable under the agreement and damages (if any) for any breach of any term of the agreement. By clause 7 it was agreed that in the event of the hiring being determined he was to pay by way of compensation for depreciation of the goods, in addition to any other sums payable thereunder, such sums as, with the amount previously paid for rent, should make up a sum equivalent to not less than one-half of the total amount including the option purchase price payable under the agreement. This court held that there was no question as to the plaintiffs' claim under clause 7 "being "liquidated damages or in the nature of a penalty," and that, therefore, the owner was entitled to recover his money.

Slesser L.J.,[2] having referred to cases in which payments were made as compensation for depreciation where the hirer's default had brought the agreement to an end, continued: "In such cases "... the question has arisen whether the sum which the owner "may claim by way of compensation for depreciation of the goods, "in addition to any other sums payable as provided in clause 7, "is liquidated damages or a penalty. The cases as I understand "them—two in the Divisional Court and a decision in the Court "of Appeal—seem to establish the view that they are to be "regarded as liquidated damages, but it is not necessary in the "present instance for us to express any opinion upon those deci-"sions, because they have nothing to do with the particular case "which we are here to determine, for here the hirer, not the "owner, terminated the hiring. He has exercised an option and "the terms on which he may exercise the option are those set out "in clause 7. The question, therefore, whether these payments "constitute liquidated damages or a penalty in the instances "mentioned does not arise in the present case."

Scott and Clauson L.JJ.[3] agreed, but Clauson L.J. pointed out "that it would save much misunderstanding, and would certainly "conduce to the reputation as honest traders of those who hire out "bicycles under these circumstances, if they were to take steps "whenever this form of contract is used, to make it clear by a "statement on the face of the contract, that the young person "who enters into it is under the liability" which the court was enforcing in that case. I agree with that observation. The Hire-Purchase Acts of 1938 and 1954 have secured that result in transactions within their scope, but the transaction in the present case, being over £300 in amount, is unfortunately outside their scope.

Mr. Neil Lawson sought to distinguish that case in two ways. First he argued that the defendant broke the terms of the hiring agreement by not giving proper notice of termination and by returning the car not to the owners but to the dealer who was not their agent. If that be so he can argue that the sum claimed under clause 9 is damages for his own breach. He relied on

[2] [1938] 2 K.B. 83, 87–88. [3] Ibid. 89.

Cooden Engineering Co. Ltd. v. *Stanford*[4] as establishing that the sum could be and is a penalty on the facts of the present case. But in my judgment that argument is quite untenable. The letter of September 3 was a notice to terminate, and the car was quite properly returned to the dealer, who accepted it. The plaintiff company gave the defendant no other address to which he was to return it. They waived their rights to have the car delivered to any other address, and accepted delivery to the dealer as the fulfilment by the hirer of his obligations under clause 9 (*a*).

Mr. Lawson's second point is that the reasoning which lay behind *Associated Distributors* v. *Hall*[5] has been disapproved by this court in the later case of *Cooden Engineering Company Ltd.*[6] In the former case, he argues, Slesser L.J.[7] referred to certain cases reported in Jones and Proudfoot on Hire-Purchase Law (2nd ed.) which were decided on reasoning that did not commend itself to this court in the later *Cooden Engineering* case.[8] Salter J. in *Elsey & Co. Ltd.* v. *Hyde*[9] had said that since a clause provided for payment in events not caused by a breach as well as in those caused by a breach, the payment under the clause in compensation for a breach could not be a penalty; and Greer L.J. in *Chester & Cole Ltd.* v. *Wright*[10] had said that where a hirer had to pay such a sum as is here claimed—whether on termination through his own fault or from some other cause—it was not a penalty, but a sum to become payable in a certain event, namely, termination of the agreement as thereby provided, and not by way of damages for breach of the agreement. Simonds J. held this view binding on him in *In re Apex Supply Co. Ltd.*[11] It is argued that since that reasoning of Salter J. and Greer L.J. was disapproved by the majority in the *Cooden Engineering* case,[12] therefore the effect of the decision in *Associated Distributors Ltd.* v. *Hall*[13] has been weakened.

I cannot agree. In the *Cooden Engineering* case,[14] Somervell L.J. with whom Hodson L.J. agreed, disapproved of the reasoning of Salter J. and Greer L.J. But he left open the question decided in *Associated Distributors Ltd.* v. *Hall.*[15] The reasoning of which he disapproved is not necessary to, nor is it the basis of, the decision in *Associated Distributors Ltd.* v. *Hall*[15]; nor did Somervell L.J. suggest that the decision was wrong. Moreover it was the unanimous decision of this court, whereas the *Cooden Engineering* case[16] was a majority decision with a powerful

[4] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915, C.A.
[5] [1938] 2 K.B. 83.
[6] [1953] 1 Q.B. 86.
[7] [1938] 2 K.B. 83–87.
[8] [1953] 1 Q.B. 86.
[9] (1926) (unreported). See Jones and Proudfoot's Notes on Hire-Purchase Law, 2nd ed., at p. 107.
[10] (1930) op. cit. 124, 129.
[11] [1942] Ch. 108; [1941] 3 All E.R. 473.
[12] [1953] 1 Q.B. 86.
[13] [1938] 2 K.B. 83.
[14] [1953] 1 Q.B. 86, 96.
[15] [1938] 2 K.B. 83.
[16] [1953] 1 Q.B. 86.

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dissenting judgment by Jenkins L.J. Even had the *Cooden Engineering* case [16] criticised the reasoning in *Associated Distributors Ltd.* v. *Hall*,[17] we should in my view be bound by the decision in the earlier case. It was decided, rightly as the law now stands, on the ground that the sum payable was the price of the hirer's right to terminate, and could not be considered as a penalty since it was not payable in respect of any breach.

Finally, Mr. Lawson argues that it is unfair that the defendant cannot attack as being a penalty the sum payable under clause 9, whereas he could have done so had he made default in his obligations. It is inequitable that the honest man should be in a worse position than the defaulter. The court should, he urges, regard the sum payable in this case as analogous to a penalty, and unconscionable, and it should therefore decline to enforce its payment. He has cited no case where such a course has been taken in similar circumstances. He relies on the following dicta in the *Cooden Engineering* case.[16] But it must be remembered that the hire-purchase agreement in that case was extremely harsh to the hirer who was bound to pay all the instalments even if he returned the hired vehicle immediately after the hiring had started.

Somervell L.J. said [18]: "In *In re Apex Supply Co. Ltd.*[19] "the claim was based on the hiring company having gone into "liquidation. Though it may well be that the conclusion would "be the same, it might fall to be considered on equitable rather "than on common law principles." And Lord Jenkins L.J. deals more fully with the matter. He said [20]: "Although in the "view I take the sum payable under clause 11 is not a penalty "in the sense contended for in the present appeal, it might I "suppose conceivably have been argued that the provision in "question is a penal provision in the sense that it is so oppressive "and unconscionable that equity should grant relief from it upon "equitable terms. Compare *In re Dagenham (Thames) Dock* "*Co.*; *Ex parte Hulse* [21]; *Kilmer* v. *British Columbia Orchard* "*Lands Ltd.*[22]; and *Steedman* v. *Drinkle*,[23] cases in which relief "was successfully sought from provisions for forfeiture of instal-"ments of purchase money in contracts for the sale of land "comparable for the present purpose to the one considered by "Farwell J. in *Mussen* v. *Van Diemen's Land Co.*,[24] and note "Farwell J.'s explanation in the last mentioned case of the prin-"ciple on which those cases proceeded. But if that argument "were tenable here at all—and I express no opinion one way or "the other about that, for no such argument has been raised in "the present case—it surely could not be equitable in the circum-"stances to grant relief on terms which would put the owners in

[16] [1953] 1 Q.B. 86.
[17] [1938] 2 K.B. 83.
[18] [1953] 1 Q.B. 86, 98.
[19] [1942] Ch. 108.
[20] [1953] 1 Q.B. 86, 112–113.
[21] (1873) L.R. 8 Ch. 1022.
[22] [1913] A.C. 319; 29 T.L.R. 319, P.C.
[23] [1916] 1 A.C. 275; 32 T.L.R. 231, P.C.
[24] [1938] Ch. 253; 54 T.L.R. 225; [1938] 1 All E.R. 210.

"any worse position than they would have been in if the hirer "had returned the vehicle under clause 10 on the date on which "they repossessed themselves of it under clause 11. Be that as "it may, the question does not arise in the present case, in which "the owners' claim has been contested solely on the ground that "the sum sued for is a penalty in what I have termed the relevant "sense, and as such wholly irrecoverable." I respectfully agree with those observations.

Clause 6 is not a penal provision. It is a right to return the car before the period of hiring had expired. Without clause 6 the hirer could not do so. In former days there were many agreements that contained no such right. There must obviously be a provision to compensate the owners in some degree. The amount of such compensation must be a question of degree. Even assuming (without deciding) that the figure of two-thirds under clause 9 is so high as to be penal, and that had the hirer made default, that figure would be held to be a penalty, yet in order to show that the bargain was unconscionable and unenforceable the particular facts and the resulting circumstances must be investigated. Whereas in considering whether a sum payable constitutes a penalty, the contract itself at the time of its creation and its inherent circumstances are the test (see *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*,[25] *per* Lord Dunedin), in considering whether equity should enforce an agreement, the general circumstances surrounding the agreement and also the later facts are relevant.

In *Stockloser* v. *Johnson*[26] where a purchaser sought unsucessfully to recover forfeited deposits, Somervell L.J. said[27]: "As "the basis of the plaintiff's right, if he has one, is the unconscion-"ability of the defendant's retaining sums which have been paid "to him as instalments, I agree that the circumstances of the "particular case should be looked at and the question is not one "to be decided by looking only at the contract."

Denning L.J. said[28]: "These illustrations convince me that "in a proper case there is an equity of restitution which a party "in default does not lose simply because he is not able and willing "to perform the contract. Nay, that is the very reason why he "needs the equity. The equity operates, not because of the "plaintiff's default, but because it is in the particular case "unconscionable for the seller to retain the money. In short, "he ought not unjustly to enrich himself at the plaintiff's "expense. This equity of restitution is to be tested, I think,

[25] [1915] A.C. 79, 86; 30 T.L.R. 625, H.L.
[26] [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630, C.A.
[27] [1954] 1 Q.B. 476, 488.
[28] Ibid. 492.

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"not at the time of the contract, but by the conditions existing "when it is invoked."

Romer L.J. on the other hand said [29]: "There is, in my judg-"ment, nothing inequitable per se in a vendor, whose conduct is "not open to criticism in other respects, insisting upon his con-"tractual right to retain instalments of purchase-money already "paid. In my judgment, there is no sufficient ground for inter-"fering with the contractual rights of a vendor under forfeiture "clauses of the nature which are now under consideration, while "the contract is still subsisting, beyond giving a purchaser who "is in default, but who is able and willing to proceed with the "contract, a further opportunity of doing so; and no relief of any "other nature can properly be given, in the absence of some "special circumstances such as fraud, sharp practice or other "unconscionable conduct of the vendor, to a purchaser after the "vendor has rescinded the contract."

In the present case there is no evidence at all establishing that the plaintiff company behaved improperly or unconscionably except in so far as it is argued that the contract was a harsh one. The defendant has not sought leave to bring affidavit evidence. The plaintiffs have offered an affidavit which we have not admitted. But Mr. Lawson has to concede that the plaintiffs have in fact done badly out of the transaction although he contends that he might be able to show that had they been astuter or more vigilant, they would have done very well out of it.

In my judgment, therefore, no case for equitable relief is made out. Only very exceptional circumstances could possibly justify it, for any relief available in respect of hire-purchase agreements must also (it is conceded) be available in respect of all contracts. It would be a novel extension for the law to interfere on equitable grounds with ordinary contracts freely entered into by persons under no duress or mistake merely on the ground that in certain events they have turned out harshly for parties who subsequently wished or were compelled by circumstances to abandon their contracts. Parliament has rightly put certain fetters on hire-purchase contracts on social grounds prompted by considerations of the kind of persons who enter into them, and the nature of the transactions. It has, perhaps unfortunately, chosen not to put fetters on transactions of the size of that in the present case. This court cannot seek to repair that deliberate omission by creating special principles for that purpose. On general principles the evidence (or lack of it) in this case does not justify the court's interference with the contractual rights of the parties. Not without regret I am of opinion that the appeal must be allowed.

[29] [1954] 1 Q.B. 476, 501.

HARMAN L.J. I am of the same opinion and though I should like to emulate the laconic terms of the judgment of the county court judge who delivered judgment in two words, I feel constrained to add a word or two because of the uneasy feeling I have that the position of the law as it stands is not satisfactory. If the judgment of the majority in the *Cooden Engineering* case [30] be right, then the position may be different according to whether there is somewhere behind the termination of the contract a breach by somebody. It has been pointed out quite rightly to us that it is unsatisfactory if the man who honestly admits to the finance company that he cannot go on may have to pay a penalty, but that if he waits for the finance company to exercise their rights and in the meanwhile breaks the contract, he may be able to escape paying it on the ground that penalty for breach of contract is not enforceable in law. I have felt myself oppressed by that consideration.

The solution may be that the minority view in *Cooden Engineering* [30] was in fact the right one. I do not think anyhow that the discrepancy can be healed by some rather loose conception of what are called equitable principles. Equitable principles are, I think, perhaps rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. Since the time of Lord Eldon anyhow the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles. There are some who would have it otherwise, and I think Lord Denning is one of them. He, it will be remembered, invented an equity called the equity of the deserted wife. That distressful female's condition has really not been improved at all now that this so-called equity has been analysed.

Similarly I rather deprecate the attempt to urge the court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be disadvantageous to one of the parties. It is pointed out in one of the cases cited to us yesterday (and Lord Nottingham's observation in *Maynard* v. *Moseley* [31] is still true) that: "the Chancery "mends no man's bargain," and I do not therefore see my way to call in aid equity to mend what may be an unfortunate situation and one which, if it calls for remedy, calls for aid by the legislature rather than by the justiciary.

I therefore agree that this appeal should be allowed, holding as I do that we are bound by the case before Slesser, Scott and Clauson L.JJ.[32] cited by my Lord.

[30] [1953] 1 Q.B. 86.
[31] (1676) 3 Swanst. 651, 655.
[32] [1938] 2 K.B. 83.

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Davies L.J. I agree with both judgments.

Appeal allowed.
Judgment set aside and in lieu judgment for appellants for £206 3s. 4d. with costs on county court scale 4.
By consent no order in respect of appellants' costs of appeal and cross-appeal.
Leave to appeal to House of Lords.

Solicitors: *Ronald Brooke & Co., Ilford; Edwards, Son & Noice.*

M. M. H.

[central criminal court.]

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June 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30; *July* 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22.

Paull J. and a jury.

REGINA *v.* GRUNWALD and Others.

Crime — Fraud — Investments — "Reckless" making of statements or promises—Meaning of "reckless"—Prevention of Fraud (Investments) Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 45), *s.* 13 (1).

In order to convict an accused of the "reckless" making of a statement or a promise, contrary to section 13 (1) of the Prevention of Fraud (Investments) Act, 1958,[1] the jury must be satisfied of the following matters: (1) that the statement or promise was in fact made; (2) that it was a rash statement to make or a rash promise to give; and (3) that the person who made the statement or gave the promise had no real basis of facts on which he could support the statement or promise. If any one of those three matters is not proved, the jury must return a verdict of Not Guilty.

Reg. v. *Bates and Russell* [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842 and *Reg.* v. *Mackinnon* [1959] 1 Q.B. 150; [1958] 3 W.L.R. 688; [1958] 3 All E.R. 657 not followed.

Trial on Indictment.

On June 15, 1960, Friedrich Grunwald, Herbert Hugh Murray and Harry Oscar Jasper were arraigned at the Central Criminal Court upon an indictment containing 12 counts. By counts 4 and 11 Grunwald and Jasper were charged with inducing agreement for the disposal of securities by the making of reckless

[1] Prevention of Fraud (Investments) Act, 1958, s. 13 (1): "Any "person who . . . by the reckless "making of any statement, promise "or forecast which is misleading, "false or deceptive, induces or "attempts to induce another person— "(*a*) to enter into or offer to enter "into—(i) any agreement for, or with "a view to, acquiring, disposing of, "subscribing for or underwriting "securities . . . shall be guilty of an "offence, and liable to imprisonment "for a term not exceeding seven "years."

[Reported by A. D. Rawley, Esq., Barrister-at-Law.]

statements, contrary to section 13 (1) (*a*) (i) of the Prevention of Fraud (Investments) Act, 1958. The particulars laid in count 4 were as follows: " [Grunwald and Jasper on July 20, 1959], by " the reckless making of a statement and promise contained in a " letter of offer to the shareholders of Lintang Investments Ltd., " which were misleading, false or deceptive, namely, the state- " ment ' on behalf of our clients H. Jasper & Co. Ltd. we offer " ' to acquire all your shares of 5s. each in the capital of the " ' above-mentioned company for 24s. per share ' and the promise " ' if the offer becomes unconditional our said clients will make " ' payment to the accepting shareholders in accordance there- " ' with on August 31, 1959,' induced Down Nominees Ltd. to " enter into an agreement for disposing of 2,750 shares of the " said Lintang Investments Ltd."

Count 11 laid the following particulars: " [Grunwald and " Jasper on August 4, 1959], by the reckless making of a " statement and promise contained in a letter of offer to the " shareholders of the Ely Brewery Co. Ltd., which were mis- " leading, false or deceptive, namely, the statement ' on behalf " ' of our clients H. Jasper & Co. Ltd. we offer to acquire all " ' your fully paid ordinary stock units of 3s. 6d. each in the " ' capital of the above-mentioned company at 5s. per unit and " ' all your 6d. paid-up units at 2s. per unit ' and the promise " ' if the offer becomes unconditional our clients will make pay- " ' ment to the accepting stockholders in accordance therewith " ' on September 14, 1959,' induced Arthur Isadore Freedman " to enter into an agreement for disposing of seven thousand " shares of the said Ely Brewery Co. Ltd."

By count 12 Jasper alone was charged with inducing agreement for disposal of securities by the making of reckless statements, contrary to section 13 (1) (*a*) (i) of the Prevention of Fraud (Investments) Act, 1958, the particulars being as follows: " [Jasper " on September 14, 1959], by the reckless making of a promise " and statement which were misleading, false and deceptive, " namely, the promise on behalf of H. Jasper & Co. Ltd. that " all assenting shareholders of Ely Brewery Co. Ltd. who had " accepted an offer dated August 4, 1959, would be paid in accor- " dance with the terms of the said offer, and the statement that " moneys were available for the purpose of making the said " payments, induced Lazarus Nidditch to enter into an agreement " for disposing of 486,724 shares of the said Ely Brewery Co. " Ltd."

Grunwald was a solicitor, a partner in the firm of Harewood & Co., and was managing director of the Jasper group of companies. He had acted as solicitor for the State Building Society. Murray was the managing director and secretary of the State Building Society. Jasper was a director of H. Jasper & Co. Ltd., merchant bankers and licensed dealers in securities. He was also chairman of the Jasper group of companies. The case for

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the prosecution was that Grunwald and Murray conspired together to use, temporarily, moneys of the State Building Society in order to gain control of other companies for themselves. [In this connection Grunwald and Murray were also charged, under counts 2 and 6, with fraudulent conversion of property, namely, cheques to the total value of £3,405,500, contrary to section 20 (1) (iv) (*b*) of the Larceny Act, 1916.] That on a number of previous occasions this method had been used successfully by them, but in the case of Lintang Investments Ltd. their plans had failed. As far as concerned Jasper, it was not alleged that he knew that the State Building Society's moneys were being used to purchase shares, but it was alleged that he had authorised the use of his name as a principal in the transactions to gain control of other companies, whereas he was in fact a nominee.

On June 21 and July 1, 1960, there was legal argument on the meaning of "reckless" in section 13 (1) of the Prevention of Fraud (Investments) Act, 1958. The case only calls for report on the ruling and direction given to the jury by Paull J. on the meaning of "reckless" and on that part of the summing-up which dealt with the same matter.

Mervyn Griffith-Jones, J. C. Mathew and *B. L. Leary* for the Crown.

F. W. Beney Q.C., W. G. Wingate and *W. A. Macpherson* for Grunwald.

F. H. Lawton Q.C. and *R. M. O. Havers* for Murray.

Morris Finer and *M. D. Sherrard* for Jasper.

The following cases, not cited in the ruling, were referred to in argument: *Williams Bros. Direct Supply Stores Ltd.* v. *Cloote* [2]; *Rex* v. *Hinds* [3]; *Reg.* v. *Russell* [4]; *Akerhielm* v. *De Mare* [5]; *Derry* v. *Peek* [6]; *Behn* v. *Burness.* [7]

July 4. Paull J. In this case the prosecution evidence has taken over a fortnight. At the end of that evidence counsel made certain submissions to me, some of them based upon the proposition that there was no evidence on which the accused could be convicted. At first I was inclined to take the view that with a case of this complexity it would be better to leave the decision as to evidence until all the evidence had been heard. It was pointed out to me, however, that it was my duty to rule at this stage, and I think that that is right. Therefore, with regard to those counts upon which there have been submissions that there is no evidence to support them, I feel that I ought to deal with that matter here and now, and I proceed to do so.

[2] (1944) 60 T.L.R. 270, D.C.

[3] Unreported (July, 1950, C.C.C.).

[4] [1953] 1 W.L.R. 77, C.C.A.; [1952] 2 All E.R. 842.

[5] [1959] A.C. 789; [1959] 3 W.L.R. 108; [1959] 3 All E.R. 485, P.C.

[6] (1889 14 App.Cas. 337, H.L.

[7] (1863) 3 B. & S. 751.

Chiefly the matter concerns the defendant Jasper. It is important to realise that Jasper is only charged under three counts. There is no count against Jasper alleging that he was a party to any fraudulent conversion. The counts only relate to certain statements or promises which he is alleged to have made or given. It is said that those statements or promises were reckless statements and, so far as they consisted of promises, were reckless promises.

Section 13 (1) of the Prevention of Fraud (Investments) Act, 1958, makes it an offence to make a reckless statement or give a reckless promise in order to induce some other person either to purchase shares or to sell shares. The only task which I have to perform now is to decide whether or not there is any evidence sufficient to go to the jury that on the occasions alleged the statements and promises made by Jasper were reckless.

That word "reckless" is a word which is not too easy to define precisely. Indeed, there has been a difference of judicial opinion with regard to its meaning. In *Reg.* v. *Bates and Russell* [1] Donovan J. took the view that the word "reckless" really is the equivalent of "careless." In *Reg.* v. *Mackinnon* [2] Salmon J. took the view that before a person can be convicted of making a reckless statement the prosecution must show that there was some dishonesty with regard to the statement made. I regret to say that I do not altogether agree with either of my brethren. I regret it because it means that I bring, at any rate to discussion, yet a third meaning of the word "reckless," but, as I have reached in my own mind a perfectly clear conclusion, it is my duty to express that conclusion. It is a word used in an Act of Parliament, and primarily words used in Acts of Parliament mean precisely what they say. "Reckless" is a word which is in quite common use, and the ordinary citizen, when asked whether there was any difficulty in defining the word "reckless," would, I venture to think, say "No." He is accustomed to it in many ways—reckless driving, reckless conduct, and now, in this Act, a reckless statement or a reckless promise.

The first point to note is that it is not applied to the person who makes the statement or gives the promise. You have not to consider whether the person was a reckless sort of person. What you have to consider is whether the statement or the promise has been proved to be a reckless statement or promise. If you look up the meaning of the word "reckless" in the Oxford English Dictionary, a dictionary, of course, which is the result of tremendous research and of great learning, you will find with regard to such things as statements or promises that there is only one meaning given and that meaning is "characterised by "heedless rashness." In other words, the statement or promise

[1] [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842; on appeal *Reg.* v. *Russell* [1953] 1 W.L.R. 77.

[2] [1959] 1 Q.B. 150; [1958] 3 W.L.R. 688; [1958] 3 All E.R. 657.

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must be a rash statement or promise and must be made heedless of whether the person making it has any real facts on which to base the statement or the promise. Facts, of course, may include what a man has been told by apparently responsible persons, and I do not think that it would be right to import into the word "reckless" a meaning which might include a statement made as a result of an apparently responsible person having given that man the information upon which he gives the statement or makes the promise. Of course, if he knows facts outside what he has been told, that must be taken into consideration.

I would also say this. A man may honestly and strongly hold an opinion with which others disagree. Provided he bases that opinion on facts which he has reason honestly to believe exist and makes the statement or gives the promise because of the existence of those facts, then, in my judgment, that statement or promise is not reckless. He has reckoned, although he may have reckoned wrongly or even been somewhat careless in the conclusion to which he has come. Carelessness, in my judgment, may not in itself be sufficient to constitute recklessness, although, of course, it is one of the factors which have to be taken into account. Clearly, a statement or promise cannot be both careful and reckless. On the other hand, I do not think that it is necessary to find dishonesty. A statement or promise may be reckless although the person making it, in some somewhat vague way, thinks that the statement is true or the promise is warranted.

I would sum it up in this way: that before a jury can convict in respect of this section in this Act they must be satisfied of three things, (1) that the statement or promise was in fact made, (2) that it was a rash statement to make or a rash promise to give, and (3) that the person who made the statement or gave the promise had no real basis of facts on which he could support the statement or the promise. If those three matters are proved to the satisfaction of a jury, then, in my judgment, the jury may convict. If any one of those three matters is not proved, then the jury must return a verdict of Not Guilty. But, as I have said, in considering the matter, bases of fact may and, indeed, must include that which has been told to the man charged by apparently respectable and responsible persons.

I propose to apply that principle to the charges against Jasper. The first of those charges is contained in count 4, which alleges that on July 20, 1959, in a letter of offer to the shareholders of Lintang Investments Ltd. signed by Harewood & Co., of whom Grunwald was a partner, it is stated on behalf of H. Jasper & Co. Ltd., "We offer to acquire . . . your shares . . . for 24s. per "share . . . "; and in that letter the promise is given that, if the offer becomes unconditional, payment will be made on August 31, 1959. I am prepared to accept that there is some evidence that that letter was sent out with the full knowledge of Jasper, although it is true that when Brueckmann, his partner, gave

evidence, he seemed to give the impression that he, Brueckmann, was the person who was primarily dealing with the matters in connection with Lintang Investments Ltd. on behalf of H. Jasper & Co. Ltd. But I will assume that point against Jasper and then I ask myself these questions: Is there any evidence that that statement was made rashly without any real basis of fact to support it? Was the promise given rashly without any real basis of fact to support the promise?

The facts are these. Grunwald, a partner in Harewood & Co., had been the person who organised—and I use that word advisedly because the precise position is a matter of dispute, I think, between Grunwald and Murray—but undoubtedly organised a number of what are known as "take-overs"; in other words, organised a way in which certain companies could be taken over in the sense that the shareholders should be bought out and the shares should go into the possession of a group of persons of whom Grunwald was, I think, one. In each of those 14 cases H. Jasper & Co. Ltd. had acted. Each of those 14 cases had been successful and there had been no difficulty in finding the money, so that when H. Jasper & Co. Ltd. were approached once more to use their name as the licensed offeror to purchase the shares of Lintang Investments Ltd. Jasper knew that at any rate there had been a record of success so far as take-overs were concerned in which Grunwald was involved. But there is this to be said against him: that this take-over was going to be a very much larger take-over than any which had taken place before. The largest take-over up to that moment had been a take-over involving something like three-quarters of a million pounds. This would involve something like eight, or possibly nine, million pounds; certainly something in excess of £7,000,000.

If Jasper had without more ado authorised that letter, I should, myself, hold that there was certainly evidence to go to the jury that the statement made and the promise given were reckless. But that is not the position. Jasper's first reaction was to say to Grunwald, according to Jasper's statement, which, of course, is not strictly evidence but which has been put in by the prosecution against him, that this was crazy. I think one has to realise exactly what was meant by the word "crazy" and, when one looks at Jasper's statement, what he is saying is that it is crazy to pay that amount of money to obtain shares of Lintang Investments Ltd., but he was assured by Grunwald that the matter had been gone into very carefully. His next step was to inquire who lay behind Grunwald. According to Jasper's own statement, he was told Lloyds Bank, but, according to evidence given by the other director, Brueckmann, Jasper and Brueckmann were told that there was really a consortium consisting of Grunwald himself, Murray, the Bergers and Lloyds Bank.

I say at once, because this point is one of the points which

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the jury have subsequently to decide, that that statement may have been a complete lie. It may be that we shall find (I do not know, and I do not forecast) that the fact that Murray was alleged to have been a person involved was not a true statement. It does not matter. So far as Jasper is concerned, there was no reason at that moment why he should disbelieve that statement. Murray, we know, was a man who already held (and here there is no dispute) something like £2,000,000 worth of shares in the Jasper companies. It is not disputed that the Bergers were people who, if I may say so, do not appear to have been anxious to part with their money, but if pressed could find something in the neighbourhood of £7,000,000 or £8,000,000. Berger was asked whether he was not one of the largest property owners in England. He demurred from that, but confessed that if his properties were valued at £7,000,000 or £8,000,000, that would not be too great a sum. In addition there was Lloyds Bank. If a person is solemnly assured that persons like that lie behind a take-over transaction, I cannot see that it can be said that there is evidence to put before the jury of a reckless statement or promise, if the person who makes the statement or promise says: "We offer to acquire your shares for 24s. a share and payment "will be made on August 31, 1959." So far as he would know at that moment, there was no reason why it should not have been met.

With regard to count 11, it has been pointed out by the prosecution that other matters became known to Jasper. Between July 20 and August 4, which is the date upon which count 11 is founded, certain events had happened. Count 11 is, again, a charge of making a reckless statement, and the reckless statement on this occasion is contained, or alleged to be contained, in a letter of offer to the shareholders of Ely Brewery Co. Ltd. In that letter it is stated on behalf of H. Jasper & Co. Ltd.: "We offer to acquire ". . . your ordinary stock units of 3s. 6d. each . . . at 5s. per "unit and . . . your 6d. . . . units at 2s. per unit"; and the promise is given that, if the offer becomes unconditional, payment will be made on September 14, 1959.

It is quite true that before August 4 Grunwald had told Jasper that they were having difficulty with Lloyds Bank. But further circumstances must be borne in mind. Jasper left for a holiday in Switzerland before the end of July, i.e., before this letter was sent out, and undoubtedly it was Brueckmann who took the whole of the part, so far as Jasper & Co. Ltd. were concerned, in sending out this letter. Jasper himself was in Switzerland. It is quite true, as the prosecution say, that there were, no doubt, telephone conversations going on between him and his partner, but if the only difference which Jasper could know was that Lloyds were causing some difficulty, there were still the Bergers, there was still Murray, there was still Grunwald, and, for all Jasper knew, others.

I see no evidence to prove that by August 4 the position was such that Jasper, even if he had been in England, could not make such a statement or give such a promise without being reckless. I must be satisfied that there is some evidence on which the jury could so find. I am very doubtful whether a man can be said to have made a statement or given a promise when he was in Switzerland and the whole matter was dealt with by the other director; but I will assume that against Jasper for the purpose of my judgment.

I pause here to say that, although I think that there is no evidence of recklessness with regard to the statements made in those letters of offer, I am very far from saying that H. Jasper & Co. Ltd. cannot be criticised. Brueckmann (and it was Brueckmann, not Jasper) wrote a letter to say that they had £3,000,000 when they certainly did not have £3,000,000. But that was after this event; it was after this letter was written, and I do not think it can be evidence against Jasper.

Now, if that be right on those two charges against Jasper, there is still the third charge, count 12, which alleges that on September 14, 1959, Jasper made a reckless statement and a reckless promise, when he was in England, in relation to the actual paying of the directors of the Ely Brewery Co. Ltd. as the result of this offer which had been made by the letter of August 4. In order to see what the position is, it is necessary to consider a little carefully what happened. The actual count is based upon, and indeed states the effect of, a letter which Jasper gave to Nidditch, who was the managing director of Ely Brewery Co. Ltd. In that letter he said that moneys were available to pay all the assenting shareholders of Ely Brewery Co. Ltd. who accepted the offer dated August 4, 1959, and promised that all shareholders who accepted the offer should be paid accordingly. There is no doubt at all that before Jasper went to Cardiff on September 13 for the purpose of paying out the directors of Ely Brewery Co. Ltd. he well knew that there were grave financial difficulties; and if the evidence was that, with those grave financial difficulties, he simply sat down and wrote a letter in which was that statement and that promise, I should have no hesitation in leaving the matter to the jury. I should have no hesitation in saying that there was ample evidence upon which the jury could convict. But that is not what happened. When Jasper went down to Cardiff on September 13 he knew that Nidditch, the chairman of Ely Brewery Co. Ltd., wanted two things. He wanted the money which was due to the directors to be paid on the Monday, and he wanted a letter from a bank to say that the moneys which would later have to be paid to the shareholders were lying secure in the bank. When Jasper went down he knew that the second part could not be fulfilled, that money was not in the bank.

On the evening of September 13, which was a Sunday, there

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was a dinner at which the matter was discussed. At that dinner Nidditch said that he wanted the letter concerning the shareholders' money before he accepted his money and resigned as director. Jasper there and then, quite frankly and quite honestly, indicated that he thought there would be difficulties about that letter because he did not believe that the money was lying in the bank. He was quite open about it. He did not try and conceal that fact, and, in effect, Nidditch said: "No letter, no deal "tomorrow." Later, when Jasper and Rose, who had gone down with him, were discussing the matter in the hotel, they were both extremely worried, and Jasper said: "Well, we shall "not get that letter tomorrow. The bank representative will "come down with the draft for the directors, but he will not "come down with a letter saying that the money for the share-"holders is in the bank, because it is not, and I know it is not "in the bank." Sure enough, on the next day that situation arose.

As a result, Nidditch said: "I will not complete." If then and there Jasper had signed the letter to say that the money was available, it would have been a reckless statement, but he did nothing of the sort. Both he and Rose twice got on the telephone to Kanter. Kanter was a partner in Harewood & Co., and therefore a partner of Grunwald. As far as the evidence goes, because I have to decide on the evidence which is now before me, there was no reason why Jasper should not have thought that Kanter knew just about as much of the matter, or very nearly as much of the matter, as Grunwald. The fact is that on that Sunday Grunwald had left this country, and Kanter knew that at 8 a.m. on the Monday morning. Therefore, when Rose and Jasper telephoned Kanter, the situation was that Grunwald had left the country, and, once more, if Kanter had said "I am sorry, but my partner has left the coun-"try," everybody would have known that there was something wrong, because Grunwald had originally said, only a day or two before, that he was going down to the take-over proceedings at Cardiff. But Kanter did not say so. He merely said that his partner was not available, and to the ordinary person that would mean that the partner was out on some other business, was not in the office, or, if he was in the office, was busy with some other client.

Jasper and Rose, because they both had conversations (they were both very worried men), in effect, asked Kanter what they should do. Jasper told Kanter that there was no letter saying that the money was available, and there was a conversation, into which I need not go in detail, in which Jasper indicated to Kanter that he thought that there might well be difficulties in finding the money. There was certain money available which could not be used legally. Jasper knew it and he told Kanter so. Then the situation arose as to what Jasper and Rose should do. Should they just leave the matter uncompleted and come back, or what should happen? Thereupon Kanter, in effect, dictated

to Rose the very letter which Jasper signed. He said that it would be proper and right to sign such a letter, and Jasper knew that Kanter knew the facts which he, Jasper, knew, namely, that the money was not in the bank and there were certain moneys which could not be used. Kanter assured Jasper it would be quite in order to sign a letter in the terms of the charge under count 12, and actually, if he did not dictate the very words, dictated the meaning of the clause. Kanter has given evidence. He has said that that letter which Jasper wrote is a letter he authorised him to give. And so one comes to the extraordinary position in which a letter is given by a worried man on the direct authority and advice of a solicitor who is a perfectly respectable solicitor (no charge is made against Kanter), and who, presumably, so far as Jasper knew, knew the facts that Jasper knew, and, one is bound to say, without Kanter disclosing the fact to Jasper, that Grunwald had left the country. I cannot feel that a statement made in those circumstances can be described as being reckless. I do not think that that evidence is sufficient evidence to put before the jury on a charge of recklessness.

I have defined reckless, and I ask myself two questions: First, was it rash? It may well have been rash. That, I think, it might well have been. But was it made without any real basis of fact to support it? The answer is "No," because Jasper had the very solid basis of fact that a responsible solicitor, who, as far as he knew, knew all the circumstances, told him that it was a proper letter to write and give to Nidditch. In those circumstances I think that those three counts fail against Jasper and he should be discharged.

[The jury returned a verdict of Not Guilty in respect of Jasper, who was then discharged. The case continued against Grunwald and Murray.]

July 22. PAULL J. [summing up on count 4 against Grunwald, referred to the ruling which he had already given on the meaning of "reckless" in section 13 (1) of the Prevention of Fraud (Investments) Act, 1958, and continued:] The test which I give to you is this: you must be satisfied that Grunwald, when he made that promise to pay the shareholders the money on August 31, 1959, had no real basis of fact upon which that promise could be made. If you are satisfied about that, convict him. If you think there is a real doubt about it, acquit him.

Let us turn to the facts. On July 20 what exactly did Grunwald know? That is what we must think about on this charge. Grunwald says quite bluntly: "I intended to use the State "Building Society's three-and-a-quarter million pounds." Indeed, he goes further and says: "At that date Murray had promised "me that he would provide at least £4,000,000 finally and pro-"bably up to £5,000,000." He says: "If that promise had not

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"been made to me and if I had not understood from Murray that "he was prepared to pay me that money over from the State "Building Society's coffers for me to use for the purchase of the "shares, I would never have started the transaction at all."

Of course, you may take the view that that was a complete lie, that Grunwald has been lying to you. You may take the view that that may very well be true, and you may take the view —I do not know; it depends entirely upon the view you take of Grunwald and Murray—that the truth of the matter is that there was an arrangement between them whereby this money, the three-and-a-quarter million, should be used as a basis for paying for the directors' shares. Assume for the moment that you take that view. You may very well say to yourself, may you not, in the first place, "Well, if Grunwald did have that promise, prima "facie, in the first instance, looking at it just offhand, he had "the beginnings of a basis for that statement." After all, if the State Building Society were to advance £5,000,000 towards the £8,500,000, it did not leave so very much over if Berger was to give a million and if somebody else was to advance other moneys, and you may therefore think: "Well, in that case, can it be "said that it was reckless?"

But, you know, that is leaving out one very important consideration. I do not know, but, bearing in mind the fact that Grunwald is a solicitor, who, after all, has learned his law, and bearing in mind that the very basis of fraudulent conversion is the fact that one uses other people's money for one's own purposes and that it does not matter whether one thinks that later one will be able to pay it back or whether one thinks that mortgages would later be taken out, you may find it rather difficult to believe that a man of Grunwald's ability honestly believed that he was entitled to take no less than three-and-a-quarter million pounds from the State Building Society's money to buy shares for himself, for Murray and the whole of the group so that, when that transaction was over at the moment of purchase, they would have the shares and the State Building Society would have nothing whatsoever for its three-and-a-quarter million pounds. It is utterly immaterial that a man should say: "Ah, well, I'll "use this money for purposes I have no right to use it for, but "in the end, no doubt, all will resolve itself because the horse "will win" or "the shares will go up" or "the take-over will "be successful." It is a fraudulent conversion whether the horse wins or loses, whether the shares go up or down and whether the take-over is or is not successful; and you may have, may you not, great difficulty in believing in those circumstances that Grunwald honestly believed that he could use what was in effect a quarter, or thereabouts, of the whole of the resources of the State Building Society in order, for the time being, to give it away to get shares for himself and for the other members of the group.

If you take that view and if you feel that that is the conclusion you are bound to come to, then two things follow. The whole of the defence of Grunwald on counts 2 and 6 falls to the ground. That is the end of his defence on those counts if you think that the buying of the shares was not honest and that he must have known it as a solicitor and as one who is grounded in the very basis of the law. If you think that, you may well think that it would be right to convict him on counts 2 and 6. In addition, since no man has the right to take into consideration moneys he knows he has no right to use, upon count 4, the whole basis on which he says "this promise was not reckless "because I was going to have these resources" also falls to the ground. That is the way I would suggest to you that you look at this matter. As the prosecution has said, you are entitled to say: "Well, even if the State Building Society money could be "used, he still did not have promises sufficient to have raised "the £8,500,000." But I would advise you to exercise your common sense. Let the basis of your decision here be really: Did he know he had no right to use that money? Did he know he had no right to buy shares for himself and for others with the three-and-a-quarter million pounds? If he did, then he had no basis for that statement at all, because what he was doing was to say in effect: "I am going to commit a crime and I am going "to use the moneys of that crime to pay the shareholders," and that no man can do.

In effect count 4, you may think—it is a matter for you—really depends upon the decision you give on counts 2 and 6, and if you convict him on counts 2 and 6 you may well feel that there is no real defence to count 4. If you feel you can acquit him, then I would say to you acquit him also of this count, although you are entitled, as the prosecution has said, even then to consider whether you can convict, but, as a matter of common sense, I would suggest that you take the course I have outlined to you.

[The remainder of the summing-up does not call for report. Of the counts mentioned in this report, Grunwald and Murray were both convicted on counts 2 and 6; Grunwald was convicted on count 4 and acquitted on count 11. Both were sentenced to five years' imprisonment.]

Solicitors: *Director of Public Prosecutions; Stafford Clark & Co.; Wontner & Sons; D. J. Freeman & Fraser.*

[CHANCERY DIVISION.]

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Mar. 3.

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DUNN *v.* BLACKDOWN PROPERTIES LTD.

[1959 D. No. 1243.]

Easement—Sewage and drainage—Right arising at uncertain date in future—Right to use sewers and drains "now passing or hereafter "to pass" under private road—No sewers and drains in existence at date of grant—Whether void for perpetuity—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 162 (1) (*d*) (iv).

Perpetuity Rule—Easement—Right to use sewers and drains "hereafter "to pass"—Whether void.

By two conveyances dated respectively December 17, 1926, and January 11, 1938, two plots of land were conveyed to the plaintiff's predecessors in title, together with the right for the grantees, their heirs and assigns to use the sewers and drains "now passing or "hereafter to pass" under a private road on which the plots abutted and belonging to the defendants' predecessors in title. At some date after January 11, 1938, the defendants' predecessors in title constructed a surface water sewer along the road and a soil sewer which passed from their land lying north of the road, ran under the road for some distance and turned on to other land of theirs.

In an action by the plaintiff, to whom the two plots together with the foregoing right had been conveyed on September 20, 1945, claiming, inter alia, a declaration that she was entitled to the right to use the sewers and drains then passing or thereafter to pass under the road in connection with the two plots:—

Held, (1) that since no sewers or drains were in existence at the date of the conveyance to the plaintiff's predecessors in title the grant of the right to use the sewers and drains "hereafter to pass" was a grant of an easement to arise at an uncertain date in the future not limited to take effect within the perpetuity period and was, therefore, void.

South Eastern Railway Co. v. *Associated Portland Cement Manufacturers* (*1900*) *Ltd.* [1910] 1 Ch. 12; 26 T.L.R. 61, C.A. and *Sharpe* v. *Durrant* [1911] W.N. 158, C.A. considered.

(2) That, on its true construction, section 162 (1) (*d*) (iv) of the Law of Property Act, 1925,[1] was only intended to make it clear that, if the basic right of sewage was not itself void for perpetuity, the ancillary right of construction work to make the basic right effective was not to be treated as void for perpetuity because it might be exercised outside the perpetuity period, and that, accordingly, the right to user of the sewer was not validated by the subsection.

Held, further, that the words "passing . . . under" in the grant should not be construed as "exclusively passing" under, so that,

[1] Law of Property Act, 1925, s. 162 (1): "For removing doubts, "it is hereby declared that the rule "of law relating to perpetuities does "not apply and shall be deemed "never to have applied— . . . (*d*) To "any grant, exception, or reservation "of any right of entry on, or user of, "the surface of land or of any "easements, rights, or privileges over "or under land for the purpose "of— . . . (iv) constructing, laying "down, altering, repairing, renewing, "cleansing, and maintaining sewers, "watercourses, cesspools, gutters, "drains, water-pipes, gas-pipes, "electric wires or cables or other like "works."

if the soil sewer had been in existence at the date of the conveyance to the plaintiff, and had passed exclusively under the defendants' land, the plaintiff, provided that she did not propose to overload it, would have been entitled to join up with it and use it, even though it passed under land of the defendants other than the road.

ACTION.

The following statement of facts is taken substantially from the judgment of Cross J. The plaintiff, Patience Louise Dunn, was the owner of two plots of land, the "pink land" and the "blue land" at Pyrford, between Woking and Byfleet. Both plots had a frontage on the west to a private road, Pine Tree Hill, which belonged to the defendant company, Blackdown Properties Ltd. After running southwards past the pink land and then past the blue land, Pine Tree Hill joined another private road, Norfolk Farm Road, which ran eastwards from the point of its junction with Pine Tree Hill, along the southern frontage of the blue land into a public road, the Old Woking Road.

The conveyances of the pink land and the blue land to the plaintiff's predecessors in title contained certain rights over Pine Tree Hill and Norfolk Farm Road to which the plaintiff was entitled. By a conveyance dated December 17, 1926, the freehold in the pink land was conveyed by John Sugden as beneficial owner to Charles Freemantle together with the full right and liberty for him, his heirs and assigns and all persons authorised by him or them in common with others having the like right and liberty at all times thereafter by day or by night and for all purposes with or without horses or other animals, carts, carriages, wagons or other vehicles to go, return, pass and repass along, over and upon roads coloured brown on the plan to the conveyance, and also full right and liberty for him and such persons as aforesaid, in common with others having the like right and liberty, to use the sewers and drains then passing or thereafter to pass under the said roads or any part thereof. The roads coloured brown on the plan to that conveyance were: (a) the part of Pine Tree Hill which abutted on the pink land; (b) a further part of Pine Tree Hill running southwards past the blue land to Norfolk Farm Road; and (c) the part of Norfolk Farm Road which ran eastwards from the junction with Pine Tree Hill to the Old Woking Road.

By a conveyance made on January 11, 1938, William Maides and Charles Taylor, as beneficial owners, conveyed to Eric Downes the freehold in the blue land together with full right and liberty for him and his successors in title and all persons authorised by him at all times thereafter by day or by night and for all purposes with or without horses or other animals, carts, carriages, wagons or other vehicles to go, return, pass and repass over and along so much of Norfolk Farm Road and Pine Tree Hill as were coloured brown on the plan, together with full right and liberty for him and such persons as aforesaid in common with others having the like right and liberty to use the sewers and drains

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then passing or thereafter to pass under the roads or any part thereof. The roads coloured brown on the plan to that conveyance were: (a) the part of Pine Tree Hill running past the blue land, and (b) the part of Norfolk Farm Road running eastwards from its junction with Pine Tree Hill to the Old Woking Road.

Neither on December 17, 1926, nor on January 11, 1938, were there any sewers or drains passing under Pine Tree Hill or Norfolk Farm Road, or any part of those roads through which the respective vendors had the right to discharge drainage. In November and December the defendants constructed a surface water sewer along Pine Tree Hill, and a soil sewer which passed from the defendants' land lying immediately to the north of the pink land, ran southwards along Pine Tree Hill for some distance past part of the pink land, and then turned westwards on to other land of the defendants lying on the farther side of the road. From that point it ran downhill to join a sewer in another road considerably farther to the west.

By a conveyance dated September 20, 1945, both the pink and the blue plots were conveyed to the plaintiff in fee simple together with the foregoing rights. The freehold ownership of the soil of Pine Tree Hill was vested in the defendants by a transfer dated November 14, 1957. The plaintiff sought the right to connect the drains from any houses which she might build on the plots with any of the sewers in Pine Tree Hill belonging to the defendants or their successors in title, and the defendants disputed that she had any such right.

By this action the plaintiff claimed a declaration that she was entitled to a right of way from the pink and blue land over and along that part of Pine Tree Hill on which the land abutted, an injunction restraining the defendants from interfering with that right and a declaration that she was entitled to the right for herself and her successors in title and all persons authorised by her or them (in common with others having the like right) to use the sewers and drains then passing or thereafter to pass under Pine Tree Hill in connection with the pink and blue land.

Sir Lynn Ungoed-Thomas Q.C. and *F. Bower Alcock* for the plaintiff.

Nigel Warren Q.C. and *A. J. Balcombe* for the defendant company.

The following case, in addition to those referred to in the judgment, was cited in argument: *Smith* v. *Colbourne*.[2]

Cur. adv. vult.

[2] [1914] 2 Ch. 533, C.A.

March 3. CROSS J. read the following judgment which, after stating the facts, continued: The pleadings raised two issues between the parties. The first is as to the measure of access to Pine Tree Hill to which the plaintiff is entitled, and the second is as to her rights of drainage, but when the action began it appeared that there was really no dispute between the parties on the first point. Counsel on both sides agreed that the plaintiff was entitled to such access from the pink and blue land to Pine Tree Hill as was reasonable, having regard to the state of her property from time to time, and that the access at present available, which is through two gateways marked on an agreed plan, is reasonable as things are at present.

The facts with regard to the drainage are as follows: [His Lordship stated those facts and continued:] The plaintiff does not need any drainage facilities over Pine Tree Hill, but she claims that she has the right to connect the drains from any houses which she may hereafter build on the pink or blue land with any sewers belonging to the defendants or their successors in title which may then be in Pine Tree Hill, and in particular with the soil sewer.

In answer to that claim the defendants pleaded: (1) that in so far as the conveyances dated December 17, 1926, and January 11, 1938, purported to grant to the predecessors in title of the plaintiff the right to use sewers and drains thereafter to pass under the roads therein mentioned as opposed to rights to use any sewers and drains then in existence, the respective grants were void as infringing the rule against perpetuities, and, alternatively (2) that the plaintiff is not entitled to use any part of the sewers or drains under the said roads if by doing so she will thereby necessarily use the sewers and drains passing under other parts of the defendants' land in respect of which the plaintiff has no right of drainage. The defendants, that is to say, contend that, if the grants are not void for perpetuity, the only sewer through which the plaintiff would be entitled to pass her sewage would be one running along Pine Tree Hill to the junction of Norfolk Farm Road and then down Norfolk Farm Road into a public sewer in the Old Woking Road. She would, they say, have no right to use a sewer such as the soil sewer, which leaves Pine Tree Hill and passes over other land of the defendants on its way to a public sewer.

Subject to the operation of section 162 of the Law of Property Act, 1925, with which I shall deal later, there is no doubt that the rule against perpetuities applies to grants of easements. It follows that, where the grant is not immediate but is of an easement to arise in the future, it will be void unless it is limited to take effect only within the perpetuity period.

It is not, however, always easy to decide whether the grant in question is of an immediate right or of a right to arise in the future. The difficulty may be illustrated by comparing *South*

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Eastern Railway Co. v. *Associated Portland Cement Manufacturers (1900) Ltd.*[1] with *Sharpe* v. *Durrant.*[2]

The facts in the former case were that, by a conveyance made on December 31, 1847, one John Hales Calcraft conveyed to the South Eastern Railway Co. a strip of land to be used by them as a railway line, reserving to himself, his heirs, appointees and assigns, inter alia, the right to construct at his or their expense a tunnel or archway under the proposed railway where it passed or was intended to pass through or over the land thereby conveyed. In 1907 the defendants, who were assignees of the benefit of this reservation, wished to construct a tunnel under the railway line, but the railway company claimed, among other things, that the reservation was void for uncertainty and for perpetuity.

Swinfen Eady J. held[3] that the reservation was not void for uncertainty, since it was for the vendor, Calcraft, or his assigns to decide where the tunnel was to be built when he or they wished to build it. He dealt with the objection of perpetuity in two ways. First, he held that the right reserved was an immediate easement and not an easement to arise in the future whenever the vendor, Calcraft, or his assigns decided to build the tunnel. Secondly, he pointed out that, as the plaintiff railway company was one of the original contracting parties, the agreement could be enforced against it by the assignee of the benefit of it without regard to the rule against perpetuities. The case went to the Court of Appeal,[4] which affirmed the judgment on this latter ground without expressing any view on the question whether the reservation was of an immediate or a future easement.

The facts in *Sharpe* v. *Durrant*[5] were that in 1889 a vendor conveyed to a purchaser a strip of land for a tramway, reserving the right to cross the line at two points to be selected by him, and the purchaser covenanted to provide crossings at those points. In 1892 the vendor selected one crossing point and notified his selection to the purchaser, but no crossing was made. The purchaser subsequently sold the strip to the defendant.

Warrington J. held[6] that the reservation was void for perpetuity on the ground that, until the selection was made, no easement was created. He went on, however, to hold that the covenant to provide crossings implied a negative undertaking not to interfere with the crossing which bound the land in the hands of the defendant under the doctrine of *Tulk* v. *Moxhay.*[7] *Sharpe* v. *Durrant* was affirmed by the Court of Appeal,[8] but there is no report showing whether or not that court accepted the view of Warrington J. that the reservation was void for perpetuity.

[1] [1910] 1 Ch. 12; 26 T.L.R. 61, C.A.
[2] [1911] W.N. 158, C.A.
[3] [1910] 1 Ch. 12.
[4] Ibid.
[5] [1911] W.N. 158.
[6] (1911) 55 S.J. 423.
[7] (1848) 1 H. & Tw. 105.
[8] [1911] W.N. 158.

I do not find the views expressed by Swinfen Eady J. and Warrington J. as to the effect from the point of view of perpetuity, of a right given to the grantee to select the site of an easement at all easy to reconcile. I do not think, however, that I am compelled to choose between them in this case. If there had been a sewer under Pine Tree Hill at the dates of the grants to her predecessors in title the plaintiff could have claimed, on authority of the *Associated Portland Cement* case,[9] that the owners of the pink and blue land had from the first a right exercisable at any time to make connections with and use that sewer or any sewer substituted for it, but, as there was no sewer under the road, the plaintiff must rely on the words "or hereafter "to pass." It is not for the owners of the pink or blue land to decide whether or not a sewer will or will not pass under the road in future. That is for the owners of the road to decide, and I do not see how this part of the right granted can be treated as anything but the grant of an easement to arise at an uncertain date in the future.

Counsel for the plaintiff submitted that in the *Associated Portland Cement Company* case[9] the right to construct the tunnel only arose if the railway company decided to build the railway and that Swinfen Eady J. must have thought that this fact did not make the reservation bad for perpetuity. I do not so read the facts or the judgment. It is to my mind reasonably clear that the reservation in question was of an immediate right to build a tunnel exercisable as from the date of the conveyance to the railway company, whether or not a railway was built.

The plaintiff next argued that, assuming that the grants would have been void at common law, they were saved by section 162 (1) of the Law of Property Act, 1925. That subsection starts with the words: "For removing doubts, it is here-"by declared that the rule of law relating to perpetuities does "not apply and shall be deemed never to have applied," and there follow three paragraphs, (*a*), (*b*) and (*c*), which deal with rights, powers or rent charges given by way of indemnity against payment of a rent. Paragraph (*d*), which is the material paragraph for present purposes, is in the following terms: "(*d*) To "any grant, exception, or reservation of any right of entry on, "or user of, the surface of land or of any easements, rights, or "privileges over or under land for the purpose of—(i) winning, "working, inspecting, measuring, converting, manufacturing, "carrying away, and disposing of mines and minerals; (ii) "inspecting, grubbing up, felling and carrying away timber and "other trees, and the tops and lops thereof; (iii) executing "repairs, alterations, or additions to any adjoining land, or the "buildings and erections thereon; (iv) constructing, laying down,

[9] [1910] 1 Ch. 12.

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"altering, repairing, renewing, cleansing, and maintaining sewers, "watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, "electric wires or cables or other like works."

It is to be observed that paragraphs (*a*) and (*b*) merely deal with rights of entry or easements which are ancillary to grants of other property. They presuppose grants of minerals or timber which are not themselves void for perpetuity and are directed to making it clear that the fact that the rights of entry or easements given to enable the grantee to get the minerals or timber may not be exercised for many years after the original grants is not to make the ancillary rights void for perpetuity. Similarly, sub-paragraph (iii) presupposes that the grantee has an interest in the adjoining land which is itself not void for perpetuity. He is given a right of entry or easement over the servient land for the purpose of doing the work referred to on this adjoining land, and the fact that these rights may be exercisable from time to time in the indefinite future is not to be treated as making the grant of them void for perpetuity.

Having regard to the context in which it appears, I doubt very much whether sub-paragraph (iv) was intended to do more than make it clear that, if A had a right of drainage or some similar right over the land of B itself which was not itself void for perpetuity, ancillary rights of constructing and repairing works to make the basic right effective were not to be treated as void for perpetuity because they might be exercised outside the perpetuity period. To construe sub-paragraph (iv) as validating grants of rights of drainage or similar rights to arise at some uncertain date in the future would lead to very odd results. Suppose, for example, a grant to landowner A that, if at any time landowner B or his successors in title should construct a road from point X on the border of A's land to point Y on the other side of B's land, A and his successors in title should be entitled to use the road and to construct and use a drain from their land running to it, then if sub-paragraph (iv) means what the plaintiff says it means the grant of the right of drainage would be good although the grant of the right of way was bad.

The plaintiff, however, urges that, whatever the draftsman of the Act may have meant, the words "easements . . . for the "purpose of . . . constructing . . . sewers" naturally include the grant of a right of drainage, and I am prepared to assume for the purpose of this judgment that this is so. Even on that footing, however, I cannot see how the plaintiff can succeed. She is not simply claiming a right to construct and use a drain running under Pine Tree Hill. She is claiming a right to construct a drain from her land to join a sewer already constructed by the owners of the soil of Pine Tree Hill and to use that sewer. I cannot see how the right to user of this sewer, if void for perpetuity apart from section 162, can be validated by the section.

Counsel for the plaintiff urged that the only right which his

client needed to claim was a right to construct a drain to join the defendants' sewer. She would not, he said, be concerned with what happened to her sewage after it reached the sewer. I cannot accept this submission. The right to construct a drain to join the sewer would be useless to the plaintiff without the further right to use the sewer.

Having regard to the view which I have formed on the perpetuity point, it is not strictly necessary for me to say anything on another point, but, in case the case goes further, it is perhaps right that I should deal with it. In the ordinary case which the forms in the books of precedents have in mind one has a row of houses adjoining a street and a sewer running under the whole length of the street. The words used there are not designed to meet a case such as the present where, having regard to the lie of the land, the sewer turns away from the street and runs across country under adjoining land of the servient owner. The question is whether in these circumstances the words in the grant "passing ". . . under" should be construed as "exclusively passing "under." On the whole I think not. In cases of doubt a grant should be construed against the grantor and I see no sufficient reason why, had the soil sewer been in existence at the date of the grant, the plaintiff should not have been entitled to join up with it and use it, even though it passes in part under the land of the defendant company other than Pine Tree Hill. I would add that in saying this I assume: (a) that the sewer in question passed exclusively under the land of the defendant company on its way to their sewer and not also over the land of a third party; and (b) that the plaintiff did not propose to put a quantity of sewage into the sewer which was greater than it could reasonably bear having regard to its other commitments at the time. I say nothing about what the position would be if these assumptions were not correct.

In the result I hold that the action fails on this question.

Judgment for the defendants. Costs incurred by plaintiff between September 24, 1959, *and October* 1, 1959, *to be paid by defendants; plaintiff to pay defendants' costs from October* 1, 1959.

Solicitors: *Griffinhoofe & Co.; Herbert Baron & Co.*

M. G. T.

[CHANCERY DIVISION.]

1961
Mar. 9, 10, 13, 14, 15.

Pennycuick J.

In re BAKER (INFANTS).

[1960 B. No. 1839.]

Education—School—Attendance—School attendance order—Refusal of parent to comply with school attendance order—Children made wards of court on summons by local authority—Jurisdiction of Chancery Division to consider welfare of child—Education Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *ss.* 36, 37 (2).

Infant—Ward of court—Jurisdiction—Refusal of parent to comply with school attendance orders—Whether jurisdiction over children.

Crown—Prerogative—Statute, application to—Crown as parens patriae —Wardship jurisdiction of Chancery Division—Whether restricted by Education Act, 1944.

The mother of four infants between 5 and 15 years of age was convicted and fined by justices in November, 1957, for refusing to comply with school attendance orders served on her by the local education authority under section 37 of the Education Act, 1944,[1] and her appeal was dismissed by quarter sessions in May, 1958. In November, 1958, the mother was again convicted and fined by

[1] Education Act, 1944, s. 7: "The statutory system of public education shall be organised in three progressive stages to be known as primary education, secondary education, and further education; and it shall be the duty of the local education authority for every area, so far as their powers extend, to contribute towards the spiritual, moral, mental, and physical development of the community by securing that efficient education throughout those stages shall be available to meet the needs of the population of their area."

S. 36: "It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

S. 37: "(1) If it appears to a local education authority that the parent of any child of compulsory school age in their area is failing to perform the duty imposed on him by the last foregoing section, it shall be the duty of the authority to serve upon the parent a notice requiring him, within such time as may be specified in the notice not being less than fourteen days from the service thereof, to satisfy the authority that the child is receiving efficient full-time education suitable to his age, ability, and aptitude either by regular attendance at school or otherwise. (2) If, after such a notice has been served upon a parent by a local education authority, the parent fails to satisfy the authority in accordance with the requirements of the notice that the child to whom the notice relates is receiving efficient full-time education suitable to his age, ability, and aptitude, then, if in the opinion of the authority it is expedient that he should attend school, the authority shall serve upon the parent an order in the prescribed form (hereinafter referred to as a 'school attendance order') requiring him to cause the child to become a registered pupil at a school named in the order: Provided that before serving such an order upon a parent the authority shall, where practicable, afford him an opportunity of selecting the school to be named in the order, and if a school is selected by him, that school shall, unless the Minister otherwise directs, be the school named in the order. (3) If the local education authority are of opinion that the school selected by the parent as the school to be named in a school attendance order is unsuitable to the age, ability or aptitude of the child with respect to whom the order is to be made, or that the attendance of the child at the school so selected would involve unreasonable expense to the authority, the authority may, after giving to the parent notice of

the justices for refusing to comply with the orders and her appeal was dismissed by quarter sessions in February, 1959, and by the Queen's Bench Divisional Court in February, 1960. The mother persisted in her refusal to comply with the orders, and the local education authority, on May 9, 1960, took out a summons under the Law Reform (Miscellaneous Provisions) Act, 1949, asking that three of the infants, who were then between 5 and 15 years of age, be made wards of court, and that directions be given as to their education. Pennycuick J. found that the mother was not causing the infants to receive efficient full-time education as required by the Education Act, 1944:—

Held, (1) that the Education Act, 1944, had by necessary implication restricted the inherent jurisdiction of the Sovereign as exercised by the court, to the extent that it could not give any direction at variance with the Act, and that it could not prevent the making of a school attendance order, or, while such an order was in force, direct that a child should receive education otherwise than in accordance with the order.

(2) That the Act of 1944, by placing outside the jurisdiction of the court the decision whether a child should receive education in accordance with a school attendance order, had equally put it outside the proper scope of the jurisdiction of the court to enforce such an order, so that the local education authority must rely on the sanctions contained in the Act. Accordingly, the infants would cease to be wards of court and no directions would be made as to their education.

In re M. (*An Infant*) [1961] 2 W.L.R. 350; [1961] 1 All E.R. 788, C.A. applied.

ADJOURNED SUMMONS.

The mother of four infants between 5 and 15 years of age was convicted and fined by justices in November, 1957, and again in November, 1958, for refusing to comply with school attendance

"their intention to do so, apply to "the Minister for a direction deter- "mining what school is to be named "in the order. . . . (5) If any person "upon whom a school attendance "order is served fails to comply with "the requirements of the order, he "shall be guilty of an offence against "this section unless he proves that "he is causing the child to receive "efficient full-time education suitable "to his age, ability, and aptitude "otherwise than at school."

S. 40: "(1) Subject to the pro- "visions of this section, any person "guilty of an offence against section "37 or section 39 of this Act shall "be liable on summary conviction, in "the case of a first offence against "that section to a fine not exceeding "one pound, in the case of a second "offence against that section to a "fine not exceeding five pounds, and "in the case of a third or subsequent "offence against that section to a "fine not exceeding ten pounds or to "imprisonment for a term not "exceeding one month or to both "such fine and such imprisonment. "(2) It shall be the duty of the local "education authority to institute pro- "ceedings for such offences as afore- "said wherever, in their opinion, the "institution of such proceedings is "necessary for the purpose of en- "forcing the duty imposed upon a "parent by this Act to cause his "child to receive efficient full-time "education suitable to his age, "ability, and aptitude, and no such "proceedings shall be instituted "except by or on behalf of a local "education authority."

S. 76: "In the exercise and per- "formance of all powers and duties "conferred and imposed on them by "this Act the Minister and local edu- "cation authorities shall have regard "to the general principle that, so far "as is compatible with the provision "of efficient instruction and training "and the avoidance of unreasonable "public expenditure, pupils are to be "educated in accordance with the "wishes of their parents."

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orders served on her by the local education authority under section 37 of the Education Act, 1944. Her appeals against the convictions were dismissed but she persisted in her refusal to comply with the orders. On May 9, 1960, the local education authority took out a summons under the Law Reform (Miscellaneous Provisions) Act, 1949, to which the father and the mother were respondents, asking that three of the infants who were then under 15 years of age be made wards of court, and that directions be given as to their education.

The facts are more fully stated in the judgment of Pennycuick J.

The summons was heard in chambers and adjourned into open court for judgment.

A. C. Sparrow for the local education authority.
W. A. Bagnall for the mother.
T. A. C. Burgess for the father.

Cur. adv. vult.

Pennycuick J. This is a summons taken out by the Norfolk County Council in the matter of three infants—Robin, Felicity and Wendy. The respondents are the mother and father respectively of the infants. The summons asks, first, that the infants may be made wards of the court and, second, that directions may be given as to the education of the infants. The mother and father are at present separated and the mother is living in a country district in Norfolk. Her family consists of seven children, an older son who is now aged 15, the three infants to whom the present summons relates are respectively 14½, 13 and 12 years of age, and three younger children.

The mother has a rooted objection of principle to sending her children to school, and has waged a prolonged defensive battle on this issue against the council as the local education authority. The council has made a succession of school attendance orders under the Education Act, 1944, resulting in a series of prosecutions before the justices. In 1954 the first prosecution was dismissed because the council had not complied in certain respects with the requirements of the Act. On November 15, 1957, the justices convicted the mother and imposed a fine of 10s. in respect of each child, the children then including the eldest son who is now past school age. The mother appealed to quarter sessions who, on May 16, 1958, dismissed her appeal

On November 28, 1958, the justices again convicted the mother and imposed a fine of £1 in respect of each child. The mother appealed to quarter sessions, which dismissed her appeal on February 10, 1959, and in turn to the Queen's Bench Divisional Court, which dismissed her appeal on February 5, 1960.

The mother persists in her refusal to comply with the school attendance orders. These orders, as they now stand amended, require the attendance of the children at the South Dereham secondary modern school.

The council now seeks to enforce school attendance by means of these proceedings. Evidence has been filed by F. J. Earl, the administrative assistant to the education committee of the council, and the mother and father. All three have been cross-examined before me on their affidavits, and I come without hesitation to the conclusion, so far as I am concerned to do so, that the mother is not causing the children to receive efficient full-time education as required by the Education Act, 1944.

I turn now to the relevant provisions of the Act. [His Lordship read section 7, the definition of "compulsory school age" in section 35, sections 36, 37 (1) (2) (3), observed that section 37 (4) provided in effect that parents might make application for substitution of another school for that named in the order, section 37 (5), stated that section 39 was concerned with the duty of parents to secure regular attendance of a registered pupil, sections 40 (1) (2) and 76, and continued:] The effect of the provisions which I have just read is that the parent is bound to cause the child to receive efficient full-time education either by regular attendance at school or otherwise. If the local authority is not satisfied that the parent is performing this duty, the local authority, subject to certain preliminary procedure, and provided that in its opinion it is expedient that the child should attend school, must serve on the parent a school attendance order requiring the parent to cause the child to become a registered pupil at the school named in the order, as to which the parent has a limited power of selection. If the parent fails to comply with the requirements of the order, and is unable to prove that he is causing the child to receive efficient full-time education otherwise than at school, he is guilty of an offence and, on summary conviction for this offence, he is liable to fines of a specified progressive amount, and on the third offence, also to imprisonment.

It appears to me clear that the Education Act, 1944, has, by necessary implication, restricted the inherent jurisdiction of the Sovereign as exercised by this court, to the extent that the court could not give any direction at variance with the Act. In particular, the court could not prevent the making of a school attendance order; nor, so long as a school attendance order is in force, could the court direct that the child shall receive education otherwise than in accordance with the order—that is to say, by becoming a registered pupil and attending regularly at the school named in the order.

Mr. Sparrow, for the council, accepts, and indeed, asserts this position; but he contends that, subject only to the limitations imposed by the Act, the inherent jurisdiction of this court remains unimpaired, and that in exercise of this jurisdiction the court can give a direction, the effect of which will be to enforce the school attendance orders made by the council. That is, indeed, the whole purpose of the present application.

In my judgment, the Act, by placing outside the jurisdiction

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of the court the decision as to whether or not a child shall receive education in accordance with a school attendance order, has equally put it outside the proper scope of the jurisdiction of the court to enforce such an order. The court in the exercise of its inherent jurisdiction, can only properly give a direction after it has decided that the act directed to be done is for the benefit of the infant concerned: see, in this connection, the principle laid down by section 1 of the Guardianship of Infants Act, 1925.

It seems to me necessarily to follow that the court cannot properly give a direction where the decision whether the act is to be done rests with some other authority, so that the court is not itself able to decide whether or not the act is for the benefit of the infant.

Much assistance on this point is to be derived from the recent case of *In re M. (An Infant)*,[1] where a local authority had vested in itself under section 2 of the Children Act, 1948, the rights and powers of the infant's parent. The infant's foster-mother issued a summons making the infant a ward of court, and the local authority applied for an order de-warding the infant. Cross J. acceded to the application of the local authority,[2] and his decision was upheld by the Court of Appeal.

Cross J. gave his reasons, beginning with the sentence[3]: "I agree; but, viewing the matter for the moment as free from "authority, I think that the provisions of this Act to which I have "referred lead inevitably to the conclusion that the prerogative "has been restricted," and ending with the sentence: "So long, "therefore, as the local authority is acting within the powers "given to it by the Act, this court, as I see it, has no right, let "alone any duty, to inquire into the wisdom of their decisions."

Lord Evershed M.R., with whom the other members of the Court of Appeal agreed, said[4]: "On those premises, that is to "say in the absence of any challenge as to the propriety of what "the local authority or its officers have done, as distinct from "their wisdom, I feel compelled by the clear indication of the "language to which I have alluded in the statute, to conclude "that this matter of judging the present best interests of the "child in the circumstances of this case has been placed by "Parliament in the exclusive jurisdiction of the local authority. "Mr. May conceded that on the premises as I have stated them "the onus would be heavy upon him to persuade the Chancery "courts to override or disregard the conclusions of the local "authority. But that argument and that concession appear to "me to involve Mr. May in something of a dilemma. For the "purposes of deciding the immediate questions which now have "been raised, either the prerogative jurisdiction survives and "exists, or it does not; and if it does survive and exist, then the

[1] [1961] 2 W.L.R. 350; [1961] 1 All E.R. 788, C.A.

[2] [1960] 3 W.L.R. 1045; [1961] 1 All E.R. 201.

[3] [1960] 3 W.L.R. 1045, 1050.

[4] [1961] 2 W.L.R. 350, 357.

"decision as to what now is in the best interests of the child "must rest not with the local authority but with the court. "There seems to me to be no escape from that result."

Towards the end of his judgment the Master of the Rolls said[5]: "It may perhaps be useful for me to add by way of "summary the following: (1) The prerogative right of the Queen, "as parens patriae in relation to infants within the realm, is not "for all purposes ousted or abrogated as the result of the exercise "of the duties and powers by local authorities under the "Children Act, 1948: in particular the power to make an infant "a ward of court by invocation of section 9 of the [Law "Reform (Miscellaneous Provisions) Act, 1949] is unaffected.

"(2) But even where a child is made a ward of court by virtue "of the Act of 1949, the judge in whom the prerogative power is "vested will, acting on familiar principles, not exercise control "in relation to duties or discretions clearly vested by statute in "the local authority, and may, therefore, and in a case such as "the present normally will, order that the child cease to be a "ward of court. This result will occasion no surprise to those "familiar with wardship proceedings, for in many cases where "infants are made wards of court, the directions of the court are "sought only on particular matters, such, for example, as the "place of education or to control the activities of the infant in "relation to marriage or undesirable associations where a united "parental control has failed; in such cases the court makes no "order as to the custody, care or maintenance, for that remains "in the hands of unimpeachable parents and the court does not "interfere in relation to such matters.

"(3) There remains the right (and duty) of the judge in whom "the prerogative power is vested, to control the activities of a "local authority in cases where the local authority is shown to be "acting in some way in breach or in disregard of its statutory "duties."

Those passages which I have read, although addressed to an entirely different situation under a different Act, appear to me to be directly in point as to the principles to be applied in the present case. Mr. Sparrow, for the council, sought to meet this difficulty in a number of ways.

First, he contended that this court, although precluded by the Education Act, 1944, from making a decision as to whether the children should receive education in accordance with the school attendance orders made under the Act, may yet consider whether such compliance would be for the benefit of the children, and, if satisfied that it is so for the benefit of the children, may enforce the school attendance orders.

I find the greatest difficulty in the conception that this court can, or should, conduct an independent inquiry of this kind into a matter the decision upon which has been entrusted to the local authority; and I think that in any case that contention cannot be

[5] [1961] 2 W.L.R. 350, 360.

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reconciled with the statements which I have just quoted from the judgment in *In re M.*[6]

Secondly, he contended that this court is bound to assume that compliance with the school attendance orders was for the benefit of the children concerned. No doubt the Act was passed in what Parliament conceived to be the interests of children generally; but Parliament legislates for the community as a whole, and I do not think there is anything in the Act or in the general law which entitles the court to assume that its provisions are necessarily for the benefit of every particular child between the ages of five and fifteen.

Thirdly, he contended, with truth, that the Act has by no means wholly excluded the parent from control of his children's education; and he referred to the general provision in section 76, and more particularly, to the limited power contained in section 37. Therefore, he said, the jurisdiction of the court stands unimpaired to a corresponding extent. But that contention does not meet the present point—namely, that the court is being asked to enforce school attendance orders, as to the operation of which the court has no discretion at all.

It may be that these specific contentions do not do justice to the forceful argument of Mr. Sparrow on behalf of the council. In broad terms, he urges that these children are in jeopardy, and that the court ought to come to their rescue. I feel much sympathy with this plea; but the court can only act within its proper jurisdiction, and it seems to me that I am not entitled to stretch that jurisdiction in order to meet the unusual circumstances of the present case. Indeed, it would be a dangerous precedent to do so.

I have been referred to *Attorney-General* v. *Bastow*,[7] and in particular to the statement of Devlin J. to this effect[8]: "However, I think it must be a matter of administrative discretion "whether the enforcement of the law, in the face of someone "who is determined to defy it, is best achieved by going to the "police court in a series of applications of that nature, or by "going to the High Court and asking it to use its powers, which "would amount to the imposition, if necessary, of an indefinite "sentence until such time as the defendant has purged his "contempt."

But there is, I think, a vital difference between an application to enforce a public right, such as was the position in that case, and an application to the inherent jurisdiction of this court to protect the interests of particular infants.

For the reasons given above, I have come to the conclusion that enforcement of these school attendance orders lies outside the proper function of this court, and that the council must rely upon such sanctions as are contained in the Act itself.

[6] [1961] 2 W.L.R. 350.

[7] [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

[8] [1957] 1 Q.B. 514, 522.

I should like to make it clear that I am not intending to express the slightest agreement with the mother's views as to the education of children in general, or of her own children in particular. Equally, I am not intending to express the slightest disagreement with the views expressed by the Norfolk justices or the Queen's Bench Divisional Court. On the contrary, as I have already said, I, too, have come to the clear conclusion that the mother is not causing her children to receive efficient, full-time education as required by the Act.

I must refer, in conclusion, to one further contention advanced by Mr. Bagnall for the mother, and by Mr. Burgess for the father—namely, that the present application is ultra vires the council. I do not think that contention takes me any further. If I am right in my view that the court cannot properly make an order such as that sought by the council, then obviously the application fails on that ground. If, on the other hand, the court could properly make the order, then it seems to me that the council would have power to make the application as being incidental to, or consequential upon, the exercise of its powers under the Act.

I propose, therefore, to direct that the children cease to be wards of court and not to make any direction as to their education.

Direction accordingly.
Summons dismissed with costs, father's costs to be separately taxed for purpose of Legal Aid and Advice Act, 1949.
Leave to appeal if required.

Solicitors: *Sharpe, Pritchard & Co. for F. P. Boyce, Norwich; Piesse & Sons for Russell, Steward, Stevens & Hipwell; Field, Roscoe & Co. for Sadler, Lemmon & Gethin.*

M. G. T.

[HOUSE OF LORDS.]

TSAKIROGLOU & CO. LTD. . . . . APPELLANTS;
AND
NOBLEE THORL G.M.B.H. . . . . RESPONDENTS.

H. L. (E.)*
1961
Feb. 15, 16, 20, 21; *Mar.* 28.

Sale of Goods—C.i.f.—Route—"Usual and customary"—Customary route blocked—Availability of alternative route—Whether alternative route must be used.
Contract—Frustration—C.i.f. contract—Usual and customary route via Suez blocked—Whether performance "a thing radically different "from that which was undertaken by the contract"—Whether

* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD HODSON and LORD GUEST.

H. L. (E.)

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Tsakiroglou & Co. Ltd. v. Noblee Thorl G.m.b.H.

parties "must have made" contract on basis of continued availability of canal.

Contract—Implied term—Reasonable performance—C.i.f. contract—Usual route—Time when route usual.

"Shipment."

Contract — Frustration — Fact or law — Finding by jury or arbitrator regarding commercial or fundamental difference.

Fact or Law.

Arbitration—Special case—Findings of fact—Primary facts—Whether court bound by findings of fact.

By a written contract dated October 4, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Hamburg during November/December, 1956. On November 2, the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The alternative route round the Cape of Good Hope was more than twice as long, and freightage by this route far more costly. The sellers failed to ship the goods, and in arbitration proceedings the umpire held that the sellers were in default and the appeal board upheld the umpire's award.

The appeal board found that "the performance of the contract "by shipping the goods on a vessel routed via the Cape of Good "Hope was not commercially or fundamentally different from its "being performed by shipping the goods on a vessel routed via the "Suez Canal":—

Held, (1) that a term that shipment should be (a) via Suez or (b) by the usual and customary route at the date of the contract, should not be implied into the contract.

In re L. Sutro & Co. and Heilbut, Eymons & Co. [1917] 2 K.B. 348; 33 T.L.R. 359, C.A. considered.

(2) That since the Suez Canal was unusable during the relevant period the sellers' duty was to ship the goods to the required port by a reasonable and practicable route if available.

(3) That although the route via the Cape involved a change in the method of performance of the contract, it was not such a fundamental change from that undertaken under the contract as to entitle the sellers to say that the contract was frustrated.

Carapanayoti & Co. Ltd. v. *E. T. Green Ltd.* [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115 overruled.

Per Viscount Simonds. It does not automatically follow that, because one term of a contract becomes impossible of performance, the whole contract is thereby abrogated. Nor does it follow, because as a matter of construction a term cannot be implied, that the contract may not be frustrated by events (post, p. 639).

(4) That the shipment was not prevented by war or force majeure within the meaning of the contract; placing the goods on board a vessel for the right destination was not prevented.

Observations of Bailhache J. in *In re Comptoir Commercial Anversois and Power, Son & Co.* [1920] 1 K.B. 868, 878, C.A. applied.

Per curiam. The finding of the appeal board that shipment via the Cape was not commercially or fundamentally different from shipment via the Canal was not binding on the court for it involved a question of law.

Decision of the Court of Appeal [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A. affirmed.

Appeal from the Court of Appeal (Sellers, Ormerod and Harman L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 28, 1960, in favour of the respondents, Noblee Thorl G.m.b.H., affirming the order of Diplock J., dated December 9, 1958, whereby it was adjudged that an award in a special case stated by the Court of Appeal of the Incorporated Oil Seed Association dated April 21, 1958, was correct. By that award the board of appeal upheld an award of an umpire dated February 20, 1957, awarding the respondents £5,625 against the appellants, Tsakiroglou & Co. Ltd., as damages for breach of contract.

The appeal arose out of a dispute between the appellants as sellers and the respondents as buyers under a written contract dated October 4, 1956, incorporating the terms of contract form No. 38 of the Incorporated Oil Seed Association, whereby the appellants agreed to sell to the respondents 300 tons of Sudanese groundnuts at £50 per 1,000 kilos including bags c.i.f. Hamburg, shipment during November/December, 1956. No goods were shipped by the appellants in fulfilment of this contract, and in consequence the respondents claimed damages for breach of contract. The appellants denied that they had committed any breach of contract. The principal question raised by this appeal was whether the appellants were relieved of their obligation to ship such goods during November/December, 1956, by reason of the fact that the Suez Canal was blocked on November 2, 1956, and remained closed to shipping until April 9, 1957. Because of the closure of the Suez Canal it was impossible on and at all material times after November 2, 1956, to ship such goods to Hamburg on board a vessel proceeding via the Suez Canal. The appellants contended, inter alia, that by virtue of this event the contract became impossible of performance, or alternatively, that the happening of the event destroyed a basic but tacit assumption of the contract (namely, that the Suez Canal would at all material times remain open for shipping), which thereby became discharged through the operation of the doctrine of frustration. The umpire to whom the dispute was originally referred, the board of appeal, Diplock J. and the Court of Appeal, all rejected this contention and held the appellants liable to the respondents.

By a contract in writing dated Hamburg, October 4, 1956, between Tsakiroglou & Co. Ltd. of Khartoum as sellers, and the respondents, Noblee Thorl G.m.b.H. of Hamburg/Harburg as buyers, through agents, the sellers agreed to sell and the buyers to buy about 300 tons of Sudanese groundnuts in the shell basis 3 per cent. admixture new crop 1956/57 at £50 per 1,000 kilos including bags c.i.f. Hamburg. Shipment November/December, 1956, with payment cash against documents on first presentation for 95 per cent. of the amount of provisional invoice, balance to be paid after the analysis on final invoice. The contract form was to be the Incorporated Oil Seed Association Contract No. 38 (hereinafter called "I.O.S.A. Contract No. 38") with arbitration in London, and that contract was signed by the Hamburg agents. Clause 1 of I.O.S.A. Contract No. 38 provided for "Shipment

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"from a West African port . . . by steamer or steamers (tankers "excluded) direct or indirect with or without transhipment." It was found as a fact in the case stated that both parties contracted on the basis that the goods would be shipped from Port Sudan. Clause 6 of the contract provided: "In case of prohibition of "import or export, blockade or war, epidemic or strike, and in "all cases of force majeure preventing the shipment within the "time fixed, or the delivery, the period allowed for shipment or "delivery shall be extended by not exceeding two months. After "that, if the case of force majeure be still operating, the contract "shall be cancelled."

On October 29, 1956, the Israelis invaded Egypt; on November 1, Britain and France commenced military operations, and on November 2 the Suez Canal was blocked to shipping and remained blocked until April 9, 1957.

No goods were shipped under the contract, the sellers claiming that they were prevented from doing so by events which had occurred in the Middle East.

When the contract of October 4, 1956, was entered into the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. After the closing of the Canal the shortest and a practicable route to Hamburg was via the Cape of Good Hope. The sea route via Suez to Hamburg was approximately 4,386 miles, and via the Cape 11,137 miles.

From November 10, 1956, a 25 per cent. freight surcharge was placed on goods shipped on vessels proceeding via the Cape of Good Hope and this was increased to 100 per cent. on December 13, 1956.

The sellers' claim that the contract was at an end because of the closure of the Suez Canal was not accepted by the buyers.

In arbitration proceedings, the umpire, by an award dated February 20, 1957, awarded that the sellers were in default and should pay to the buyers as damages the sum of £5,625 together with £79 15s. cost of the award. The sellers were dissatisfied with the award, and a board of appeal appointed to hear the appeal on January 28, 1958, dismissed the appeal and upheld the umpire's award. The board of appeal's award was in these terms:

"So far as it is a question of fact we find and as far as it is "a question of law we hold:

"(i) There were hostilities but not war in Egypt at the "material time.

"(ii) Neither war nor force majeure prevented shipment of the "contract goods during the contract period if the word 'ship-"'ment' means placing the goods on board a vessel destined for "the Port of Hamburg.

"(iii) If the word 'shipment' includes not only the placing of "the contract goods on board a vessel but also their transportation "to the contract destination then shipment via the Suez Canal

"was prevented during the contract period of shipment by reason "of force majeure but shipment via the Cape was not so "prevented.

"(iv) It was not an implied term of the contract that ship- "ment or transportation should be made via the Suez Canal.

"(v) The contract was not frustrated by the closure of the "Suez Canal.

"(vi) The performance of the contract by shipping the goods "on a vessel routed via the Cape of Good Hope was not com- "mercially or fundamentally different from its being performed "by shipping the goods on a vessel routed via the Suez Canal."

Eustace Roskill Q.C. and *R. A. MacCrindle* for the appellant.
A. A. Mocatta Q.C. and *J. F. Donaldson* for the respondent.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Commissioners of His Majesty's Works and Public Buildings* [1]; *Postlethwaite* v. *Freeland* [2]; *The Aello* [3]; *Frenkel* v. *MacAndrews & Co.* [4]; *Bank Line Ltd.* v. *Arthur Capel & Co.* [5]; *British and Benningtons Ltd.* v. *North Western Cachar Tea Co.* [6]; *Universal Cargo Carriers Corporation* v. *Citati* [7]; *Lewis* v. *Louis Dreyfus & Co.* [8]; *Brauer & Co. (Great Britain) Ltd.* v. *Clark (James) (Brush Materials) Ltd.* [9]

Their Lordships took time for consideration.

March 28. VISCOUNT SIMONDS. My Lords, on April 21, 1958, the board of appeal of the Incorporated Oil Seed Association made an award by which they upheld the award of an umpire in an arbitration between the appellants and the respondents awarding the latter the sum of £5,625 against the former as damages for breach of contract. Upon case stated Diplock J. upheld the award. The decision was affirmed by the Court of Appeal. The matter now comes before this House. Not for the first time I venture to point out that the first two stages in proceedings which will ultimately be resolved in the highest court could conveniently be omitted.

The contract, for breach of which damages were awarded to the respondents, was made on October 4, 1956. It incorporated the terms of contract form No. 38 of the Incorporated Oil Seed Association and by it the appellants agreed to sell to the respondents 300 tons of Sudanese groundnuts at £50 per 1,000 kilos

[1] [1949] 2 K.B. 632; [1950] 1 All E.R. 208, C.A.
[2] (1880) 5 App.Cas. 599, H.L.
[3] [1961] A.C. 135; [1960] 3 W.L.R. 145, H.L.
[4] [1929] A.C. 545; 45 T.L.R. 311, H.L.
[5] [1919] A.C. 435; 35 T.L.R. 150, H.L.
[6] [1923] A.C. 48, H.L.
[7] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.
[8] (1926) 31 Com.Cas. 239, C.A.
[9] [1952] 2 T.L.R. 349; [1952] 2 All E.R. 497; [1952] 2 Ll.L.Rep. 147, C.A.

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including bags c.i.f. Hamburg, shipment during November/December, 1956. No goods were shipped by the appellants in fulfilment of this contract in the circumstances stated in the special case which I summarise.

All groundnuts exported from the Sudan to Europe are shipped from Port Sudan, which is the only suitable port. At the date of the contract (October 4, 1956), the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. Both parties then contemplated that shipment would be made by that route. It would have been unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape of Good Hope. Before the closure of the Suez Canal the appellants acquired 300 tons of Sudanese groundnuts in shell which were held to their order in warehouses at Port Sudan as from November 1, 1956. They also, before the closure, booked space for 300 tons of nuts in one or other of four vessels scheduled to call at Port Sudan between November 10 and December 26, 1956. The shipping company cancelled these bookings on November 4, 1956. British and French armed forces began military operations against Egypt on October 29, 1956. The Suez Canal was blocked on November 2 and remained closed for effective purposes until at least April 9, 1957. But the appellants could have transported the goods from Port Sudan to Hamburg via the Cape of Good Hope during November and December, 1956.

The distance from Port Sudan to Hamburg via the Suez Canal is about 4,386 miles, and via the Cape about 11,137 miles. The freight ruling at the time of the contract for the shipment of groundnuts from Port Sudan to Hamburg via the Canal was about £7 10s. per ton. After the closure of the Canal the Port Sudan United Kingdom Conference imposed the following surcharges for goods supplied on vessels proceeding via the Cape, namely, as from November 10, 1956, 25 per cent., and as from December 13, 1956, 100 per cent. The market price of Sudanese nuts in shell shipped from Port Sudan c.i.f. Hamburg was £68 15s. per ton between January 1 and 13, 1957. As has been already said, the appellants did not ship any nuts. They claimed that they were entitled to consider the contract as cancelled, and to this view they adhered.

The contract provided by clause 6 that "In case of prohibition "of import or export, blockade or war, epidemic or strike, and in "all cases of force majeure preventing the shipment within the "time fixed, or the delivery, the period allowed for shipment or "delivery shall be extended by not exceeding two months. After "that, if the case of force majeure be still operating, the contract "shall be cancelled."

The award was in these terms: "So far as it is a question of "fact we find and as far as it is a question of law we hold:

"(i) There were hostilities but not war in Egypt at the material "time:

"(ii) Neither war nor force majeure prevented shipment of the "contract goods during the contract period if the word 'shipment' "means placing the goods on board a vessel destined for the Port "of Hamburg:

"(iii) If the word 'shipment' includes not only the placing "of the contract goods on board a vessel but also their transpor-"tation to the contract destination then shipment via the Suez "Canal was prevented during the contract period of shipment by "reason of force majeure but shipment via the Cape was not so "prevented:

"(iv) It was not an implied term of the contract that shipment "or transportation should be made via the Suez Canal:

"(v) The contract was not frustrated by the closure of the "Suez Canal:

"(vi) the performance of the contract by shipping the goods "on a vessel routed via the Cape of Good Hope was not com-"mercially or fundamentally different from its being performed "by shipping the goods on a vessel routed via the Suez Canal."

The first three of these findings relate to the claim of the appellants that the exceptions clause (clause 6 of the contract) absolved them from performance of the contract. I will deal with this at once and shortly.

Similar words to those in clause 6 fall to be construed in *In re Comptoir Commercial Anversois and Power, Son & Co.*[1] Bailhache J. said: "Now, if I give to the word 'shipment' the widest "meaning of which it is capable, it cannot mean more than "bringing the goods to the shipping port and then loading them "on a ship prepared to carry them to their contractual destina-"tion." His judgment on this point was affirmed in the Court of Appeal.[2] It has never been questioned and I see no reason for questioning it. In *Fairclough, Dodd & Jones Ltd.* v. *J. H. Vantol Ltd.*[3] the decision turned on the very particular words of the contract and is not in conflict with the earlier case.

I come then to the main issue and, as usual, I find two questions interlocked: (1) What does the contract mean? In other words, is there an implied term that the goods shall be carried by a particular route? (2) Is the contract frustrated?

It is convenient to examine the first question first, though the answer may be inconclusive. For it appears to me that it does not automatically follow that, because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated. Nor does it follow, because as a matter of construction a term cannot be implied, that the contract may not be frustrated by events. In the instant case, for example, the impossibility of the route via Suez, if that were assumed to be

[1] [1920] 1 K.B. 868, 878, C.A.
[2] [1920] 1 K.B. 868, 885, 892, 898; 36 T.L.R. 101, C.A.
[3] [1957] 1 W.L.R. 136; [1956] 3 All E.R. 921, H.L.

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the implied contractual obligation, would not necessarily spell the frustration of the contract.

It is put in the forefront of the appellants' case that the contract was a contract for the shipment of goods via Suez. This contention can only prevail if a term is implied, for the contract does not say so. To say that that is nevertheless its meaning is to say in other words that the term must be implied. For this I see no ground. It has been rejected by the learned trial judge and each of the members of the Court of Appeal; and in two other cases, *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[4] and *Gaon (Albert D.) & Co.* v. *Société Interprofessionelle des Oléagineux Fluides Alimentaires*,[5] where the same question arose, it was rejected by McNair J. and Ashworth J. respectively. A variant of this contention was that there should be read into the contract by implication the words "by the usual and customary route" and that, as the only usual and customary route at the date of the contract was via Suez, the contractual obligation was to carry the goods via Suez. Though this contention has been viewed somewhat differently, I see as little ground for the implication. In this I agree with Harman L.J.,[6] for it seems to me that there are precisely the same grounds for rejecting the one as the other. Both of them assume that sellers and buyers alike intended and would have agreed that, if the route via Suez became impossible, the goods should not be shipped at all. Inasmuch as the buyers presumably wanted the goods and might well have resold them, the assumption appears wholly unjustified. Freight charges may go up or down. If the parties do not specifically protect themselves against change, the loss must lie where it falls.

For the general proposition that in a c.i.f. contract the obligation, in the absence of express terms, is to follow the usual or customary route there is a significant absence of authority. Some reliance was placed on *In re L. Sutro & Co. and Heilbut, Symons & Co.*[7] But the facts and the question arising upon them were widely different from those in the present case. The decision was that since the contract clearly contemplated carriage by sea from the loading port to the ultimate port of discharge it could not be performed by carriage partly by sea and partly by rail, though the arbitrators had found that that method of transport had become a usage in the trade. It is possible that, if the decision was reviewed in this House, it might not stand: it is unnecessary now to determine that question. For as I have said, the decisive fact there was that the actual route was different in kind from the contractual route. Apart from this authority the appellants relied on a passage in Kennedy on C.I.F. Contracts, 1st ed., p. 39: "In "the absence of express terms in the contract the customary or "usual route must be followed." I cannot accept this general

[4] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.
[5] [1960] 2 Q.B. 318, 341; [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693.
[6] [1960] 2 Q.B. 318, 370.
[7] [1917] 2 K.B. 348; 33 T.L.R. 359, C.A.

proposition without some qualification. In particular, since it is, in any case, clear that it is not the date of the contract but the time of performance that determines what is customary, the proposition must be qualified by adding to it some such words as "unless at the time of performance there is no customary or "usual route." If those words are implied, the question arises: "What then?" The answer must depend on the circumstances of each case. This leads me directly to section 32 (2) of the Sale of Goods Act, 1893, which provides that "Unless otherwise autho- "rised by the buyer, the seller must make such contract with the "carrier on behalf of the buyer as may be reasonable having re- "gard to the nature of the goods and the other circumstances of "the case." If there is no customary route, that route must be chosen which is reasonable. If there is only one route, that must be taken if it is practicable: see *Evans, Sons & Co.* v. *Cunard Steamship Co. Ltd.*,[8] *per* Wills .J

I turn now to what was the main argument for the appellants: that the contract was frustrated by the closure of the Canal from November 2, 1956, till April 1957. Were it not for the decision of McNair J. in *Green's* case[9] I should not have thought this contention arguable and I must say with the greatest respect to that learned judge that I cannot think he has given full weight to the decisions old and new of this House upon the doctrine of frustration. He correctly held upon the authority of *Reardon Smith Line Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[10] that "where a contract, expressly "or by necessary implication, provides that performance, or a "particular part of the performance, is to be carried out in "a customary manner, the performance must be carried out in a "manner which is customary at the time when the performance "is called for."[11] But he concluded[12] that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made and that to impose upon the sellers the obligation to ship by an emergency route via the Cape would be to impose upon them a fundamentally different obligation which neither party could at the time when the contract was performed have dreamed that the sellers would be required to perform. Your Lordships will observe how similar this line of argument is to that which supports the implication of a term that the route should be via Suez and no other. I can see no justification for it. We are concerned with a c.i.f. contract for the sale of goods, not a contract of affreightment, though part of the sellers' obligation will be to procure a contract of affreightment. There is no evidence that the buyers attached any importance to the route. They were content that the nuts should be shipped at any date in November or December. There

[8] (1902) 18 T.L.R. 374, 375.
[9] [1959] 1 Q.B. 131.
[10] [1939] A.C. 562; 55 T.L.R. 929; [1939] 3 All E.R. 444, H.L.
[11] [1959] 1 Q.B. 131, 145.
[12] [1959] 1 Q.B. 131, 149.

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was no evidence, and I suppose could not be, that the nuts would deteriorate as the result of a longer voyage and a double crossing of the Equator, nor any evidence that the market was seasonable. In a word, there was no evidence that the buyers cared by what route or, within reasonable limits, when the nuts arrived. What, then, of the sellers? I recall the well-known passage in the speech of Lord Atkinson in *Johnson* v. *Taylor Bros. & Co. Ltd.*[13] where he states the obligations of the vendor of goods under a c.i.f. contract, and ask which of these obligations is (to use McNair J.'s word) "fundamentally" altered by a change of route. Clearly the contract of affreightment will be different and so may be the terms of insurance. In both these respects the sellers may be put to greater cost: their profit may be reduced or even disappear. But it hardly needs reasserting that an increase of expense is not a ground of frustration: see *Larrinaga & Co. Ltd.* v. *Société Franco-Américaine des Phosphates de Medulla, Paris.*[14]

Nothing else remains to justify the view that the nature of the contract was "fundamentally" altered. That is the word used by Viscount Simon in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[15] and by my noble and learned friend Lord Reid in *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[16] In the latter case my noble and learned friend Lord Radcliffe [17] used the expression "radically different" and I think that the two expressions mean the same thing, as perhaps do other adverbs which have been used in this context. Whatever expression is used, I venture to say what I have said myself before and others more authoritatively have said before me: that the doctrine of frustration must be applied within very narrow limits. In my opinion this case falls far short of satisfying the necessary conditions. Reluctant as I am to differ from a judge so experienced in commercial law as McNair J., I am glad to find that my view is shared by Ashworth J. and all the members of the Court of Appeal.

Upon this part of the case I have not thought it necessary to deal with Pearson J.'s decision in *Société Franco Tunisienne D'Armement* v. *Sidermar S.P.A.*[18] There the question was whether a charterparty was frustrated by the blocking of the Suez Canal. The learned judge held that it was, but was at pains to point out that the position was very different in a contract for the sale of goods. Upon that point I agree with him and need not discuss the matter further.

I come finally to a question which has given me some trouble.

[13] [1920] A.C. 144, 155; 36 T.L.R. 62, H.L.

[14] (1922) 38 T.L.R. 739; 28 Com. Cas. 1, C.A.; (1923) 39 T.L.R. 316; 29 Com.Cas. 1, H.L.

[15] [1952] A.C. 166, 185; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617, H.L.

[16] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

[17] [1956] A.C. 696, 729.

[18] [1960] 3 W.L.R. 701; [1960] 2 All E.R. 529.

I refer to the sixth finding in the special case which I have already fully set out. It will be remembered that the vital words were "not commercially or fundamentally different." Diplock J., regarding this as a finding of fact, thought that the case was thereby concluded. I cannot regard this as a correct decision. It is a question of law whether a contract has been frustrated and it is commonly said that frustration occurs when conditions arise which are fundamentally different from those contemplated by the parties. But it does not follow from the use by the arbitrator of the word "fundamentally" in describing the difference between the actual and the contemplated conditions that the court is precluded from forming its own judgment whether or not a contract has been frustrated. It is of great value to the court to know that lay arbitrators with special knowledge do or do not regard the new circumstances as so different from those contemplated that they think "fundamental" an appropriate word to use. But the value is evidential only. It has not the sanctity of a finding of fact. I do not say that an arbitrator should be debarred from the use of the word "fundamental" or "radical" or any other word which he thinks apt to give emphasis to his view. But if he does so he must not be taken indirectly to determine the question of law which the court must decide.

In my opinion the appeal should be dismissed with costs.

LORD REID. My Lords, the appellants agreed to sell to the respondents 300 tons of Sudan groundnuts at £50 per ton c.i.f. Hamburg. Admittedly, the groundnuts had to be shipped from Port Sudan. The usual and normal route at the date of the contract was via Suez Canal. Shipment was to be November/December, 1956, but on November 2, 1956, the Canal was closed to traffic and it was not reopened until the following April.

It is stated in the special case that "the sellers could have "transported the goods from Port Sudan to Hamburg via the "Cape during November or December 1956." The freight via Suez would have been about £7 10s. per ton. The freight via the Cape was increased by stages. It was £15 per ton after December 13. I shall assume in favour of the appellants that the proper comparison is between £7 10s. and £15 per ton.

The appellants refused to ship the goods via the Cape and on February 9 the respondents gave notice of their intention to buy in against the appellants. The question now is whether by reason of the closing of the Suez route the contract had been ended by frustration.

The appellants' first argument was that it was an implied term of the contract that shipment should be via Suez. It is found in the case that both parties contemplated that shipment would be by that route but I find nothing in the contract or in the case to indicate that they intended to make

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this a term of the contract or that any such term should be implied: they left the matter to the ordinary rules of law.

Admittedly the ordinary rule is that a shipper must ship by the usual and customary route, or, if there is no such route, then by a practicable and reasonable route. But the appellants' next contention was that this means the usual and customary route at the date of the contract, while the respondents maintain that the rule refers to the time of performance. There appears to be no decided case about this and perhaps that is not surprising because the point cannot often arise. Apart from the opinion of McNair J. in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[19] and of the Court of Appeal in this case which are against the appellants, there are a few expressions of opinion on this matter but I shall not examine them as the precise point may not have been in the minds of their authors, and I am doing no injustice to the appellants because on the whole these opinions favour the respondents' contention. Regarding the question as an open one I would ask which is the more reasonable interpretation of the rule.

If the appellants are right, the question whether the contract is ended does not depend on the extent to which the parties or their rights and obligations are affected by the substitution of the new route for the old. If the new route made necessary by the closing of the old is substantially different the contract would be at an end however slight the effect of the change might be on the parties. That appears to me to be quite unreasonable: in effect it means writing the old route into the contract although the parties have chosen not to say anything about the matter. On the other hand, if the rule is to ascertain the route at the time of performance, then the question whether the sellers are still bound to ship the goods by the new route does depend on the circumstances as they affect them and the buyers: whether or not they are such as to infer frustration of the contract. That appears to me much more just and reasonable and in my opinion that should be held to be the proper interpretation of the rule.

I turn then to consider the position after the canal was closed, and to compare the rights and obligations of the parties thereafter, if the contract still bound them, with what their rights and obligations would have been if the canal had remained open. As regards the sellers, the appellants, the only difference to which I find reference in the case—and indeed the only difference suggested in argument—was that they would have had to pay £15 per ton freight instead of £7 10s. They had no concern with the nature of the voyage. In other circumstances that might have affected the buyers, and it is necessary to consider the position of both parties because frustration operates without being invoked by either party and, if the market price of groundnuts had fallen instead of rising, it might have been

[19] [1959] 1 Q.B. 131.

the buyers who alleged frustration. There might be cases where damage to the goods was a likely result of the longer voyage which twice crossed the Equator, or perhaps the buyer could be prejudiced by the fact that the normal duration of the voyage via Suez was about three weeks whereas the normal duration via the Cape was about seven weeks. But there is no suggestion in the case that the longer voyage could damage the groundnuts or that the delay could have caused loss to these buyers of which they could complain. Counsel for the appellants rightly did not argue that this increase in the freight payable by the appellants was sufficient to frustrate the contract and I need not therefore consider what the result might be if the increase had reached an astronomical figure. The route by the Cape was certainly practicable. There could be, on the findings in the case, no objection to it by the buyers and the only objection to it from the point of view of the sellers was that it cost them more And it was not excluded by the contract. Where, then, is there any basis for frustration?

It appears to me that the only possible way of reaching a conclusion that this contract was frustrated would be to concentrate on the altered nature of the voyage. I have no means of judging whether, looking at the matter from the point of view of a ship whose route from Port Sudan was altered from via Suez to via the Cape, the difference would be so radical as to involve frustration and I express no opinion about that. As I understood the argument it was based on the assumption that the voyage was the manner of performing the sellers' obligations and that therefore its nature was material. I do not think so. What the sellers had to do was simply to find a ship proceeding by what was a practicable and now a reasonable route—if perhaps not yet a usual route—to pay the freight and obtain a proper bill of lading, and to furnish the necessary documents to the buyers. That was their manner of performing their obligations, and for the reasons which I have given I think that such changes in these matters as were made necessary fell far short of justifying a finding of frustration. I agree that the appellants cannot rely on the provisions of clause 6 of the contract regarding prevention of shipment. I therefore agree that this appeal should be dismissed.

I should, perhaps, add a few words about the finding in the case that performance by shipping via the Cape of Good Hope was "not commercially or fundamentally different" from performance by shipping via Suez. This cannot be intended to mean that it was neither different commercially nor different fundamentally. Plainly there is a commercal difference between paying £7 10s. and paying £15 per ton freight. It must mean that performance was not fundamentally different in a commercial-sense. But all commercial contracts ought to be interpreted in light of commercial considerations. I cannot imagine

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a commercial case where it would be proper to hold that performance is fundamentally different in a legal though not in a commercial sense. Whichever way one takes it the ultimate question is whether the new method of performance is fundamentally different and that is a question of law. The commercial importance of the various differences involved in the change of route—delay, risk to the goods, cost, etc.—is fact on which specific findings by arbitrators are entirely appropriate. But the inference to be drawn on a consideration of all the relevant factors must, in my view, be a matter of law—was there or was there not frustration.

Lord Radcliffe. My Lords, I think that the outcome of this appeal depends upon a short point. The real issue, as I see it, is to determine how to define the obligation of the appellants, the vendors, under the sale contract of October 4, 1956, so far as it related to shipment of the goods sold and the provision of shipping documents. Once it is settled what that definition should be, there is not much difficulty in seeing what are the legal consequences that should follow, having regard to the facts found for us by the special case.

This is a sale of goods on c.i.f. terms. Such a sale involves a variety of obligations, both those written out in the contract itself and those supplied by implication of law for the business efficacy of the transaction. The only sector of these obligations that is relevant for the purpose of this case is the vendors' duty "to "procure a contract of affreightment under which the goods will "be delivered at the destination contemplated by the contract" (see *Biddell Brothers* v. *E. Clemens Horst Co.*,[20] *per* Hamilton J.). Even within this sector, however, there are gaps which the law has to fill in: for instance, what form of contract of affreightment will meet the needs of the transaction, and what route or routes are permissible for the carrying vessel selected? In the present case nothing turns on the form of the bill of lading, which is not in evidence: everything turns on the question of route. The written contract makes no condition about this, its only stipulation being that shipment is to be from a West African port, by which we are asked to assume that the parties in fact meant Port Sudan. So the voyage was to begin at Port Sudan and to end at Hamburg. The primary duty under this part of the contract was to dispatch the groundnuts by sea from one port to the destination of the other.

At the date when the contract was entered into the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. It would be unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape at any time when the Suez Canal was open. The Suez Canal was blocked on

[20] [1911] 1 K.B. 214, 220; 27 T.L.R. 47.

November 2, 1956, and remained blocked until April, 1957. Nevertheless, during the months of November/December, 1956, the period in which the vendors had to ship under the contract, it was feasible for them to transport the goods via the Cape of Good Hope. It would have involved a voyage of some 11,137 miles as against 4,386 miles by way of Suez, and it would have meant a rise in freight rate of 25 per cent. (and in the last two weeks of December, 100 per cent.) above that ruling when the sale contract was made. These differences did not, however, in the opinion of the board of appeal of the Incorporated Oil Seed Association who state the case, render transport by the Cape route commercially or fundamentally different from transport by way of the Suez Canal.

Now in these circumstances were the appellants under obligation to procure a bill of lading for the transport of the goods by the Cape route, the Suez Canal not being available? That depends on how their obligation is defined. It is said on their behalf that the duty of shipment is a duty to ship by the "customary or usual route," a route which can be ascertained as that followed by settled and established practice (see Kennedy, C.I.F. Contracts, 1st ed., p. 39). Failing express provision on the point by the terms of the contract, that is, in my opinion, a correct general statement of what the law would imply; but I do not accept the further proposition which the appellants' argument requires, namely that, given the existence of such a route at the date of the contract, the whole of the vendor's obligation with regard to shipment is contained in this phrase, "the customary "or usual route." Putting aside exceptional cases in which there never has become established any customary route at all from one port to the other, we have to consider the case in which, while there has been a customary route at or before the date of the sale, that route is not available at the time when the vendor is ready to ship. The appellants say that, since the whole obligation consists in shipping by the customary or usual route, the contract would in that event become unenforceable, either because its terms had become impossible of performance or because it was avoided by frustration. In this context the two alternatives would amount to the same thing. I think, however, that the vendor's obligation has to be determined in the light of matters as they stand at the date of shipment, and it may be proper for him to take a course in those circumstances which it would not have been proper for him to take at the date of the contract.

In my opinion there is no magic in the introduction of the formula "customary or usual route" to describe the term implied by law. It is only appropriate because it is in ordinary circumstances the test of what it is reasonable to impose upon the vendor in order to round out the imperfect form of the contract into something which, as mercantile men, the parties may be presumed to have intended. The corpus of commercial law has been built up largely by this process of supplying from the common

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usage of the trade what is the unexpressed intention of the parties. It is necessary first to ascertain what is the commercial nature or purpose of the adventure that is the subject of the contract; that ascertained, it has next to be asked what within this scope are the essential terms which, so far as not expressed, must be implied in order to make the contract efficacious as a business instrument. The natural way to answer this question is to find out what is the usual thing in the same line of business. Various adjectives or phrases are employed to describe the point of reference. I can quote the following from judicial decisions: recognised, current, customary, accustomed, usual, ordinary, proper, common, in accordance with custom or practice or usage, a matter of commercial notoriety: and, of course, reasonable. I put "reasonable" last because I think that the other phrases are at bottom merely instances of what it is reasonable to imply having regard to the nature and purpose of the contract. The basic proposition is therefore that laid down by Brett M.R. in *Sanders* v. *MacLean*[21]: "The stipulations which are inferred in "mercantile contracts are always that the party will do what is "mercantilely reasonable."

Applying that proposition to the present case I do not think that it is enough for the appellants to point out that the usual and customary route for the transport of groundnuts from Port Sudan to Hamburg was via the Suez Canal, and that at the date of the sale contract both parties contemplated that shipment would be by that route. This contract was a sale of goods, which involved dispatching the goods from Port Sudan to Hamburg; but, of course, the transport was not the whole but only one of the incidents of the contract, in which particular incident neither vendors nor buyers were directly implicated. There was nothing to prevent the vendors from dispatching the goods as contracted, unless they were impliedly bound as a term of the contract to use no other route than that of the Suez Canal. I do not see why that term should be implied and, if it is not implied, the true question seems to me to be, since shipment was due to be made by some route during November/December, whether it was a reasonable action for a mercantile man to perform his contract by putting the goods on board a ship going round the Cape of Good Hope and obtaining a bill of lading on this basis. A man may habitually leave his house by the front door to keep his appointments; but, if the front door is stuck, he would hardly be excused for not leaving by the back. The question, therefore, is what is the reasonable mercantile method of performing the contract at a time when the Suez Canal is closed, not at a time when it is open. To such a question the test of "the usual and customary "route" is ex hypothesi inapplicable.

On the facts found by the special case I think that the answer is inevitable. The voyage would be a much longer one in terms

[21] (1883) 11 Q.B.D. 327, 337, C.A.

of miles; but length reflects itself in such matters as time of arrival, condition of goods, increase of freight rates. A change of route may, moreover, augment the sheer hazard of the transport. There is nothing in the circumstances of the commercial adventure represented by the appellants' contract which suggests that these changes would have been material. Time was plainly elastic. Not only did the vendors have the option of choosing any date within a two-month period for shipment, but also there was a wide margin within which there might be variations of the speed capacity of the carrying vessel or vessels selected. There was no stipulated date for arrival at Hamburg. Nothing appears to suggest that the Cape voyage would be prejudicial to the condition of the goods or would involve special packing or stowing, nor does there seem to have been any seasonal market to be considered. With all these facts before them, as well as the measure of freight surcharge that would fall to the vendors' account, the board of appeal made their finding that performance by shipping on the Cape route was not "commercially or fundamentally "different" from shipping via the Suez Canal. We have no material which would make it possible for us to differ from that conclusion.

It has been a matter of debate whether this finding ought to be treated as a finding of fact, by which a court would be bound, or as a holding of law, which, as such, would be open to review. It was treated as the first by the learned trial judge: it was treated more as the second by the Court of Appeal whose view of it was, I think, that, while of the utmost relevance for the determination of the final issue of the case, it did not bind the court so as to dictate what it should decide. So far as the distinction can be made between law and fact, I agree with the Court of Appeal. I regard it as a mixed question of fact and law whether transport via the Cape of Good Hope was so materially different from transport via the Suez Canal that it was not within the range of the c.i.f. contract or, alternatively, was so radically different that it left that contract frustrated. The ultimate conclusion is a conclusion of law, but in a case of this sort that conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men.

I do not believe that in this, as in many other branches of commercial law, it is possible to analyse very precisely where law begins and fact ends. That is because in this field legal obligations and legal rights are largely founded upon usage and practice, which themselves are established as matters of fact. Many things which are now regarded as settled principles of law originated in nothing more than common mercantile practice, and the existence and terms of this practice have been vouched sometimes by questions put to and answered by special juries, sometimes by the findings and views of commercial arbitrators and sometimes by the bare statements of the judges, founded upon their experience at the Bar or on the Bench. It would be difficult, for instance, to

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separate the judgments on commercial law delivered by three such masters as Lord Esher, Scrutton L.J. and Lord Sumner from their personal acquaintance with mercantile usages and their translation of the one into the terms of the other.

I do not think, therefore, that it is right to be very analytical in distinguishing between questions of law and questions of fact in matters of this kind. Since Lord Mansfield's day commercial law has been ascertained by a co-operative exchange between judge and jury, and now that arbitrators have taken the place of juries I do not think that we can start all over again with an absolute distinction between the respective spheres of judge and arbitrator. Generally speaking, I do not think that a finding in the form which we have here can ever be conclusive on the legal issue. When all necessary facts have been found it remains a question of law for the court what on the true construction of the contract are the obligations imposed or whether, having regard to the terms of the contract and the surrounding circumstances, any particular term is to be implied. But, when the implication of terms depends essentially upon what is customary or usual or accepted practice, it is inevitable that the findings of fact, whatever they may be, go virtually the whole way towards determining the legal result.

The finding in this case is perhaps unusual in that it does not speak for any usage or practice of trade—ex hypothesi, there was no established usage once the Suez Canal was blocked—but rather for the view of mercantile men as to the significance of adopting the alternative route. It is a summary way of stating that a voyage by that route would not involve any elements of difference that would be regarded as material by persons familiar with the trade. It would be contrary to common sense that a court, which cannot uninstructed assess the commercial significance of, say, a surcharge of £7 10s. per ton for freight in a c.i.f. contract of this kind, should not pay careful attention to such a view from such a source; just as it would be, I think, contrary to principle that a court should regard a view so expressed as finally conclusive of the legal issue.

I must add that I do not think that such a finding is altogether satisfactory for the purposes of a special case. It is in essence a summary of the commercial significance of several separate aspects of the Cape route as contrasted with the Suez Canal route, and it is embarrassing for a court which has to answer the question raised by the case to have before it only the summary and not the arbitrator's findings upon the individual aspects which make up the conclusion. I can see that, if this form came into general use, a court might feel obliged to send back the case containing it for further and more explicit findings. It would have been better if the specal case had identified the several aspects of difference, length, time, cost, risk, etc., which, as it is, the court is left to infer, and had made with regard to them, both

separately and together, the finding that was clearly intended that they were not significant from the mercantile point of view.

I agree with the opinions already expressed by my noble and learned friends who have preceded me, that the exception clause, clause 6 of the contract, does not apply.

I would dismiss the appeal.

Lord Hodson. My Lords, the appellants have put in the forefront of their argument that it is an implied term of every c.i.f. contract including the contract under consideration that the goods shall be carried by the (or if more than one a) customary route. In this connection it is contended that the relevant moment of time for determining whether a route is customary is the time when the contract is concluded.

The first part of the proposition has been accepted by Diplock J. and by the majority of the Court of Appeal, while the second part was rejected, it being held in both courts that the sellers' obligation, under a contract such as this, is to ship by a route usual and customary at the time of performance. If the whole of the proposition were accepted it would be equivalent in this contract to adding by implication the words "via Suez." For the reasons already given such implication is unnecessary and should be rejected.

Harman L.J. in the Court of Appeal did not accept either limb of the proposition and did not see the necessity of implying any such words as "by the usual and customary route." He pointed out that the sellers' duty was to ship the goods from Port Sudan to the normal port by a ship leaving within the given period.

It is true that as the case finds: "At the date when the "contract was made the parties contemplated that shipment "would be made by the Suez Canal." This, however, is a contract of sale not of carriage and unless there is some special rule applicable to c.i.f. contracts the duty of the sellers is defined by section 32 of the Sale of Goods Act, 1893, which provides:

"32—(1) Where, in pursuance of a contract of sale, the seller "is authorised or required to send the goods to the buyer, delivery "of the goods to the carrier, whether named by the buyer or not, "for the purpose of transmission to the buyer is prima facie "deemed to be a delivery of the goods to the buyer.

"(2) Unless otherwise authorised by the buyer, the seller "must make such contract with the carrier on behalf of the "buyer as may be reasonable having regard to the nature of the "goods and the other circumstances of the case. If the seller "omit so to do, and the goods are lost or damaged in course of "transit, the buyer may decline to treat the delivery to the carrier "as a delivery to himself, or may hold the seller responsible in "damages."

Applying the provisions of that section to this case the sellers

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are bound to ship by a reasonable route having regard to the nature of the goods and the other circumstances of the case.

It might be, as Harman L.J. pointed out, that it was essential for the buyers to receive the goods within a given time and that this could only be done by sending them via Suez; moreover the goods might be of a nature which would not stand a route crossing the Equator twice.

Unless persuaded by authority that this line of reasoning is wrong, I find it convincing for the Sale of Goods Act in effect codifies the relevant law.

The appellants rely upon a passage to be found in Kennedy on C.I.F. Contracts, 1st edition, p. 39:

"In the absence of express terms in the contract the cus-
"tomary or usual route must be followed."

This passage is not supported by any authority save that it was, I think, assumed to be correct by Scrutton L.J. in *In re L. Sutro & Co. and Heilbut, Symons & Co.*[22] The actual decision in that case is not of assistance. The majority of the Court of Appeal held that, in a contract made in 1916 for the sale of rubber to be shipped from the East to New York, a tender of goods which had been transmitted by rail from the western seaboard of the United States to New York was not a good tender and the buyers were not bound to accept the same. Scrutton L.J., who dissented, was of opinion that the tender was good and the route taken by the rubber was at the time a usual route and not excluded by the terms of the contract from the means of performance open to the vendor. He did, however, use these words[23]:

"Where there is a contract to carry from A to B if the exact
"route or method of carriage is not specified in the contract,
"the carriage must be by one of the usual routes and methods
"of carriage, at the option of the carrier." This language is, I think, appropriate to a contract of affreightment but it is true that that sentence was used in a case where a c.i.f. contract was under consideration and is for that reason relied upon as an authoritative dictum, contained as it is in the judgment of a master of the law whose words carry great weight not least in matters appertaining to commercial transactions.

Notwithstanding the fact that the procuring of a contract of affreightment is part of the obligation of the buyer under a c.i.f. contract, I am not persuaded that the proposition contended for by the appellants is sound and I am of the same opinion as Harman L.J., that it is not necessary to imply in this contract the words "by the usual and customary route."

On any view it would seem that the passage in Kennedy on C.I.F. Contracts requires some qualification for, if an event happened which prevented a particular route being used so that a slightly longer journey, perhaps outside permissible deviation,

[22] [1917] 2 K.B. 348. [23] Ibid. 362.

was necessary, then, other routes being available, the seller could surely not say he was free from his contract.

If I have stated the obligation of the buyers correctly, one then looks to see what the position was after the closure of the Suez Canal rendered shipment impossible by what would have been the normal route but for the closure.

The contract was dated October 4, 1956, and provided for the sale of 300 tons of groundnuts at a price of £50 per 1,000 kilos c.i.f. Hamburg. Shipment November/December, 1956. On November 2, 1956, the canal was blocked and transportation by that route became impossible until April, 1957. Thus virtually the whole of the shipment period remained open to the sellers.

The freight ruling at the time of the contract for shipment of groundnuts from Port Sudan to Hamburg via the Suez Canal was £7 10s. per ton. After the closure the frieght rates were increased by surcharges for goods proceeding by the Cape of Good Hope, namely as from November 10, 1956, 25 per cent. and as from December 13, 1956, 100 per cent. The distance from Port Sudan to Hamburg via the Suez Canal is approximately 4,386 miles and the distance from Port Sudan to Hamburg via the Cape of Good Hope is approximately 11,137 miles. On January 15, 1957, the buyers brought in a quantity of groundnuts against the sellers at a price of £68 10s. per 1,000 kilos, the market price this time being £68 15s. per ton. Nothing was proved or found as to the nature of the goods or other circumstances which would render the route round the Cape unreasonable or impracticable and this route was at all times available.

Unless shipment by the Cape route was so onerous to the sellers as to make the performance of the contract fundamentally different in kind from any performance they had promised, the contract of October 4, 1956, remained binding between the parties.

The material date is the date of performance when the seller chooses to ship the goods by a ship of his choice which may be fast or slow and during the shipment period it follows from the findings in the award that the Cape route was the only reasonable and practicable route. The freight was higher than that involved in the Suez route but even when increased by 100 per cent. still remained only a proportion of the purchase price of the groundnuts even though a significant proportion. Freight rates go up and down and it is exceedingly difficult in a commercial contract to escape from its terms on the ground of frustration by the increased expense involved when the time of performance is reached as compared with that contemplated when the contract is made. Indeed the appellants did not rest their frustration argument on the increase of freight, realising the difficulty of maintaining such a submission unless the increase were astronomical, but maintained that the "long haul round the Cape" was so fundamentally different from what had earlier been the usual route that the c.i.f. contract which included the obligation

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to procure a contract of affreightment had been frustrated by the closure of the canal.

I see no ground as a matter of law on the true construction of this contract and the facts found in the special case upon which the frustration can stand. Viscount Maugham pointed out in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[24] : "The doctrine of frustration is "only a special case of the discharge of contract by an impos-"sibility of performance arising after the contract was made."

On the construction of the contract which appears to me to be correct having regard in particular to the dates for shipment extending over the period November/December, 1956, there is no room in my judgment for any application of the doctrine to this case.

I would add that I cannot agree with Diplock J. that the question in this case is answered simply by reference to the finding of mixed law and fact numbered (vi) in the special case where the arbitrators found in so far as it is a question of fact and held in so far as it is a question of law that "the per-"formance of the contract by shipping the goods on a vessel "routed via the Cape of Good Hope was not commercially or "fundamentally different from its being performed by shipping "the goods on a vessel routed by the Suez Canal."

This does not purport to be a finding of fact only although it is true, I think, that a finding of fact can properly be extracted from it, namely that nothing had been proved such as, for example, some characteristic of the goods which would have rendered the performance commercially different in kind. This finding of fact is relevant, being a conclusion by commercial men who will know what relevance is permissible, although ultimately the question whether or not there has been frustration, is a question of law. The ingredients of frustration are the facts and those facts are for the arbitrators whether they are facts found directly or by inference. For example, in *Jackson* v. *Union Marine Insurance Co. Ltd.*[25] the question left by Brett J. to the jury was: "whether the time necessary for getting the ship off the "rocks and repairing her so as to be a cargo-carrying ship was . . . "so long as to put an end in a commercial sense to the com-"mercial speculation entered upon by the shipowner and the "charterers?" This question was characterised in the Court of Exchequer Chamber by Bramwell B.[26] as one which could not have been left in better terms although it might be paraphrased or amplified. I only comment that the actual question there related to delay which is one of the relevant factors in reaching a conclusion as to frustration. It does not seem to me to involve that a finding of fact made by the arbitrators in such general language as that contained in clause (vi) of this award is conclusive

[24] [1942] A.C. 154, 168; 57 T.L.R. 485; [1941] 2 All E.R. 165, H.L.

[25] (1873) L.R. 8 C.P. 572, 573.

[26] (1874) L.R. 10 C.P. 125, 141.

as a matter of law in determining whether or not the contract has been frustrated. If such were the case the same set of facts could be decided by arbitrators either way in successive cases without the court having power to intervene.

There remains only for consideration the exception clause (No. 6). Since it was at all times possible for the appellants to effect shipment of the goods at Port Sudan on a vessel which would carry them to Hamburg this clause does not avail the appellants: see the judgment of Bailhache J. in *In re Comptoir Commercial Anversois and Power, Son & Co.*,[27] confirmed in the Court of Appeal.

I would dismiss the appeal.

LORD GUEST. My Lords, the relevant facts in this appeal are: (1) By contract of sale dated October 4, 1956, the respondents contracted with the appellants for the purchase of 300 tons Sudanese groundnuts at £50 per 1,000 kilos c.i.f. from Port Sudan to Hamburg, shipment November/December, 1956. (2) The usual and normal route from Port Sudan to Hamburg was at the date when the contract was made via the Suez Canal, the distance being approximately 4,386 miles. (3) The Suez Canal was blocked on November 2, 1956, and remained blocked until April 9, 1957. (4) An alternative route from Port Sudan to Hamburg via the Cape of Good Hope was available throughout November and December, 1956, the distance being approximately 11,137 miles, and the sellers could have transported the goods from Port Sudan to Hamburg during this period.

The appellants never shipped any goods or tendered any documents, and in answer to a claim for damages by the respondents contended that the contract had been frustrated by the closure of the Suez Canal.

I may first dispose of a preliminary argument by the appellants. Mr. Roskill, for the appellants, argued that the obligation of the seller was to procure a contract of affreightment for the buyer whereby the goods will be conveyed to the contractual destination by the usual and customary route to be ascertained when the contract was made. Authority for this proposition was said to be found in Kennedy's C.I.F. Contracts, 1st ed., p. 39, where it is stated: "In the absence of express terms in the "contract the customary or usual route must be followed." I will assume for the purposes of this argument that this is a correct statement of the law. Mr. Roskill's argument further proceeded that if it was a breach of the contract for the seller to provide a contract of affreightment other than by the usual or customary route, then the closure of that route must result in frustration of the contract. "How can a route," he said, "which was in "breach of the contract one day, be obligatory next day?" This is not, to my mind, a true dilemma. The fallacy of this argument.

[27] [1920] 1 K.B. 868, 875 et seq.

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in my opinion, is to confuse a breach of contract for which damages may be due with the circumstances under which frustration of the contract occurs. It by no means follows that, assuming the sellers would have been in breach of contract to ship via the Cape of Good Hope, the sellers would be entitled to avoid the contract because the Suez Canal route was not available. This would depend on whether shipment via the Cape was a radically different thing from shipment via the Suez Canal.

The juridicial basis of the doctrine of frustration was recently examined by this House in *Davis Contractors Ltd.* v. *Fareham Urban District Council*[28] and it is unnecessary to deal with the earlier cases on the subject. Whether frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands does not appear to me to matter in the circumstances of the present case. Lord Reid in *Davis*[29] approached the matter on the basis that frustration only occurred where a fundamentally different situation had arisen which the contract had not contemplated. Lord Radcliffe put the matter thus[30]: "So perhaps it would be "simpler to say at the outset that frustration occurs wherever the "law recognises that without default of either party a contractual "obligation has become incapable of being performed because the "circumstances in which performance is called for would render "it a thing radically different from that which was undertaken by "the contract. Non haec in foedera veni. It was not this that "I promised to do."

The contract under consideration is a c.i.f. contract. Under such a contract the seller has to procure a contract of affreightment under which the goods will be delivered at the destination contemplated (*Johnson* v. *Taylor Bros. Co. Ltd.*,[31] *per* Lord Atkinson). All that is contained in the contract is "Shipment "from Port Sudan as per bill or bills of lading dated or to be "dated November/December, 1956." No route is given or provided for. The seller's obligation is governed by section 32 (2) of the Sale of Goods Act, 1893, whereby he has to make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. He must therefore procure a reasonable contract of affreightment. The appellants contended that the respondents obligation was to procure a contract of affreightment which he can tender to the buyer whereunder the goods will be conveyed by the usual and customary route to the contractual destination, and that the usual and customary route must be ascertained at the date when the contract was made. The argument further proceeded that when this contract was entered into the usual and customary route was via the Suez Canal, and that as that route had been closed by the time shipment fell to be

[28] [1956] A.C. 696.
[29] Ibid.
[30] Ibid. 728, 729.
[31] [1920] A.C. 144, 155, 156.

made the contract had been frustrated. The first and critical matter to ascertain is the date when the sellers' obligation in regard to the contract of affreightment is to be judged. Under the present contract the sellers' obligation was shipment by a bill of lading to be dated November/December, 1956. They could therefore fulfil their contractual obligation by shipping at any date up to December 31. By the date when performance was called for the Suez Canal was closed and the only available route was by the Cape of Good Hope. In my opinion the seller's obligation is to be determined by the circumstances prevailing at the date when he chooses to ship the goods and not when the contract was made. No authority was quoted by the appellants for the contention that the tempus inspiciendum was the date of the contract. It is also in my view, contrary to common sense and the terms of this contract. In regard to the question of whether the usual or customary route must be followed reliance was placed on an obiter dictum of Scrutton L.J. in *In re L. Sutro & Co. and Heilbut, Symons & Co.*[32]: "Where there is a contract to "carry from A to B if the exact route or method of carriage is not "specified in the contract, the carriage must be by one of the "usual routes and methods of carriage, at the option of the "carrier. If the other party wishes to exclude some usual route "or method of carriage, he can do so by inserting such a term "into the contract, but in the absence of such a term the option "of selecting a usual method of performance is with the person "who has to perform." The first part of the quotation is clearly dealing with a contract of affreightment where the carrier has the option of selecting a usual route. In the second part of the quotation I am not clear whether the learned Lord Justice is dealing with a c.i.f. contract or a contract of affreightment. I am not at all satisfied that this dictum together with the quotation from Kennedy's C.I.F. Contracts, 1st ed., p. 39, previously referred to, is justification for implying into every c.i.f. contract an obligation on the seller to obtain a contract of affreightment by the usual and customary route. As Harman L.J. in the Court of Appeal said[33]: "Why it should be necessary to imply such words "as 'by the usual and customary route,' I do not see." In my opinion, all that the seller has to do is to procure a reasonable contract of affreightment. In judging whether it was a reasonable contract of affreightment the question whether the route given is the usual or customary route may be of importance for consideration with all other relevant circumstances. Whether or not such a term is implied in the present case, at the time when performance was called for there was no usual or customary route because the Suez Canal was closed and the only practicable route was via the Cape of Good Hope. The sellers could have fulfilled their obligation by a bill of lading via the Cape. There was

[32] [1917] 2 K.B. 348, 362.
[33] [1960] 2 Q.B. 318, 369.

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Lord Guest.

accordingly, no frustration because there was no change of circumstances to justify the application of the doctrine.

The cases dealing with contracts of affreightment are, in my view, not helpful, because in such contracts very different considerations apply from those in a contract of sale. In a c.i.f. contract the seller does not have to deliver the goods. He only has to ship them at the port indicated with a contract of affreightment to the port of destination. An example of the frustration of a contract of affreightment is *Société Franco-Tunisienne d'Armement* v. *Sidermar S.P.A.*,[34] where Pearson J. held that a charterparty was frustrated by the blocking of the Suez Canal on the ground that it was a term of the contract (express or implied) that the vessel was to go by the Suez Canal, and he was able to hold that the route via the Cape was so different that it was a fundamentally different voyage. There are no circumstances in the present case to justify the implication of a term that the route should be via the Suez Canal.

The only case in which a c.i.f. contract has been held to be frustrated by closure of the Suez Canal is *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[35] decided by McNair J. The circumstances were almost precisely similar to the present. The learned judge held that the nature and extent of the sellers' obligation in relation to the route was to be ascertained at the time of performance. He then proceeded, however, to find that the contract was frustrated because to impose on the sellers an obligation to ship via the Cape was to impose upon them a fundamentally different obligation from that which they undertook when the contract was made. The learned judge, I think, fell into the error which he had previously corrected in the sellers' argument by treating the date of the contract as the date when the sellers' obligation had to be ascertained. If the critical date is the time when performance is called for, there cannot be frustration.

It remains to consider the ground on which Diplock J. held that the appellants failed. He considered that what had been described as the "special finding" of the board of appeal—"(vi) The performance of the contract by shipping the goods "on a vessel routed via the Cape of Good Hope was not commer-"cially or fundamentally different from its being performed by "shipping the goods on a vessel routed via the Suez Canal"—was a conclusion of fact with which he could not interfere and that he was accordingly bound by that finding to hold that there was no frustration. In my opinion the learned judge misinterpreted the finding. These findings are prefaced by the statement: "So far as it is a question of fact we find and as far as it is a "question of law we hold:—" Finding (vi) in my view is clearly a finding in law, and if I had thought that there were no facts to justify this finding I should, for my part, not have hesitated to disregard it. But as a finding of fact it is, as Sellers L.J. said, of

[34] [1960] 3 W.L.R. 701. [35] [1959] 1 Q.B. 131.

the utmost relevance in a case of frustration, although it is not, in my opinion, conclusive.

The appellants' final argument was based on clause 6 of the contract which is in the following terms: "In case of prohibition "of import or export, blockade or war, epidemic or strike, and in "all cases of force majeure preventing the shipment within the "time fixed, or the delivery, the period allowed for shipment or "delivery shall be extended by not exceeding two months. After "that, if the case of force majeure be still operating the contract "shall be cancelled."

It was contended that shipment was prevented by the closure of the Suez Canal and that, as the cause operated beyond two months, the contract was cancelled. In my opinion "shipment" in the context means bringing the goods to the port of shipment, and "prevention" means either physical or legal prevention (*In re Comptoir Commercial Anversois and Power, Son & Co.*[36]). In no circumstances can it be said that shipment was prevented by the closure of the Suez Canal.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Richards, Butler & Co.; Bernard Samuel Berrick & Co.*

J. A. G.

[36] [1920] 1 K.B. 868.

[COURT OF APPEAL.]

UNION OF INDIA *v.* COMPANIA NAVIERA AEOLUS S.A.

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1961
Feb. 14, 15, 16.
Sellers, Willmer and Donovan L.JJ.

[1960 I. No. 310.]

Shipping — Charterparty — Demurrage — Exceptions clause — Centrocon charter—"Time for loading or discharging . . . shall not count" during strike—Whether receivers liable for demurrage during strike period after expiry of laytime.
Ships' Names—Spalmatori.

A bill of lading covering a cargo of bulk wheat shipped on board a steamship for delivery at Bombay expressly incorporated the terms and conditions of the charterparty for the carriage of the wheat. The charterparty provided, inter alia: "At discharging "port receivers to pay demurrage, if incurred, . . . for all time used "in excess of allowed laytime. . . ." The bill of lading and the charterparty also incorporated the strike clause of the "Centro-"con" charterparty, which provided that if the cargo could not be

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

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loaded or discharged by reason of a number of causes, including a strike of any class of workmen essential to the loading or discharge "the time for loading or discharging, as the case may be, shall not "count during the continuance of such causes provided that a "strike . . . of the shippers' and/or receivers' men shall not prevent "demurrage accruing if by the use of reasonable diligence they "could have obtained other suitable labour." It further provided in a third part of the clause that in case of any delay by reason of the excepted clauses no claim for damages or demurrage should be made by the charterers, receivers of the cargo, or owners of the steamer.

A strike broke out at the discharging port after the expiry of the laydays. It continued for eight days, and during that time the cargo could not be discharged as no other suitable labour was available. In a claim by the plaintiffs, the holders of the bill of lading and receivers of the cargo, for a declaration that they were not liable to pay the shipowners additional demurrage in respect of the strike period, McNair J. held that there was nothing in the charterparty to exclude the general rule as to the non-applicability of exceptions which came into play only during the demurrage period, and the plaintiffs' claim failed.

The plaintiffs appealed:—

Held, that there was no insuperable difficulty in providing for relief from demurrage liability if either loading or discharging after the laydays had gone by was prevented by some stipulated cause and that, by the wording of the third part of the clause, the shipowners had agreed to make no claim for demurrage in case of any delay by reason of a strike of any class of workmen essential to the discharge who could not be replaced. Accordingly, the plaintiffs were entitled to the declaration claimed.

Rederiaktiebolaget Transatlantic v. *La Compagnie Française des Phosphates de l'Oceanie* (1926) 32 Com.Cas. 126, C.A. applied.

Decision of McNair J. [1960] 1 W.L.R. 297; [1960] 1 All E.R. 753 reversed.

Appeal from McNair J.[1]

The plaintiffs, Union of India, were the holders of a bill of lading issued by Louis Dreyfus Corporation on May 5, 1957, covering a shipment of about 9,950 long tons of wheat in bulk shipped on board the *S.S. Spalmatori* at Tacoma, Washington, for delivery at Bombay, India. The bill of lading provided that all terms, conditions and exceptions of the charterparty relating to the carriage of the wheat, made between Louis Dreyfus Corporation and the shipowners, Compania Naviera Aeolus S.A., the defendants in this action, and dated London, February 20, 1957, were to be considered fully incorporated therein, and if there was any conflict between bill of lading and charterparty, provisions of the charterparty were to govern. By clause 10 of the bill of lading all terms, conditions and provisions of, inter alia, the strike clause of the "Centrocon" charterparty were to apply.

The charterparty, which was on the approved Baltimore Form C, provided for the loading of the vessel at Puget Sound of a full and complete cargo of wheat in bulk for delivery at Bombay. It provided for the steamer to be loaded according to berth terms,

[1] [1960] 1 W.L.R. 297; [1960] 1 All E.R. 753.

with customary berth dispatch, and if detained longer than six weather working days of 24 consecutive hours, Sundays and holidays excepted, charterers to pay demurrage at the rate of £200 British sterling per day, or pro rata, provided such detention shall occur by default of charterers or their agents.

A typed addition at the end of the print provided, inter alia, that certain attached typed clauses were deemed to be fully incorporated in the charterparty, also the strike clause (No. 30) of the "Centrocon" charterparty. Of the attached clauses, the following were relied upon as being material on one side or the other of the argument in this case: Clause 8: "Cargo to be received at "destination at the average rate of 1,000 tons of 2,240 lb. per "weather working day of 24 consecutive hours (Sundays and "holidays excepted even if used) but 500 tons per weather work-"ing day of 24 consecutive hours (Sundays and holidays excepted "even if used) for any portion loaded in deep tanks, it being "understood that deep tanks are clean and suitable and always "provided vessel can deliver at these rates." Clause 9: "At "discharging port receivers to pay demurrage, if incurred, at the "rate of £200 British sterling per day or pro rata for part of a "day, for all time used in discharging in excess of allowed lay-"time. Receivers to collect despatch, if earned, at discharging "port at the rate of £100 British sterling per day for each and "every day or pro rata for part of a day for all laytime saved in "discharging." Clause 10: "Notification of the vessel's readi-"ness to discharge must be delivered at the office of the receivers, "or their agents, at or before 4 p.m. (or at or before 12 noon if "on Saturday) vessel also having been entered at the Custom "House, and the laydays will then commence at 8 a.m. on the "next business day, whether in berth or not."

The "Centrocon" strike clause provided, as far as material: "If the cargo cannot be loaded by reason of riots, civil commo-"tions or of a strike or lock-out of any class of workmen, essential "to the loading of the cargo : . . or if the cargo cannot be "discharged by reason of riots, civil commotions, or of a strike "or lock-out of any class of workmen essential to the discharge, "the time for loading or discharging, as the case may be, shall "not count during the continuance of such causes, provided that "a strike or lock-out of the shippers' and/or receivers' men shall "not prevent demurrage accruing if by the use of reasonable "diligence they could have obtained other suitable labour at rates "current before the strike or lock-out. In case of any delay by "reason of the before-mentioned causes, no claim for damages or "demurrage, shall be made by the charterers, receivers of the "cargo, or owners of the steamer. For the purpose, however, of "settling despatch rebate accounts any time lost by the steamer "through any of the above causes shall be counted as time used "in loading."

The following facts stated on the writ in this action were agreed: the plaintiffs were at all material times the holders of the

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bill of lading; the laydays at the discharging port had expired at 1356 hours on July 2, 1957; discharge of the cargo at Bombay from 0700 hours on July 5 to 1700 hours on July 13, 1957, was prevented by a strike of workmen essential to the discharge; other suitable labour could not be obtained at all.

The plaintiffs claimed a declaration that upon the true construction of the charter dated February 20, 1957, and of the bill of lading dated May 5, having regard to the facts set out above, they were not liable to the defendants for £1,638 6s. 8d. additional demurrage in respect of the period of 8 days 10 hours during which the strike continued.

On February 22, 1960, McNair J. dismissed the action.
The plaintiffs appealed.

R. A. MacCrindle for the plaintiffs.
M. J. Mustill for the defendants.

The following cases not referred to in the judgment were cited in argument: *Central Argentine Railway Ltd.* v. *Marwood* [2]; *S.S. Breynton (Owners)* v. *Theodoridi & Co.* [3]; *Lilly & Co.* v. *Stevenson (D. M.) & Co.* [4]; *Aktieselskabet Reidar* v. *Arcos Ltd.* [5]; *Saxon S.S. Co.* v. *Union S.S. Co.* [6]

Sellers L.J. The question in issue between the parties has been neatly put in the claim for a declaration endorsed on the writ, on which pleading alone the case went for trial before McNair J.[1] All the material clauses are clearly set out in the judgment.

After the laydays for discharging the cargo of wheat in bulk in the defendants' steamship *Spalmatori* at Bombay had expired, so that the ship came on demurrage, the plaintiffs as holders of the bill of lading and as receivers of the whole cargo were unable for a number of days to discharge any cargo by reason of a strike of workmen essential to the discharge as no other suitable labour could be obtained for the task.

The charterparty alone need be regarded, as its material terms were incorporated expressly into the bill of lading, and by clause 9 it provided that the receivers were to pay demurrage, if incurred, for all time used in discharging in excess of allowed laytime. That clause is accepted by the parties as establishing the liability of the plaintiffs to pay demurrage for the days of the strike unless the "Centrocon" strike clause incorporated into this charterparty, which is described as the "Approved Baltimore "Berth Grain Charterparty—Steamer," exempts them from that

[2] [1915] A.C. 981, H.L.
[3] (1924) 19 Ll.L.Rep. 409.
[4] (1895) 22 Rettie 278.
[5] [1927] 1 K.B. 352; 42 T.L.R. 737, C.A.
[6] (1900) 16 T.L.R. 527; 69 L.J. Q.B. 907, H.L.
[1] [1960] 1 W.L.R. 297; [1960] 1 All E.R. 753.

liability. McNair J. held [2] that the plaintiffs were not entitled to the declaration that they were so protected and exempt and the effect is that the plaintiffs have been held liable for demurrage at a sum which is not in dispute if there is liability in respect of these days of the strike.

For the purpose of the argument here and below, the strike clause was dissected into four parts and it is convenient to retain that designation or reference although the clause has to be construed as a whole. The argument was based on the acceptance of the proposition that when once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless an exceptions clause is clearly worded so as to have that effect. The slogan (if I am not disrespectful in so describing it) "Once on demurrage, always on demurrage," which seems to have crept into use, is I think to be viewed with caution. If it means no more than that an exception which only protects laydays from running or counting will not cover days on demurrage, it is acceptable, but there is no insuperable difficulty in providing for relief from demurrage liability if either loading or discharging after the laydays have gone by is prevented by some stipulated cause.

Part 1 of the clause, as analysed and as material to this case, is as follows: "If the cargo cannot be discharged by reason . . . "of a strike . . . of any class of workmen essential to the dis- "charge, the time for loading or discharging, as the case may be, "shall not count during the continuance of such causes"; and part 2 provided that "a strike of . . . the receivers' men shall "not prevent demurrage accruing if by the use of reasonable "diligence they could have obtained other suitable labour at rates "current before the strike."

McNair J. held [3] that the words "the time for loading or "discharging" clearly meant the time allowed for these operations, especially when read in conjunction with the provision that time "shall not count during the continuance of such causes." This finding was scarcely attacked and I fully agree with the judge in the matter. If that were the whole of the protection available to the plaintiffs, as the strike did not arise in the course of the laydays, their contention would fail.

The argument before us was concentrated on part 3 of the clause, which is as follows: "In case of any delay by reason of "the before-mentioned causes no claim for damages or demurrage "shall be made by the charterers, receivers of the cargo, or "owners of the steamer." McNair J. says [4] that "Taken literally, "that . . . would mean that if there had been any delay at all, say "only a couple of days, by reason of the strike, then the owners "were to be debarred from making any claim for damages or "demurrage at all." He adds, however, that quite plainly it

[2] [1960] 1 W.L.R. 297.
[3] Ibid. 301.
[4] Ibid. 303.

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cannot mean that; and I do not think it could. The judge then regards it,[5] "if any sense is to be given to it at all," as merely an inaccurate paraphrase of the detailed provisions which have gone before it. I think the correct interpretation of the sentence would be, "no claim for damages or demurrage in respect thereof "(that is, the delay) shall be made."

It is with deference that I differ from McNair J. who is so experienced in this branch of the law in particular, but I read this part of the clause as enlarging the protection given to the plaintiffs in this case so as to defeat the shipowners' claim here for demurrage. By clause 9 demurrage was no doubt accruing when the strike arose, but by this provision the shipowners have agreed to make no claim (that is an emphatic prohibition) for demurrage in case of any delay by reason of the before-mentioned causes. These causes include a strike of any class of workmen essential to the discharge who cannot be replaced by other suitable labour. The delay in this demurrage period was due to that cause. It was here a complete stoppage. I regard this as a provision which is clearly worded so as to cover that which was not covered by the first part, which only applied to laydays. It may be that it overlaps the first part, but a charterparty is rarely if ever drawn up with the precision of the careful draftsman. It is a business document consisting of a standard form which, in accordance with common practice, is amended and amplified and then left to serve its purpose.

The two exemptions given by the whole clause are different in form as well as, I think, in substance. The first part prevents laydays from counting if a protecting clause is operating and whilst it continues. The count ceases for the period and resumes again when the cause is lifted. The protection given by the second provision on which the appellants place reliance is that the shipowners will make no claim for that to which they would otherwise be entitled. Any claim by the charterers or receivers of the cargo against the shipowners for any delay for which the shipowners might be responsible, unless the circumstances bring the event within the exceptions clause, would likewise be barred by the clause.

I would regard the clause here, part 3 of it, as at least as effective as the provision in *Rederiaktiebolaget Transatlantic* v. *La Compagnie Française des Phosphates de L'Oceanie*,[6] "demur-"rage not to accrue." In that case Scrutton L.J. said[7]: "Ordinarily when laydays have expired the exceptions excusing "delay do not apply to the demurrage days which are then run-"ning or consecutive days, the ship being, in fact, detained, or "prevented from sailing. But in this charter the exceptions "clause as to delay in loading by excepted causes ends up 'The

[5] [1960] 1 W.L.R. 297, 303.
[6] (1926) 32 Com.Cas. 126, C.A.
[7] Ibid. 130.

"'laydays not to count during the period of such delay or hind-
"'rance and demurrage not to accrue.' This clause was not
"referred to before the judge below, but it appears to be intended
"to excuse the charterer from liability for demurrage in respect
"of days on which he was, in fact, prevented from loading by
"exceptions. It was argued that the last words were only
"intended to repeat the provision that laydays should not count,
"but if so, this repetition was quite superfluous, and in fact
"demurrage could not accrue till the laydays expired. In my
"opinion the exceptions clause applies to the demurrage days,
"and days in the demurrage period on which loading was
"prevented by bad weather did not count in assessing demur-
"rage."

The plaintiffs' argument also gets some support from the views expressed by Lord Salvesen in *Moor Line Ltd.* v. *Distillers Co. Ltd.*,[8] but the case is not strictly in point and I do not refer to it further.

Mr. Mustill, in a resourceful argument, resisted the views I have expressed and contended that the part of the clause relied on was not sufficiently clear to defeat the express liability for demurrage under clause 9. Counsel sought to get assistance from the fourth part of the strike clause, which is as follows: "For the "purpose, however, of settling despatch rebate accounts any "time lost by the steamer through any of the above causes shall "be counted as time used in loading." The word "however" hardly seems appropriate. It would seem that the clause is to give some relief to the shipowners by providing that notwithstanding that laydays shall not run under the exceptions they shall be counted as if they had, so as to avoid a claim for despatch money. It does not seem to me to destroy in any way the effect of the preceding sentence.

I would hold, in the terms of the declaration sought, that the plaintiffs are not liable to the defendants for £1,683 6s. 8d. additional demurrage in respect of a period of 8 days 10 hours; and I would allow the appeal.

WILLMER L.J. I agree. In my judgment McNair J. was plainly right in the construction which he put upon what have been described as parts 1 and 2 of the strike clause. I entertain no doubt that the words "the time for . . . discharging" must mean the time stipulated by the charterparty for discharging, that is to say, the laydays. The effect of this part of the clause is thus to continue the laydays if the cargo cannot be discharged during that time by reason of a strike. If the laydays have already expired before the strike begins, this provision can have no possible application. This view is in accordance with the decision of Lord Salvesen in *Moor Line Ltd.* v. *Distillers Co. Ltd.*,[9] where the

[8] 1912 S.C. 514, 521.

[9] Ibid. 514, 519.

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words to be construed were practically identical with those in the present case.

The only real question, to my mind, is whether the third part of the clause is to be construed as affording protection to the plaintiffs in the event which has happened—namely, a strike occurring and delaying the discharge after the laydays had expired and the ship was already on demurrage. It is agreed on both sides that, as pointed out by the judge, it is impossible to construe the words used in their literal sense. That would mean that in the event of a strike causing any delay, however small, the shipowners would be precluded from making any claim for demurrage at all, however long their ship was detained. Having pointed this out, McNair J. in effect gave up the attempt to construe the words, and dismissed this sentence as [10] "merely an "inaccurate paraphrase of the detailed provisions which have "gone before it." He threw out the suggestion that this sentence was merely inserted for the purpose of leading up to the final sentence, that is part 4 of the clause, which deals only with the method of calculating despatch money at the loading port. This view was pressed upon us by counsel for the shipowners in his very attractive argument before us, his contention being that the effect of the words is merely to exclude strike time from the calculation of laydays. Alternatively, he contended that the words could be construed as covering, for the purposes of calculating laydays, delay caused by a mere partial prevention of loading, as opposed to the total prevention of loading contemplated by the words in part 1.

It seems to me that if that was the intention the words used were singularly clumsy and inapt. Why should they refer to claims for damages and demurrage, if all that was intended to be provided for was the method of calculating laydays? I think counsel for the plaintiffs was well-founded when he pointed out that part 3 deals with possible claims by both the receivers of the cargo and the owners of the ship. A claim for damages by the receivers of the cargo might arise just as well during a period when the ship is on demurrage as during the continuance of the laydays. Prima facie, therefore, in the case of a claim by the shipowners the words should equally be applicable to both periods.

In my judgment, the words of part 3 must be construed as intended to apply to a situation in which, but for their presence, one party or the other would be exposed to a claim. As was said by Fletcher Moulton L.J. in *Leonis S.S. Co.* v. *Rank (No. 2)*,[11] "this is a business document, drawn up by business men to be "used in a business sense." Seeing that the receivers of cargo are already protected under part 1 against delay due to a strike during the laydays, and bearing in mind that part 3 refers specifically to a claim for demurrage, I think the words can most

[10] [1960] 1 W.L.R. 297, 303.

[11] (1908) 13 Com.Cas. 295, 297, C.A.

naturally be construed as relieving the receivers of cargo from liability for demurrage, to the extent that the delay was due to the strike, notwithstanding that the strike did not occur until the ship was already on demurrage. Similar words were construed in a similar sense in *Moor Line Ltd.* v. *Distillers Co. Ltd.*[12] It is, of course, well established, as stated in Scrutton on Charter-parties, 16th ed., at p. 353, that "when once a vessel is on "demurrage no exceptions will operate to prevent demurrage "continuing to be payable unless the exceptions clause is clearly "worded so as to have that effect." In my judgment, however, the words in question in part 3 of the clause are sufficiently clear to have just that effect. This construction at least has the merit of attributing a sensible meaning to part 3 of the clause, and one which does provide for something not already covered by part 1.

Although I confess that the question is not altogether free from difficulty, I am unable to agree with the construction which McNair J. put upon part 3 of the clause. In my judgment, the words of this part are apt to protect the plaintiffs in the events which have happened. Accordingly, I am of opinion that the appeal should be allowed, and the plaintiffs held entitled to the declaration claimed.

DONOVAN L.J. I agree with both judgments, to which I can usefully add nothing.

Appeal allowed with costs in Court of Appeal and before McNair J. Leave to appeal to House of Lords refused.

Solicitors: *William A. Crump & Son; Holman, Fenwick & Willan.*

[12] 1912 S.C. 514.

[CHANCERY DIVISION.]

In re FOOTMAN BOWER & CO. LTD.

1961
Mar. 6, 16.
Buckley J.

[No. 00192 of 1959.]

Debt—Discharge—Clayton's case (rule in)—Current account—Effect on nature of debt.

Limitation of Action — Acknowledgment — Current account — Rule in Clayton's case—Payment generally on account—Whether payment "in respect of" balance due—Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 23 (4).

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Footman Bower & Co. Ltd., *In re.*

By section 23 (4) of the Limitation Act, 1939, "Where any right "of action has accrued to recover any debt . . . and the person liable "or accountable therefor acknowledges the claim or makes any "payment in respect thereof, the right shall be deemed to have "accrued on and not before the date of the acknowledgment or the "last payment."

The applicant supplied a company with goods over a number of years, the account between them being kept as a current account. The company from time to time made payments in the sum of £50 or multiples of £50 on account generally. A receiver and manager of the company's business was appointed in August, 1953. At that date the company owed the applicant a balance of £595 9s. 10d. After his appointment, the receiver made payments of the precise amount owing for the goods supplied to him. On March 23, 1959, an order was made for the compulsory liquidation of the company. The amount owing to the applicant by the company on March 23, 1953, six years before the winding-up order, was £815 7s. 1d. During the period between March 23, 1953, and the date of the appointment of the receiver, the applicant supplied to the company goods of the value of £80 2s. 9d. and the company made six payments to the applicant of £50 each, the last payment being made on July 10, 1953. The applicant lodged a proof in the liquidation of the company for a sum of £595 9s. 10d. The liquidator admitted the proof in the sum of £80 2s. 9d. and rejected the balance of £515 7s. 1d. on the ground that it was statute-barred. On an application for an order reversing the liquidator's rejection of the balance of the debt:—

Held, (1) that the rule in *Clayton's* case (1816) 1 Mer. 572 applied to all current accounts and that, therefore, in accordance with that rule, the various credits were prima facie to be treated as applied in the order in which the debits and credits were set against each other in the account, each new credit being treated as discharging the earliest outstanding debit; but that that did not affect the true nature of the debt which, in the case of a current account, was a simple and undivided debt for the amount of the balance due on the account for the time being.

(2) That by making a payment generally on account the company made it on account of the balance outstanding and due at the date of payment, and that such a payment constituted a payment "in respect of" the balance for the purposes of section 23 (4) of the Limitation Act, 1939, so that time started running afresh for the purpose of the Act on July 10, 1953, and that the liquidator had, therefore, been wrong in rejecting any part of the applicant's proof of debt.

Adjourned summons.

A company, Footman Bower & Co. Ltd., carried on business as a cabinet maker. The applicant, S. Leboff Ltd., was a timber merchant. For many years the applicant supplied goods to the company for the purposes of its business. The account between the applicant and the company was kept as a current account. The applicant's sales ledger contained an account in the name of the company, in which the company was debited as goods were supplied from time to time with the price of the goods. The company from time to time made payments to the applicant on account generally, and credit was given in the applicant's sales ledger for these payments as they were made. The payments

were made in sums of £50 or multiples of £50 and were not made in respect of any one or more particular debit or debits. The bought ledger of the company contained a corresponding account in the name of the applicant.

On August 11, 1953, a receiver and manager of the company's business was appointed by a secured creditor. At that date the aggregate unpaid balance owing to the applicant was £595 9s. 10d. The receiver continued the business of the company and continued to trade with the applicant; but he paid as he went, at first by a separate payment in respect of each delivery of goods, and later by a monthly payment of the precise amount owing for goods delivered to him during that month. On March 23, 1959, an order was made for the compulsory liquidation of the company.

The amount owing to the applicant by the company on March 23, 1953, six years before the date of the winding-up order, was £815 7s. 1d. During the period between March 23, 1953, and August 11, 1953, when the receiver was appointed, goods were supplied by the applicant to the company of a value of £80 2s. 9d. and, during the same period, the company made six payments each of £50, the last of such payments being made on July 10, 1953.

In April, 1959, the applicant lodged a proof of debt in the liquidation for a sum of £595 9s. 10d., "to balance of account." In December, 1960, the liquidator admitted the proof in the sum of £80 2s. 9d. and rejected the balance of £515 7s. 1d. on the ground that this part of the debt was statute-barred.

On December 29, 1960, the applicant issued a summons for an order, inter alia, (1) that the rejection by the liquidator of the applicant's proof of debt to the extent of £515 7s. 1d. on the ground that the last-mentioned debt had become statute-barred should be reversed, and (2) that the liquidator should admit the proof to dividend in full.

Muir Hunter (*David Graham* with him) for the applicant.
A. Lloyd Stott for the liquidator.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Seaber* [1]; *In re Seaber, Ex parte Peachy* [2]; *The Mecca* [3]; *In re Boswell.* [4]

Cur. adv. vult.

March 16. BUCKLEY J. read the following judgment, in which he stated the facts and continued: The liquidator contends that,

[1] (1837) 1 Deac. 543.
[2] (1837) 1 Deac. 551.
[3] [1897] A.C. 286; 13 T.L.R. 339, H.L.
[4] [1906] 2 Ch. 359; 22 T.L.R. 247.

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under the rule in *Clayton's* case,[1] the six payments, amounting to £300, made between March and August, 1953, must be treated as appropriated to the earliest debts which were outstanding on the account when such payments were respectively made, that is to say, to debits which arose before March 23, 1953, and were comprised in the balance of £815 7s. 1d. owing on that date. This would leave £515 7s. 1d. of that balance outstanding, which is the part of the proof which the liquidator has rejected.

The applicant contends that the payments made by the company within six years before the winding-up order were made in respect generally of the balance for the time being owing on the account, and that time runs under the Limitation Act, 1939, from the date of the last of those payments in respect of the whole of the balance remaining due on the account at that date.

Section 23 (4) of the Limitation Act, 1939, is in the following terms: "Where any right of action has accrued to recover any "debt or other liquidated pecuniary claim, or any claim to the "personal estate of a deceased person or to any share or interest "therein, and the person liable or accountable therefor acknow-"ledges the claim or makes any payment in respect thereof, the "right shall be deemed to have accrued on and not before the date "of the acknowledgment or the last payment." Then there is a proviso which I need not read.

Ought the £50 paid on July 10, 1953, to be taken for the purposes of this section as paid in respect of the balance then outstanding on the account, or in respect of those particular debits in the account to which it would be treated as appropriated under the rule in *Clayton's* case? [2]

Where a debtor owes a creditor two or more separate and distinct debts, the rule as to appropriation of payments is that the debtor, when he makes a payment, has the primary right to say in respect of which debt it is made. If he does not exercise that right, then the creditor may appropriate the payment to any of the debts as he chooses. An appropriation by the debtor need not be in express terms, but must be communicated to the creditor or be capable of being inferred. Where some of the debts are at the date of payment statute-barred and others are not, it is to be inferred in the absence of evidence to the contrary that the payment is appropriated by the debtor to those not barred (*Nash* v. *Hodgson* [3]) but Lord Cranworth L.C. in that case said [4]: "What may be the effect where there is a single debt "consisting of several items some of which are barred, and "some not, may be doubtful." I think he there had in mind the kind of case with which I have to deal, except that in the present case no part of the balance outstanding at July 10, 1953, was then statute-barred.

[1] (1816) 1 Mer. 572.
[2] Ibid.
[3] (1855) 6 De G.M. & G. 474.
[4] Ibid. 474, 482.

Where there are distinct debts some of which are statute-barred and some not and the debtor makes a payment in such circumstances that the creditor can appropriate it as he chooses, the creditor may appropriate it to a statute-barred debt but this, under the law before the Limitation Act, 1939, did not revive his remedies in respect of any unsatisfied balance of that statute-barred debt because no promise on the part of the debtor to pay that balance could be inferred from the circumstances: see *Mills* v. *Fowkes*.[5] Before that Act there was no statutory provision that in the case of a simple contract debt part payment should stop time running under the Statute of Limitations. For a payment to have this effect it was necessary that it should amount to an acknowledgment of the debt and import a new promise to pay the outstanding balance. The mere act of the creditor appropriating a payment to a statute-barred debt could not have this effect, for such an acknowledgment and promise could only come from the debtor. Since the enactment of the Limitation Act, 1939, the position is different, for section 23 (4) now contains a statutory provision applicable to simple contract debts whereby any payment in respect of a debt will make time start to run afresh in respect of that debt. There is no longer need to establish a new promise to pay. In my judgment, however, one must still look at the act and intention of the debtor to see whether the payment is made in respect of the particular debt. Payment is in this subsection dealt with in close conjunction with acknowledgment. Just as an acknowledgment can only acquire that character by the act of the debtor or his agent, so also, I think, a payment can for the purposes of the subsection only acquire the characteristic of being made "in respect of" the debt by the act of the debtor or his agent. Consequently, in my judgment, appropriation by a creditor of a sum received from the debtor towards satisfaction of a particular debt, be it statute-barred or not, cannot make such appropriation a "payment in respect thereof" within the meaning of section 23 (4).

In the present case no part of the balance outstanding on July 10, 1953, was then statute-barred, and, according to the evidence, the payments made by the company were made "generally on account," although on account of what is left to be inferred.

None of the cases I have so far referred to related to a current account. In *Clayton's* case[6] Sir William Grant M.R. was in fact dealing with a current account between banker and customer, but the rule known as the rule in *Clayton's* case[7] applies to any current account and is, in my judgment, applicable to the present case. Consequently, in accordance with that rule, the various credits are prima facie to be treated as applied in the order in

[5] (1839) 5 Bing.N.C. 455.
[6] 1 Mer. 572.
[7] Ibid.

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which the debits and credits are set against each other in the account, each new credit being treated as discharging the earliest outstanding debit. This method of analysing the account may be of great importance for the purpose of ascertaining various incidental matters affecting the debt; for instance, to what extent it is secured or guaranteed, where the security or guarantee extends to some only of the items in the account, or to what extent a former partner in a debtor firm is liable where there has been a change of the firm during the period covered by the account. It may also be of importance in ascertaining how far the balance in the account is contributed to by statute-barred items. It does not, however, in my view, affect the true nature of the debt itself. In the case of a current account, where the debtor-creditor relationship of the parties is recorded in one entire account, into which all liabilities and payments are carried in order of date as a course of dealing extending over a considerable period, the true nature of the debtor's liability is, in my judgment, a single and undivided debt for the amount of the balance due on the account for the time being, without regard to the several items which, as a matter of history, contribute to that balance. This was, I think, the view of Sir William Grant M.R. in *Clayton's* case,[8] for he said[9]: "But this is the case of a banking account, where "all the sums paid in form one blended fund, the parts of which "have no longer any distinct existence. Neither banker nor "customer ever thinks of saying, this draft is to be placed "to the account of the £500 paid in on Monday and this other "to the account of the £500 paid in on Tuesday. There is a "fund of £1,000 to draw upon, and that is enough. In such "a case, there is no room for any other appropriation than "that which arises from the order in which the receipts and "payments take place, and are carried into the account. "Presumably, it is the sum first paid in, that is first drawn "out. It is the first item on the debit side of the account, "that is discharged, or reduced, by the first item on the credit "side. The appropriation is made by the very act of setting "the two items against each other. Upon that principle, all "accounts current are settled, and particularly cash accounts." It was also, I think, the view of Lord Cranworth L.C. when, in the passage I have cited from *Nash* v. *Hodgson*,[10] he referred to a single debt consisting of several items. In the present case, the debits for goods supplied correspond to the sums paid in to which Sir William Grant M.R. referred[11] and, in my judgment, they constitute one blended obligation the parts of which have no longer any distinct existence. The rule in *Clayton's* case[12] merely provides a method of discovering how far the debtor is behindhand in discharging his obligation which

[8] 1 Mer. 572.
[9] Ibid. 608.
[10] 6 De G.M. & G. 474, 482.
[11] 1 Mer. 572, 608.
[12] Ibid. 572.

has accrued piecemeal over a period of time, and which elements of that obligation remain in operation.

When, as in the present case, there is an account running between the parties which to the knowledge of both parties is of that kind and kept in that way, then, if the debtor makes a payment "generally on account," it appears to me that he must be taken to be making it on account generally of whatever is owing on the balance of the account. A payment "on account" imports an acknowledgment of a liability for a larger sum: see *Friend* v. *Young*,[13] *per* Stirling J.[14] When a payment is merely stated to be "on account" without the liability on account of which it is made being specified, one must first inquire what liabilities on the part of the payer to the recipient exist. If on enquiry it is found that the only liability is in respect of a balance due on current account, the natural conclusion to reach is, in my judgment, that the payment is made on account of that balance generally, not on account of any particular items contributing to that balance. Where, as may well have been the case as regards payments by the company to the applicant, a payment would in accordance with the rule in *Clayton's* case[15] be taken to discharge, say, three items on the debit side of the account entirely and a fourth in part, it appears to me that it would be an abuse of language to describe the payment as made "on "account" of those particular items. It would be still more fanciful, if at the date of payment the oldest outstanding debits were statute-barred. If (which has not yet, so far as I know, been decided) the inference that the debtor intended to appropriate the payment to non-statute-barred items to the exclusion of statute-barred items is applicable in the case of a current account—the point left open by Lord Cranworth L.C. in *Nash* v. *Hodgson*[16]—an analysis of the account would be required before the particular item or items on account of which the debtor is to be supposed to have made the payment could be identified. If, on the other hand, that inference would not arise, it would follow that the debtor would be supposed to have made the payment on account of statute-barred items. Either position would, in my opinion, be very artificial. The much more acceptable view seems to me to be that by making a payment generally on account the debtor makes it on account of the whole of his indebtedness, that is to say, on account of the balance outstanding and due at the date of payment.

Moreover, if, where the rule in *Clayton's* case[17] applies, either party is to be taken to have made an appropriation of the payment to any particular item or items, it must, I think, normally be the creditor who is taken to have done so: see *In re Sherry*,[18] *per* Lord Selbourne L.C.[19] and *Deeley* v. *Lloyds*

[13] [1897] 2 Ch. 421.
[14] Ibid. 436.
[15] 1 Mer. 572.
[16] 6 De G.M. & G. 474, 482.
[17] 1 Mer. 572.
[18] (1884) 25 Ch.D. 692, C.A.
[19] Ibid. 702.

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Bank Ltd.,[20] *per* Lord Shaw of Dunfermline.[21] As I have already said, an appropriation by the creditor could not, in my judgment, make the payment one which was "in respect of" the particular item or items to which it is so appropriated for the purpose of section 23 (4) of the Act.

Before 1939, it was established that, where a debtor made a part payment on account of an unascertained balance owing by him to the payee in such circumstances that the payment amounted to an acknowledgment on the part of the debtor of an account pending between himself and the payee on which a balance in excess of the amount of the payment would prove to be payable, a promise to pay the balance when ascertained ought to be inferred: see *Friend* v. *Young*,[22] *Walker* v. *Butler*,[23] and *Banner* v. *Berridge*,[24] *per* Kay J.[25] Since the enactment of the Limitation Act, 1939, such a payment, in my judgment, constitutes a payment "in respect of" the balance for the purposes of section 23 (4) of that Act.

I reach the conclusion that, in the present case, the payment made by the company on July 10, 1953 (and indeed each of the other five payments made after March 23, 1953), was made on account generally of the balance outstanding at the date of payment on the account current between the company and the applicant and was a payment "in respect of" that balance for the purposes of section 23 (4). Consequently, in my judgment, on the occasion of each of the payments time started to run afresh in respect of the balance then left outstanding. Accordingly, I think that the liquidator was mistaken in rejecting any part of the applicant's proof. I will reverse his partial rejection of the proof and direct that it be admitted in full.

Order accordingly.
Liquidator to pay applicant's costs.

Solicitors: *Matthew Truckman, Lifton & Cunnington; M. L. Spector.*

V. A. M.

[20] [1912] A.C. 756; 29 T.L.R. 1, H.L.
[21] Ibid. 783.
[22] [1897] 2 Ch. 421.
[23] (1856) 25 L.J.Q.B. 377.
[24] (1881) 18 Ch.D. 254.
[25] Ibid. 274.

[QUEEN'S BENCH DIVISION.]

NEWBERRY *v.* SIMMONDS.

1961
March 1, 28.

Lord Parker C.J., Winn and Widgery JJ.

Road Traffic—"Motor-vehicle"—"Mechanically propelled vehicle"—Engine removed from motor-car—By appearance ordinary car—Whether "mechanically propelled vehicle" requiring licence—Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *s.* 15.

Between November 7 and December 3, 1959, the defendant left his Ford motor-car, for which he had no vehicle excise licence, in a public road. On being charged with having kept on a public road a mechanically propelled vehicle for which a licence under the Vehicles (Excise) Act, 1949, was not in force, whereby he became liable to the penalty provided by section 15,[1] he stated to the justices that some time prior to the period in question the engine of the car had been stolen by some person unknown. By appearance, that was, without lifting the bonnet to see if it had an engine, the car was an ordinary motor-car. The justices considered that the prosecutor had failed to prove that the car had an engine in it and that, if there was no engine in it, it was not a mechanically propelled vehicle which required an excise licence, and they dismissed the information. On appeal:—

Held, that, prima facie, the phrase "mechanically propelled "vehicle" in the Vehicles (Excise) Act, 1949, had the same meaning as it had in the Road Traffic Act, 1930, and that a motor-car did not cease to be a mechanically propelled vehicle on the mere removal of the engine if the evidence admitted the possibility that the engine might shortly be replaced and the motive power restored. The absence of an engine, therefore, was not conclusive, nor was the evidence of the defendant sufficient to take what was in other respects an ordinary motor-car out of the classification of a mechanically propelled vehicle, so that, on the totality of the evidence, the justices had no alternative but to find the charge proved, and, accordingly, the case must be remitted to them with a direction to convict.

Floyd v. *Bush* [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265, D.C. and *Lawrence* v. *Howlett* [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74; 116 J.P. 391, D.C. considered.

Quaere. Whether, once a vehicle has been shown to be by appearance a motor-car, the onus of proof might not shift to the owner to establish that at the material time it was no longer a mechanically propelled vehicle.

CASE STATED by London, Kensington, justices.

On June 28, 1960, an information was preferred by Edwin Walter Newberry (a duly authorised officer acting on behalf of the London County Council) against the defendant, Charles Simmonds, alleging that on November 7, 1959, at Courtfield Gardens, Kensington, he did keep on a public road a mechanically propelled vehicle, registration mark BBD 423, for which a licence under the Vehicles (Excise) Act, 1949, was not in force, not being a vehicle

[1] Vehicles (Excise) Act, 1949, s. 15: "(1) If any person uses on a "public road any mechanically pro-"pelled vehicle for which a licence "under this Act is not in force . . . "he shall be liable to . . . " a penalty.

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exempted from duty under section 7 of the Act, whereby he became liable to the excise penalty in that case made and provided by section 15.

The justices found the following facts: Between November 7, 1959, and December 3, 1959, the defendant kept a Ford motor-car, number BBD 423, in the road in Courtfield Gardens, Kensington, S.W.5. During that period the car bore an expired road fund licence. On February 12, 1960, a police officer saw the defendant about the Ford car. The defendant admitted he was the owner thereof and had left it in Courtfield Gardens between November 7, 1959, and December 3, 1959. When asked for its vehicle excise licence he replied he had no such licence. The defendant stated to the justices that at some time prior to the aforesaid period the engine from the Ford car had been stolen by some person unknown. When fitted with an engine the Ford car was a mechanically propelled vehicle. By appearance (that was, without lifting the bonnet to see if it had an engine) the Ford car was an ordinary motor-car.

It was contended by the defendant that because the Ford car had no engine during the period of time in question it was not a mechanically propelled vehicle within the Vehicles (Excise) Act, 1949, and that accordingly such a car required no excise licence and he was not guilty, therefore, of the offence.

It was contended on behalf of the prosecutor that the words "mechanically propelled vehicle" were words of classification and not words of definition so that the Ford car was within the ambit of the Vehicles (Excise) Act, 1949, and that since the defendant had no licence under the Act he was guilty of the offence.

The justices were of the opinion (i) that the prosecutor had failed to prove that the car had an engine in it during the period of time in question; and (ii) that if there was no engine in the car it was not a mechanically propelled vehicle which required an excise licence, and, accordingly, they dismissed the information.

The prosecutor appealed, the question for the opinion of the High Court being whether, upon the above statement of facts, the justices came to a correct determination and decision in law.

Paul Wrightson for the prosecutor.

The defendant did not appear and was not represented.

The following cases were cited in argument: *Floyd* v. *Bush* [2]; *Lawrence* v. *Howlett* [3]; *Wallace* v. *Major* [4]; and *Elliott* v. *Gray*.[5]

Widgery J. read the following judgment of the court: This is an appeal by way of case stated by justices for the Park Petty

[2] [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265, D.C.

[3] (1952) 116 J.P. 391; [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74, D.C.

[4] [1946] K.B. 473; 62 T.L.R. 406; [1946] 2 All E.R. 87, D.C.

[5] [1960] 1 Q.B. 367; [1959] 3 W.L.R. 956; [1959] 3 All E.R. 733, D.C.

Sessional Division of the County of London arising out of the hearing of an information laid by the appellant and alleging that on November 7, 1959, at Courtfield Gardens, Kensington, the defendant did keep on a public road a mechanically propelled vehicle bearing registration mark BBD 423 for which a licence under the Vehicles (Excise) Act, 1949, as amended, was not in force, whereby the defendant became liable to the excise penalty provided by section 15 of that Act.

The justices heard this information on September 16, 1960, and found the following facts: (a) between November 7, 1959, and December 3, 1959, the defendant kept a Ford motor-car, No. BBD 423, in the road in Courtfield Gardens aforesaid. (b) During the period aforesaid the car bore an expired Road Fund licence. (c) The defendant admitted that he had no current Road Fund licence for the said car. (d) By appearance (that is to say without lifting the bonnet) the car was an ordinary motor-car.

At the hearing before the justices the defendant stated that at some time prior to November 7, 1959, the engine of the car had been stolen by some person unknown, and he contended that, because the car had no engine at the material time, it was not a mechanically propelled vehicle and that, accordingly, he had not committed the offence charged.

It does not appear that the justices affirmatively accepted the defendant's statement about the theft of the car's engine. They have stated that they were of the opinion that if there was no engine in the car it was not a mechanically propelled vehicle and that the onus was on the prosecutor to prove affirmatively that the car had an engine. The prosecutor having failed to prove this fact the justices dismissed the information.

The Vehicles (Excise) Act, 1949, contains no definition of the expression "mechanically propelled vehicle," but Mr. Wrightson, who appears for the prosecutor, contends that this expression should have the same meaning in the Act of 1949 as it has in the Road Traffic Acts and, in particular, in section 1 of the Road Traffic Act, 1930. Founding himself on authority under the Act of 1930, he submits that the words are words of classification and not of definition so that a vehicle does not cease to be "mechani-"cally propelled" merely because some part of its propelling mechanism has been removed, and he invites us to say that a motor-car remains within the classification of a mechanically propelled vehicle until it finally reaches the breaker's yard and its registration book is surrendered. Accordingly, he contends that the motor-car in this case remained a mechanically propelled vehicle even if its engine had been stolen. We have not had the advantage of hearing argument on the other side.

We accept the submission that, prima facie, the words in question have the same meaning in the Act of 1949 as in the Act

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of 1930 and have accordingly considered the authorities under the latter Act cited by Mr. Wrightson.

It appears from the judgment of this court in *Floyd* v. *Bush* [1] that a vehicle may still be "mechanically propelled" for this purpose even though mechanical power was not in use at the material time, and in the somewhat unusual case of *Lawrence* v. *Howlett* [2] Devlin J. said [3]: "A motor-car is a mechanically propelled vehicle. It is designed so that it has only a mechanical means of propulsion, and, therefore, I should hold that, whatever its use might be at any given moment, whether it was in working order or whether it was being driven on a free wheel or driven downhill with the engine disengaged, it still was being used as a mechanically propelled vehicle."

In the last-mentioned case the vehicle was a pedal-cycle with an auxiliary motor from which the cylinder piston and connecting rod had been removed and, although there were indications that the removal of those parts was only temporary, the justices found as a fact that it was in use at the material time only as a pedal-cycle, but we think that it may be necessary to consider hereafter whether different considerations apply to a vehicle which has had its mechanical means of propulsion permanently removed. Such a question may be one of fact and degree in which both the extent to which the power unit and transmission have been removed and the permanence of such removal are matters for consideration. We are, however, satisfied that a motor-car does not cease to be a mechanically propelled vehicle upon the mere removal of the engine if the evidence admits the possibility that the engine may shortly be replaced and the motive power restored.

In the present case, therefore, the fact that the prosecutor had not proved that there was an engine in the car was of no significance because the absence of an engine would not be conclusive. Further, even if the justices accepted the evidence of the defendant, that evidence was not in itself sufficient to take a vehicle which was in other respects an "ordinary motor-car" out of the classification of a mechanically propelled vehicle. On the totality of the evidence in this case, the justices had no alternative but to find the charge proved, and the case will be sent back to them with a direction to convict.

That being, as the court thinks, the position with regard to the point of law raised by the case stated, it is not necessary to decide where in such a state of facts as these justices partially investigated the onus of proof would rest. It may perhaps arise some time for consideration whether, because the owner of a vehicle would normally have peculiarly within his own knowledge all the

[1] [1953] 1 W.L.R. 242; [1953] 1 All E.R. 265, D.C.

[2] (1952) 116 J.P. 391; [1952] 1 T.L.R. 1476; [1952] 2 All E.R. 74.

[3] [1952] 2 All E.R. 74, 75.

relevant facts, the onus of proof should be regarded as shifting to him, once his vehicle has been shown to be by appearance a motor-car, to establish that it was at the material time no longer a "mechanically propelled vehicle."

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Appeal allowed with costs.

Solicitor: *J. G. Barr.*

J. F. L.

[LEEDS ASSIZES.]

MARREN *v.* DAWSON BENTLEY & CO. LTD.

1961 *Mar.* 8, 9, 13.

Havers J.

[1957 M. No. 690.]

Limitation of Action—Time, computation of—Action founded on tort—Personal injuries sustained on November 8, 1954—*Writ issued on November* 8, 1957—*Whether day of event causing injuries excluded —Meaning of "from"—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2 (1)—*Law Reform* (*Limitation of Actions, etc.*) *Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 36), *s.* 2 (1).

On November 8, 1954, an accident occurred whereby the plaintiff was injured in the course of his employment with the defendants. On November 8, 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the defendants' negligence. By their defence the defendants pleaded, inter alia, that the plaintiff's cause of action, if any, accrued on November 8, 1954, and that proceedings had not been commenced within the period of three years thereof, contrary to section 2 (1) of the Limitation Act, 1939. The injuries having been held to have been caused by the defendants' negligence, on the plea as to limitation:—

Held, that the day of the accident was to be excluded from the computation of the period within which the action should be brought and that the defendants' plea therefore failed.

Radcliffe v. *Bartholomew* [1892] 1 Q.B. 161 applied.

Gelmini v. *Moriggia* [1913] 2 K.B. 549; 29 T.L.R. 486 not followed.

ACTION.

On November 8, 1954, the plaintiff, Martin Marren, was injured in the course of his employment with the defendants. By writ of summons issued on November 8, 1957, he claimed damages for his injuries which he alleged were caused by the negligence of the defendants, their servants or agents. By their defence the defendants denied negligence and said that the plaintiff's cause of action, if any, accrued on November 8, 1954, and that proceedings were not commenced within the period of three years thereof

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[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

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contrary to the Limitation Act, 1939, as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, and that the right of action was barred by effluxion of time. Havers J. held that the injuries were caused by the negligence of the defendants, and only that part of the judgment dealing with the plea under the Limitation Act, 1939, is reproduced in this report.

G. F. P. Mason for the plaintiff.
H. C. Scott for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *R. B. Policies at Lloyds* v. *Butler*[1]; *Pugh* v. *Leeds (Duke)*[2]; *Goldsmiths' Co.* v. *West Metropolitan Railway Co.*[3]

Cur. adv. vult.

March 13. Havers J., after determining the issues of negligence and assessing damages at £2,880, continued: I have now to deal with the point of law raised that the action is barred by the Limitation Act, 1939, s. 2 (1), which provides: "The following "actions shall not be brought after the expiration of six years "from the date on which the cause of action accrued, that is to "say: (*a*) actions founded on simple contract or on tort. . . ." This section has been amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, section 2 (1) of which provides: "At the "end of subsection (1) of section 2 of the Limitation Act, 1939 "(which subsection provides, amongst other things, that there "shall be a limitation period of six years for actions founded on "simple contract or on tort) the following proviso shall be inser-"ted—'Provided that, in the case of actions for damages for negli-"'gence, nuisance or breach of duty . . . where the damages "'claimed by the plaintiff for the negligence, nuisance or breach "'of duty consist of or include damages in respect of personal "'injuries to any person, this subsection shall have effect as if "'for the reference to six years there were substituted a reference "'to three years.'"

This accident occurred at 1.30 p.m. on November 8, 1954. The writ was issued on November 8, 1957. Mr. Scott contends that, as the accident happened at 1.30 p.m. on November 8, 1954, the plaintiff, if he liked, could have issued his writ that day, and therefore the last day upon which he would be entitled to bring his action would be November 7, 1957, and that, as this writ was issued on November 8, 1957, his action is barred by the statute.

There is a rather remarkable lack of authority on this point. Indeed, there has been no case which has directly decided the point under the Limitation Act, 1939, but there has been a

[1] [1950] 1 K.B. 76; 65 T.L.R. 436; [1949] 2 All E.R. 226.
[2] (1777) 2 Cowp. 714.
[3] [1904] 1 K.B. 1; 20 T.L.R. 7, C.A.

number of authorities dealing with other Acts in which Parliament has made a statutory provision of a somewhat similar character. I refer to a passage in Halsbury's Laws of England, 2nd ed., vol. 32, p. 142: "207. The general rule in cases in which a period "is fixed within which a person must act or take the conse-"quences is that the day of the act or event from which the "period runs should not be counted against him. This rule is "especially reasonable in the case in which that person is not "necessarily cognisant of the act or event; and further in support "of it there is the consideration that, in case the period allowed "was one day only, the consequence of including that day would "be to reduce to a few hours or minutes the time within which "the person affected should take action. 208. In view of these "considerations the general rule is that, as well in cases where "the limitation of time is imposed by the act of a party as in "those where it is imposed by statute, the day from which the "time begins to run is excluded; thus, where a period is fixed "within which a criminal prosecution or a civil action may be "commenced, the day on which the offence is committed or the "cause of action arises is excluded in the computation. . . ."

I was referred to a number of older authorities. The one to which I attach great importance is *Radcliffe* v. *Bartholomew*.[1] This was a decision of the Divisional Court. It was concerned with the construction of section 14 of the Act for the Prevention of Cruelty to Animals (12 & 13 Vict. c. 92), and under that section every complaint under the provisions of the Act was to be made "within one calendar month after the cause of such complaint "shall arise."

The headnote reads: "On June 30 an information was laid "against the appellant in respect of an act of cruelty alleged to "have been committed by him on May 30. An objection to the "jurisdiction of the justices having been taken, on the ground "that the complaint had not been made within one calendar "month after the cause of complaint had arisen:—*Held*, that the "day on which the alleged offence was committed was to be "excluded from the computation of the calendar month within "which the complaint was to be made; that the complaint was "therefore made in time, and the justices had jurisdiction to hear "the case."

Wills J. said[2]: "I am of opinion that the decision of the "justices was right. Unless there is something in the suggested "distinction to the effect that the same words are to be construed "differently in civil and criminal cases, I think that the case is "really governed by authority, and that of a very cogent kind. "In *Williams* v. *Burgess*,[3] the language of the section was "'within twenty-one days after the execution,' and it was held

[1] [1892] 1 Q.B. 161; sub nom. *Ratcliffe* v. *Bartholomew*, 8 T.L.R. 43, D.C.

[2] Ibid. 163.

[3] (1840) 12 Ad. & El. 635; 9 Dowl. 544.

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"that the day of execution was there to be reckoned exclusively. "In *Hardy* v. *Ryle*,[4] which was an action against a justice for "trespass and false imprisonment, the plaintiff had been dis-"charged from custody on December 14, and brought his action "on June 14 following; section 8 of 14 Geo. 2, c. 44, prescribed "that 'no action shall be brought against any justice of the peace "'for anything done in the execution of his office unless com-"'menced within six calendar months after the act committed.' "Except as to the difference between one month and six months, "those words are the same as those which we are now interpret-"ing, and it is impossible to draw any distinction between the "language of the two enactments. In that case the court held "that an action brought on June 14 in respect of a cause of "action which had arisen on December 14 was in time, "because the day on which the cause of action arose was "excluded from the computation of the six months, while that "on which the action was brought was included in it. It is true "that the reasoning by which this decision was supported was "criticised by Parke B. in *Young* v. *Higgon*,[5] but that learned "judge suggests no doubt as to the correctness of the conclusion. "At the end of his judgment occur the cogent remarks: 'Apply "'the criterion which has been before suggested—reduce the "time to one day, and then see what hardship and inconvenience "must ensue if the principle I have stated is not to be "'adopted'; and these remarks are entirely applicable to the "present case. The result of reducing the time to one day would "be that an offence might be committed a few minutes before "midnight, and there would only be those few minutes in which "to lay the complaint, which would be to reduce the matter to "an absurdity. Therefore, unless a distinction can be established "between a statute dealing with criminal, and one dealing with "civil, procedure, this case is concluded by authority. It is to "be remarked that in *Hardy* v. *Ryle*[6] the enactment was not "passed for the purpose of giving the plaintiff a right to sue, but "in order to impose a limitation on his unrestricted right, and "the authority of that and similar cases is therefore most direct "and cogent. It has been suggested that there is a distinction "between the construction to be placed on these words according "as they occur in statutes dealing with civil or criminal matters, "and that in the latter case the day on which the offence is "committed ought to be included in the computation of the "time allowed for laying the complaint; but no authority has "been shown for the existence of such a rule, which would be "most unsatisfactory in its operation if it really existed. Great "mischief might, and almost certainly would, arise from altering "the canon of construction of the same words, according to the

[4] (1829) 9 B. & C. 603.

[5] (1840) 8 Dowl. 212; 6 M. & W. 49.

[6] (1829) 9 B. & C. 603.

"subject-matter with which they dealt; and there being no "authority in support of so broad a proposition, I am certainly "not inclined to make one. The complaint was therefore in "time, and the justices must proceed with the hearing of the "summons."

Lawrance J. gave judgment to the same effect.

This was a decision of the Divisional Court which followed *Williams* v. *Burgess*[7]; it cited with approval *Hardy* v. *Ryle*; and it referred to the fact that although the reasoning by which the decision was supported in *Hardy* v. *Ryle* was criticised by Parke B., that learned judge suggested no doubt as to the correctness of the conclusion.

The learned authors of Preston & Newsom on the Limitation of Actions, 3rd ed., p. 12, referred to in an Irish case of *Somers* v. *Erskine* (*No. 2*),[8] in which it was held that, if the cause of action accrued on January 30, 1934, a writ issued on January 30, 1940, was in time. I have not had the advantage of seeing that report, but the learned authors say this: "This decision was "founded on the fact that there was no evidence at what time "of day a cause of action was complete, so that 'the court is not "'satisfied that an action could have been instituted that day.'" If the decision is based on that, I should not be prepared myself to follow it. I think the finding itself is consistent with the judgment to which I have just referred and is correct.

The learned authors also refer to a more recent decision of Channell J. in *Gelmini* v. *Moriggia*.[9] In the headnote to that case it says: "By section 3 of the Limitation Act, 1623, 'All actions "'. . . shall be commenced and sued within the time and limita-"'tion hereafter expressed, and not after (that is to say) . . . "'within six years next after the cause of such actions or suit.' "The time for payment of a promissory note expired on Saturday, "September 22, 1906. The writ in an action upon the note "against the maker was issued on Monday, September 23, 1912:— "*Held*, that inasmuch as the cause of action was complete at "the commencement of September 23, 1906, that day must be "included in calculating the six years within which the action "could be brought under the statute; that therefore the six years "expired on Sunday, September 22, 1912, and the writ was "issued too late."

Channell J. said[10]: "Upon the point with regard to the "Limitation Act, 1623, I have a very clear opinion." I need hardly say that that learned judge's very clear opinion does make me somewhat diffident in disagreeing with that point. "It "is remarkable that there is no express decision upon the "point after so many years, and the fact that it is now raised "by Mr. Moresby for the first time is a proof of his ingenuity.

[7] (1840) 12 Ad. & El. 635; 9 Dowl. 544.
[8] (1944) I.R. 368.
[9] [1913] 2 K.B. 549; 29 T.L.R. 486.
[10] Ibid. 551.

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"In the textbooks it is assumed that the action must be commenced within six years from the day on which the cause of action is complete, including that day. In *Morris* v. *Richards*,[11] Mr. Commissioner (afterwards Mr. Justice) Wills had two points to decide: first, whether the rule as to days of grace, which was then mercantile usage, but which has since become statutory, had the force of law. He decided that it had. But he held that that rule, being established as a matter of custom, must be construed with the custom that when the last day of grace expired on a Sunday the bill or note was payable on Saturday. That decision is not of great importance because in the following year the law became statutory, nor has the case much bearing on the present case, except that everybody then assumed that if a writ had been issued under the same circumstances as in the present case, namely, on the Monday, it would have been too late. The last day upon which the writ in that case could have been issued, on that assumption, happened to be a Sunday." He then deals with the rules of the Supreme Court, and I do not think that affects it one way or the other. In the next paragraph he says: "The other point is, what is the true rule as to the computation of the six years under that statute? An action cannot be brought until the cause of action is complete, and in all cases of contract the person who has to pay has the whole of the day upon which payment is due in which to pay; therefore until the expiration of that day an action cannot be brought because until then there is no complete cause of action. The result is that an action cannot be brought until the next day; but it can be brought on that day because the cause of action is complete at the commencement of that day. If the cause of action is not complete, the action cannot be brought. It therefore follows that that day is one of the days upon which the action can be brought. The words of the statute are 'within six years next 'after the cause of such action or suit.' Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises, and on that day an action can be brought, and that day is the first of all the days in the six years. Therefore, assuming that the day upon which the action can be brought to be a Thursday, and the period for bringing the action to be a week, the creditor can bring it at any time up to and including the following Wednesday, but not the Thursday. And the same rule applies where the period, as under the statute, is six years. I do not think that the day on which the cause of action arises is excluded. It is the previous day which is excluded, i.e., the day at the expiration of which the cause of action becomes complete. Any other construction would place upon the statute an interpretation which has not hitherto been accorded to it.

[11] (1881) 45 L.T. 210.

"Therefore, so far as the cause of action arises on the promissory "note, the writ was issued too late."

It is significant that none of the cases to which I have referred were cited to the learned judge in that case. Neither *Radcliffe* v. *Bartholomew* [12] nor *Hardy* v. *Ryle* [13] were cited to him. I think that the principle which was established by the Divisional Court in *Radcliffe* v. *Bartholomew* is of general application to statutes whether they deal with civil or criminal matters, and that the rule which the Divisional Court in that case laid down is of general application. I think, therefore, that I am bound by that decision. But if I am not bound by it, and it is upon me to choose between *Radcliffe* v. *Bartholomew* and the decision of Channell J., then I prefer the decision in *Radcliffe* v. *Bartholomew* and the reasons on which it is based.

Therefore, in my view, the plea that the action is barred by the Limitation Act, 1939, is bad; therefore the defence in the action must fail and there must be judgment for the plaintiff for the amount I have already indicated.

Judgment for the plaintiff for £2,880 with costs.

Solicitors: *Turner & Wall, Keighley; A. V. Hammond & Co., Bradford.*

[12] [1892] 1 Q.B. 161.

[13] (1829) 9 B. & C. 603.

[COURT OF APPEAL.]

SLATER *v.* SLATER.

C. A.

1960
June 1, 2;
July 20.

Hodson,
Pearce and
Upjohn L.JJ.

Husband and Wife—Alimony—Pending suit—Quantum—Iational assistance for wife—Court entitled to ignore benefit—Normal course.

A wife petitioner with no income other than national assistance benefit of £2 19s. per week was awarded alimony pendente lite of £2 5s. per week against her husband, who was in receipt of an income of about £500 per annum:—

Held, that the order was not wrong in principle in failing to take into account national assistance benefit, and that the Court of Appeal would not interfere with a decision within the discretion of the judge or registrar.

Sterne v. *Sterne* [1957] P. 168; [1957] 2 W.L.R. 544; [1957] 1 All E.R. 792, C.A. explained.

Decision of Marshall J. affirmed.

Per curiam. Cases in which national assistance benefit received by a wife is taken into account are likely to be the exception and not the rule, but that is a matter within the court's discretion in each particular case.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

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Appeal from Marshall J.

A wife petitioner, Emily Edith Slater, obtained an order for alimony pendente lite of £2 5s. per week in the Gloucester District Registry. The appeal of her husband, Bert Powell Slater, against this order was dismissed by Marshall J. The wife's petition alleged adultery by the husband, commencing in 1934. The husband, by his answer, admitted adultery since 1936, relied on the wife's delay as a defence, and cross-prayed for dissolution on the ground of desertion.

The husband earned about £500 per annum after deductions. He had some small assets, including savings. He was supporting the woman named and a daughter aged 10. Until 1947 he had made weekly payments in respect of a child of the marriage, but after that he had paid nothing to the wife. The wife, who, according to her affidavit, was in bad health and not working, was in receipt, at the time of making of the order, of £2 19s. per week national assistance benefit, and had no other income and only £36 savings.

The husband appealed from the order of Marshall J.

Ingram Poole and *Mrs. Glynne Bremner* for the husband.
Bryan Anns for the wife.

No cases, other than those which are referred to in the judgment, were cited in the argument.

Cur. adv. vult.

July 20. Hodson L.J. I will ask Pearce L.J. to deliver the first judgment

Pearce L.J. read the following judgment, in which he stated the facts and continued: The sole point in the appeal is whether the order is wrong in principle in failing to take into account the national assistance benefit received by the wife and failing in consequence to refuse any order for alimony. The judge in the exercise of his discretion dismissed the appeal, holding that *Sterne* v. *Sterne*,[1] which is the only relevant case, did not compel him to take the wife's benefit into account and refuse any order for alimony.

Counsel for the husband contends that the logical inference from *Sterne* v. *Sterne* [1] is that national assistance benefit must in all cases be taken into account and that the court has no discretion to disregard it. He relies on dicta from *Coombs* v. *Coombs*,[2] *Eaton* v. *Eaton* [3] and *Bass* v. *Bass* [4] as establishing that it is only the wife's necessity that justifies an order for alimony pendente lite. In this case, he argues, the wife is in no necessity since

[1] [1957] P. 168; [1957] 2 W.L.R. 544; [1957] 1 All E.R. 792, C.A.
[2] (1866) L.R. 1 P. & D. 218.
[3] (1870) L.R. 2 P. & D. 51.
[4] [1915] P. 17; 31 T.L.R. 49, C.A.

she has national assistance benefit and the sole effect of the order will be to impose on the husband the burden which is at present being borne by the community. He concedes that, if his argument is correct, no order will ever be made against a husband whose wife is receiving an equivalent amount of national assistance benefit, or even, it may be, whose wife could on application to the National Assistance Board receive an equivalent amount of benefit. But it is, he argues, more proper that the community should bear the maintenance of a wife pendente lite, since, if the wife is shown at the trial not to have forfeited her marital right to maintenance, the National Assistance Board can recover from the husband retrospectively the amounts which it has paid to the wife, whereas, if the wife is shown to have forfeited her right to maintenance, it is proper that the community should bear a loss for which the husband is proved at the trial to have had no legal liability.

That argument, although it has its attractions, is, as I think, too great a simplification of the matter and omits various considerations. The court rightly has a wide discretion in awarding alimony. The ecclesiastical courts had wide powers: see *Rees* v. *Rees*.[5] Under the joint effect of section 17 and section 32 of the Matrimonial Causes Act, 1857, the court had power at the wife's suit to make any interim order for alimony "which shall be deemed just." The power to make interim orders "as the court thinks just" was later contained in the Supreme Court of Judicature (Consolidation) Act, 1925, section 190. It now derives from the Matrimonial Causes Act, 1950, section 19 (1), which reads: "On any petition for divorce or nullity of marriage, the "court may make such interim orders for the payment of alimony "to the wife as the court thinks just."

Thus the court has always been given a wide and unfettered discretion to do what it thinks just. The paucity of reported cases on a jurisdiction which has involved the making of innumerable orders pendente lite shows that the courts have wisely been reluctant to impose on this wide discretion any fetters of legal principle. It is inevitable and convenient that the courts should develop some practice in these as in other matters. This has the advantage, inter alia, that ligitants may be able to make arrangements with an approximate knowledge of what is likely to result from recourse to a court of law. But it has always been made clear that the allowance is entirely in the discretion of the court (see *Sherwood* v. *Sherwood*[6]), and it is desirable that it should remain so. When that discretion is wrongly used in a particular case, a superior court will correct it. But it would be unfortunate if that correction of discretion on particular facts should be used to impose fetters on all subsequent use of the discretion in other cases.

The view held by the court has been that during the pendency

[5] (1821) 3 Phillim. 387.

[6] [1929] P. 120; 45 T.L.R. 53, C.A.

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of its litigation wives must be, so far as possible, relieved from necessity, even where it seems probable that they are guilty, until such time as the law formally releases the husband from his matrimonial obligations. In a court concerned amongst other things to prevent collusion it is particularly desirable that wives should not be subject to the pressure of financial stringency pendente lite. In rare cases, even where the wife has been found guilty and the husband obtains a dissolution, the court may order him to continue his payment of maintenance. The vast majority of orders for alimony pendente lite are made in favour of wives who are in fact innocent and many are made in favour of wives who, though accused, are found at the trial to be innocent. The argument that in all these cases national assistance must for the time being bear the cost of alimony pendente lite and that the wives must have recourse to national assistance rather than to their husband's resources is not attractive. It may well be preferable that the occasional hardship to a husband who finds himself compelled pendente lite to support a guilty wife should be regarded as being but one of the misfortunes of an unhappy marriage, one of the penalties paid by those who are the unfortunate losers in a venture that more often brings rich rewards.

It would be undesirable that some hard cases should produce a fetter on a wide discretion and compel a practice that is inconvenient and unfair to a large majority. For there is great inconvenience in many cases in allowing the national assistance benefits to be taken into account or to take the place of alimony from the husband. Inconvenience becomes impossibility in cases where the alimony that would be ordered is greater than the national assistance benefit. Let us assume that the proper subsistence for a wife in the court's view is £3 a week and that she is receiving £2 a week from national assistance. On the husband's argument the court should order the husband to pay only £1 per week. A week or at most a fortnight later, as an inevitable result of such an order, the national assistance benefit would be reduced by £1 per week. The wife must then apply to the court for her order to be increased to £2 a week. Inevitably, the national assistance benefit would again be reduced accordingly. She must then come back a third time in order to get an order for £3 per week—the order which she would have got originally if the national assistance benefit had been disregarded. And thus in the end the national assistance benefit cannot be taken into account.

This difficulty was not pointed out to the court in *Sterne* v. *Sterne*.[7] In that case the judge had in his discretion refused to make any order for alimony pendente lite in favour of a wife who was in receipt of national assistance benefit. Hodson L.J. pointed out[8] that the only point which emerged in that case was "whether, as a matter of law, the judge was wrong in taking "into account the receipt of public assistance by the wife in

[7] [1957] P. 168.

[8] Ibid. 171.

"reaching the result which he did." Having considered how far the husband's general liability to maintain his wife had been affected by the passing of the National Assistance Act, 1948, and having referred to certain cases on that point in the Divisional Court, he concluded that if the husband were ultimately found to be in the right he would not have to reimburse the National Assistance Board for their payments to his wife, but that if he were found to be in the wrong he would have to do so. He ended with these words [9]: "So far as the present position is concerned, it seems "to me impossible to say that the court, in the exercise of "its discretion, is not entitled to look at the facts as they are "now. Taking those facts, the wife is in receipt of an income "which the husband may in the future be compelled to reimburse "because it comes from the National Assistance Board. But "taking the position as it is, the court in the exercise of its "discretion is entitled to say that there is not here a case "in which an order should be made in favour of the wife." Ormerod L.J. concluded a short judgment with these words [10]: "She has, therefore, those means of subsistence, and I cannot "find that there was any error in principle on the part of the "judge in exercising his discretion as he did." Hallett J. agreed. Thus the lords justices were clearly saying that they would not interfere with the judge's discretion in taking national assistance benefit into account in that particular case. We are bound by that case, which rightly, as I respectfully think, holds that it would be wrong to remove from the area of the judge's discretion any consideration of national assistance benefit. There may be many occasions when it is valuable for a judge, in exercising his discretion in a case of particular hardship, to be able to take into account national assistance benefit paid to the wife. That is a very different matter from laying down the principle that a judge must always take it into account. *Sterne* v. *Sterne* [11] certainly does not compel us to impose such an undesirable fetter.

Admittedly, although the lords justices made it clear that they were merely refusing to interfere with discretion in that particular case, there are observations that, taken out of that context, would lend support to the view that as a general practice it was desirable to take national assistance benefit into account. As a result of those judgments the practical difficulties to which I have referred occurred to those more nearly concerned with the making and administering of alimony orders and in consequence the registrars' circular dated May 8, 1958, was issued to the registrars in the following terms: "Where a wife is in receipt of national "assistance for herself or a child, the registrar will: (i) express "any initial order for ancillary relief to take effect from a stated "date 14 days after the drawing up of the order (a maintenance "order following an alimony order or a modification order, need

[9] [1957] P. 168, 173.
[10] Ibid. 174.
[11] [1957] P. 168.

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"not be post-dated in this way); (ii) give immediate notice of the "making of any order to the central office of the National "Assistance Board. The fact that national assistance is being "paid should normally appear from the evidence. It may be "assumed that in all probability any wife who has a civil aid "certificate on a nil contribution is in receipt of assistance. On "receipt of a notice of the order, the Board will instruct its local "office to adjust the rate of national assistance. The registrars "are of opinion that with this arrangement there is no necessity "for them to take into account as wife's income any assistance "which is being received at the time of making the order."

In the light of these practical difficulties and considerations which were not put before the court in *Sterne* v. *Sterne* [12] it seems that cases in which the national assistance benefit received by a wife is taken into account are likely to be the exception and not the rule. But that is a matter for the court in each particular case and I would wish to say nothing that could be taken as fettering its wide discretion.

It would certainly be wrong to interfere with the discretion of the judge in the present case. I would dismiss the appeal.

Upjohn L.J. I agree with the judgment which has been delivered.

Hodson L.J. I agree with the judgment of Pearce L.J. and only add a few words of my own because I recognise that my own observations in *Sterne* v. *Sterne* [12] which have been quoted by my brother lay a foundation for the argument which has been addressed to the court to the effect that national assistance benefit must be treated as if it were the wife's independent income when an application by her for alimony pendente lite falls for consideration. My intention was not to lay down a general rule or to fetter the discretion of the court but to say no more than that, on the facts of that particular case, there was no ground shown for interfering with the exercise by the judge of the discretion vested in him.

Experience has shown that the practice initiated by the registrars' circular of May 8, 1958, is workable and convenient and not open to objection as a guide in such cases.

I have had the opportunity of speaking to Ormerod L.J., who concurs in what I have said. The appeal, therefore, will be dismissed.

Appeal dismissed with costs.

Solicitors: *Gibson & Weldon for B. A. Greenwood & Co., Poole; Thursfield & Adams, Kidderminster.*

[12] [1957] P. 168.

[PROBATE, ETC., DIVISION.]

HUNTER *v.* HUNTER AND WADDINGTON.

1961
Mar. 8, 15.

Scarman J.

Husband and Wife—Settlement—Divorce Court, ordered by—Jurisdiction—Jurisdiction to order settlement of guilty wife's property—Property situated in England—Wife resident and domiciled abroad—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 24—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 47.

A husband, who had divorced his wife on the ground of her adultery, applied to the court for an order settling the property of the wife upon the children of the family. At the date of the application part of the property was situate in England and part abroad and the wife was domiciled and resident in Kenya. The registrar made an order as to the property situated in England. On the husband seeking the confirmation of the registrar's report the wife, inter alia, challenged the jurisdiction of the court.

Held, (1) that the court had power under section 24 of the Matrimonial Causes Act, 1950,[1] to order a settlement of the property of a guilty wife which was situated in England although she was domiciled and resident abroad so long as the order was capable of being effectual.

Tallack v. *Tallack and Broekema* [1927] P. 211; 43 T.L.R. 467 applied.

(2) That, although the court might not have express power under section 24 to refer the matter of drafting such settlement to conveyancing counsel for the drafting thereof, it had power, in the absence of consent by the wife, to give directions for the preparation by the husband of such instrument as it deemed necessary, the wife's position being safeguarded by the requirement that the court must approve the draft before execution.

Style v. *Style and Keiller* [1954] P. 209, 215; [1953] 3 W.L.R. 613; [1953] 2 All E.R. 836; [1954] 2 W.L.R. 306; [1954] 1 All E.R. 442, C.A. considered.

(3) That the deed of settlement fell within the provisions of section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925,[2] the court could, therefore, ensure the due execution of

[1] Matrimonial Causes Act, 1950, s. 24 (1): "If it appears to the court "in any case in which the court pronounces a decree of divorce or for "judicial separation by reason of the "adultery, desertion or cruelty of the "wife that the wife is entitled to any "property either in possession or "reversion, the court may, if it "thinks fit, order such settlement as "it thinks reasonable to be made of "the property, or any part thereof, "for the benefit of the innocent party, "and of the children of the marriage "or either or any of them."

[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 47: "Where any person neglects or "refuses to comply with a judgment "or order directing him to execute "any conveyance, contract or other "document, or to indorse any negotiable instrument, the High Court "may, on such terms and conditions, "if any, as may be just, order that "the conveyance, contract or other "document shall be executed or that "the negotiable instrument shall be "indorsed by such person as the "court may nominate for that purpose, and a conveyance, contract, "document or instrument so executed "or indorsed shall operate and be for "all purposes available as if it had "been executed or indorsed by the "person originally directed to execute "or indorse it."

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the deed once approved by virtue of the power given to it under that section which was independent of the power of attachment.

Howarth v. *Howarth* (1886) 11 P.D. 68 applied.

(4) That the order, therefore, being an effectual order, the court had jurisdiction.

Application for settlement of guilty wife's property.

The marriage was celebrated in England in June, 1950, and was dissolved on the ground of the wife's adultery by a decree which was made absolute in March, 1960. There were two children of the family, boys aged eight and six years, whose custody had been granted to the husband. The parties to the marriage were domiciled in England but on March 22, 1960—four days after the decree absolute—the wife married one Michael Gerard Sullivan, who was not the co-respondent. Mr. Sullivan was at the date of the marriage and remained domiciled in Kenya, where he and the wife resided. Thus since her remarriage the wife had been both domiciled and resident in Kenya. The husband had also remarried and a child of that marriage was shortly to be born.

The husband, a practising solicitor, earned a gross income of about £2,670 per annum and in April, 1959, inherited a fortune of some £20,000. He owned a half-share with the former wife in a house which was the former matrimonial home. Such resources as the children had independently of the means of their parents were so slight as to be disregarded for the purposes of the application. The wife's property was inherited. She received under her father's will an absolute interest in possession worth £12,563, and a reversionary interest which, were it to fall into possession, would be worth at least £14,775 at the date of the application.

The husband's application for a settlement of the wife's property was made by notice dated April 13, 1960, by which time the fund in possession of £12,563 had been largely dissipated. Her property at that date was, therefore, represented by her share in the former matrimonial home, worth about £2,125, some assets in Kenya including the house where she was living with her new husband, and investments in Australia worth about £2,000. The registrar reported in favour of a settlement for the benefit of the two children of the marriage of all the wife's property in England, namely, her reversionary interest under her father's will and her half-share in the former matrimonial home, upon terms which would give her a life interest in the former but not the latter. The husband sought confirmation of the report, while the wife submitted first, that the court has no jurisdiction to make any order, secondly and alternatively that, in all the circumstances, more property than was reasonable is included in the settlement proposed by the registrar.

Douglas Lowe and *Bryan Anns* for the husband.

R. L. Bayne-Powell for the wife.

The following authorities were referred to in argument, in addition to those cited in the judgment: *Goff* v. *Goff* *; Settled Land Act, 1925.

Cur. adv. vult.

SCARMAN J. referred to the facts as set out above and continued: Mr. Bayne-Powell's first proposition in support of his submission of no jurisdiction was that lack of English domicile necessarily entails lack of jurisdiction. In my opinion this is altogether too sweeping a proposition, as may be seen from an examination of the decision upon which he principally relies, *Tallack* v. *Tallack and Broekema.*[1] In that case a husband petitioner moved to confirm a registrar's report under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (1)—predecessor of section 24 (1) of the Act of 1950—in which the registrar had reported in favour of ordering a settlement for the benefit of the children of the marriage of certain property of the guilty wife so as to provide each child with an annual income for life. The wife's property consisted of foreign, mainly Dutch, investments: she had no property in England. Within a few weeks of the decree absolute the wife had married the co-respondent, a Dutchman, in Holland, and had acquired a Dutch domicile. Upon these facts the wife protested against the jurisdiction to order a settlement. Her protest was upheld. In the course of his reserved judgment Lord Merrivale P. said[2]: "As "to the property of a guilty wife, which is subjected by the "statute in question to the jurisdiction of the court, it is suffi-"cient to say generally that prima facie what is dealt with "is property of a woman domiciled in England subject by reason "of her domicile to the jurisdiction of English tribunals." He then proceeded to consider the scope and limitations of the court's jurisdiction under the section over a wife not domiciled in England, thereby plainly recognising that, in some circumstances, there is jurisdiction. After indicating that an English court would not claim a jurisdiction which would infringe the authority of foreign tribunals over the domestic affairs of families domiciled within their jurisdiction, he said[3] that the following question must be answered: "Can this court give an effective judgment "as to the respondent's property so as to bind the property?" And he came to the conclusion that, in the case before him, a decree of the court would be "an idle and wholly ineffectual "process." The reason for his conclusion was that the wife's property was abroad, being largely in Holland, where it was proved effect would not be given to a decree of the English court under the section. Lord Merrivale P. had also to consider whether, even if the decree would be ineffectual against the property, the court would yet have jurisdiction because its decree

* [1934] P. 107; 50 T.L.R. 318.
[1] [1927] P. 211; 43 T.L.R. 467.
[2] [1927] P. 211, 220.
[3] Ibid. 221.

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could operate in personam against the wife. It was said she had appeared and was, therefore, subject to a personal judgment, though execution was not available. This contention, however, failed because in fact there had been no submission to the jurisdiction of the court and the wife was beyond the reach of the court. Finally, Lord Merrivale P. declared [4] "that in the absence "of evidence of the existence within the jurisdiction of any "property of the respondent subject to be dealt with . . . (under "the section), the court makes no order."

In my opinion the true principle to be gathered from the judgment of Lord Merrivale P. in *Tallack's* case [4] is that in a case where the wife is neither domiciled nor resident in England the court may nevertheless exercise its jurisdiction to order a settlement if the property to be settled is within the jurisdiction so that it may be the subject of an effectual order of the court.

Faced with this test of jurisdiction, Mr. Bayne-Powell argued that even where property suggested for settlement be as in this case, within the general jurisdiction of the court, yet no jurisdiction under the section arises unless it be possible for the court to make an effectual order. He said no such order could be made in this case, and submitted that in the last resort an order under the section can only be enforced by personal coercion and that the wife was beyond the reach of the court, or alternatively that it would be infringing the authority of the Kenya courts to seek to enforce it personally against her. It was not suggested before me that effect could be given to the court's order in Kenya, and neither evidence nor argument was directed to show that it could be. The wife, who is resident and domiciled abroad (her appearance to this application was under protest), cannot, therefore, be proceeded against personally: she is out of the reach of the court. It is, however, submitted on behalf of the husband that, since the property to be settled is within the jurisdiction, this court can make an effectual order: and, it was further said, the registrar in his report has formulated an order to which effect can be given without personal coercion of the wife or any infringement upon the authority of the courts of Kenya.

The court having ordered a settlement of property of the wife situate in England, the wife refusing to execute any settlement, the problem is whether, without resort to attachment and without infringement of the authority of the courts of Kenya, this court can give effect to its order. Mr. Bayne-Powell maintains that the answer to this question must be in the negative for the following reasons: (1) The settlement cannot be drafted: there is no power under the section to refer the matter to conveyancing counsel of the court (*Style* v. *Style and Keiller* [5]), and it

[4] [1927] P. 211, 223.

[5] [1954] P. 209, 215; [1953] 3 W.L.R. 613; [1953] 2 All E.R. 836; [1954] 2 W.L.R. 306; [1954] 1 All E.R. 442, C.A.

would be contrary to principle to allow the petitioner or his advisers to draft the instrument; (2) if it can be drafted, it cannot be executed, section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, having no application to an instrument of settlement. It would be odd if the court has power to order such settlement as it thinks reasonable but no power to provide for its drafting save by keeping a wife in prison until she purges her contempt by agreeing either to instruct her advisers, or to allow conveyancing counsel of the court, to draft the necessary instrument. The difficulty arises because there is no power expressly given by section 24 (1) of the Act of 1950 to the court to refer the matter to conveyancing counsel of the court. In *Style* v. *Style and Keiller*, Singleton L.J.,[6] impressed with the difference between section 19 (2) of the Act of 1950, which contains in the matter of secured provision for a wife on divorce an express power to refer the question of drafting to conveyancing counsel of the court, and section 24 of the same Act, which makes no mention of any such power, found it "difficult to see" how the court could of its own motion so refer the question. But he went on to add counsel had been most helpful and had agreed to such a reference. Neither Jenkins L.J.[7] nor Hodson L.J.,[8] the other two members of the court, mentioned the point in so many words, but each agreed with the judgment of Singleton L.J.

I do not read the judgment of Singleton L.J. as deciding the point. Indeed counsel's consent to the reference made a decision unnecessary. I do not, therefore, consider myself bound by the decision in *Style* v. *Style and Keiller*[9] to hold that the absence of express words in section 24 empowering the reference means that the court has no such power. Nevertheless, the views of the Court of Appeal on the point clearly have very great persuasive force. But for the fact that both section 19 (2) which deals with secured provision for a divorced wife and section 22 (4), which deals with secured provision for a wife whose husband has failed to comply with a decree of restitution of conjugal rights, contain such an express reference, the absence of any such reference from section 24 could not, in my view, be interpreted as meaning that the court, acting under that section, has no such power. Had the statute been consistently silent upon the matter, the conjunction of R.S.C., Ord. 51, rule 7, and rule 82 of the Matrimonial Causes Rules, 1957, would, in my view, have been decisive in favour of the existence of the power. Whatever may have been the position prior to the introduction of these Rules, I have to confess that, but for the views expressed by the Court of Appeal in *Style's* case,[10] I would not have thought that their operation was ousted by the silence

[6] [1954] P. 209, 220.
[7] Ibid. 220.
[8] Ibid. 223.
[9] [1954] P. 209.
[10] Ibid.

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of the section, there being no express enactment excluding them. On the contrary, I would have been inclined to think that the effect of the Rules is to fill the void left by section 24 on the matter and to empower the court to refer to conveyancing counsel of the court the drafting of the settlement it orders. Further, the view of the matter which, unaided by authority, I would be inclined to take receives a measure of support from the course taken prior to *Style's* case,[11] by at least two very experienced judges when dealing with applications to settle the property of a guilty wife. In *Lorriman* v. *Lorriman and Clair*,[12] Bucknill J. clearly assumed the court had power in the absence of consent to refer the drafting of the settlement to conveyancing counsel of the court: and I think Hodson J. acted upon the same assumption in *Barker* v. *Barker*.[13] In neither of these cases, however, was the point taken.

It is, however, unnecessary for me to reach a conclusion on the point, as I am of the opinion that the court, even if it cannot of its own motion refer the drafting to conveyancing counsel of the court, has power to give directions for the preparation of the instrument it considers to be necessary. The words of the section seem to me conclusive upon the point: for the court, having power, "if it thinks fit," to order "such settlement as "it thinks reasonable," must have power to give directions as to its drafting and finally to approve a submitted draft. The language is quite clear, requiring the court first to decide whether the case is a fit one for settlement and then to decide and order whatever settlement it considers reasonable.

Mr. Bayne-Powell, however, submitted that it would be very unjust to the wife if, in face of her refusal to consent to the drafting of the instrument either by her advisers or conveyancing counsel of the court, the husband should be given liberty to submit a draft to the court for its approval. I see nothing unjust in such a course. The wife would have the safeguard of the court's approval of the draft before it was submitted for execution. Accordingly, I think the court has power, without resort to attachment proceedings, to provide for the drafting of the settlement it thinks reasonable to order should be made.

The second reason advanced for asserting that the court is helpless when faced with a wife domiciled and resident abroad who refuses her consent, was that the court has no power to effect the execution of the settlement. Mr. Bayne-Powell, I think, conceded that if the power contained in section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, is available to the court when exercising the jurisdiction given it by section 24 of the Act of 1950, the court would be able to ensure execution of the settlement even though the wife refuse to do so and be outside the reach of the court.

[11] [1954] P. 209.
[12] [1908] P. 282; 24 T.L.R. 575.
[13] [1944] P. 77; 60 T.L.R. 417; [1944] 2 All E.R. 446.

[His Lordship then referred to the provisions of section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, so far as material and continued:] In my judgment the section is applicable if the settlement, which the court may order under section 24 (1) of the Act of 1950, falls within the scope of the phrase "any conveyance, contract or other document." I was referred by counsel to *In re Cathcart*,[14] *Savage* v. *Norton*[15] and *Howarth* v. *Howarth*.[16] The settlement envisaged by section 24 (1), as is that proposed by the registrar in this case, is an instrument whereby property is transferred to trustees to be held on certain trusts. Being a transfer of property it falls, in my opinion, within the term "any "conveyance, contract or other document" as used in section 47 of the Act of 1925. It is the same sort of instrument as a deed ordered under section 19 (2) of the Act of 1950, making secured provision for a wife and in *Howarth* v. *Howarth*[17] the court did appoint a person to execute the necessary deed in a case where it had ordered a secured provision. The latter case is also helpful in that the Court of Appeal[18] made it plain that the power conferred on the court by section 47 (then section 14 of the Supreme Court of Judicature Act, 1884), is quite independent of the power of attachment. "Such a person" (i.e., one who refuses to execute an instrument to which the section applies) "has no right to say that he prefers going to prison." It was, therefore, held not beyond the power of the court to appoint a person to execute the deed instead of enforcing its order by imprisonment. For these reasons I am of the opinion that in a case where a wife has property in England, although she herself be neither resident nor domiciled in England, the court has jurisdiction under the section to make an order settling the whole or part of the property situate in England. In my view the court can in such a case make an effectual order without resort to personal coercion of the wife.

[His Lordship concluded by varying the registrar's report by ordering, inter alia, a settlement for the benefit of the two children of one half of the wife's reversionary interest subject to her life interest therein and the whole of her interest in the matrimonial home.]

Solicitors: *Ralph Bond & Rutherford; Gibson & Weldon.*

E. J.

[14] [1893] 1 Ch. 466, C.A.
[15] [1908] 1 Ch. 290.
[16] (1886) 11 P.D. 68, 95; 2 T.L.R. 705.
[17] 11 P.D. 68, 95.
[18] Ibid. 99, 100.

[CHANCERY DIVISION.]

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Mar. 14, 15, 17, 20, 29.

Cross J.

In re A SOLICITOR.

[1960 P. No. 1143.]

Solicitor — Costs — Taxation — Bill — Payment of bill — Application by client for reference to taxing master for taxation—Summons heard more than 12 *months after bill paid—Jurisdiction—Inherent jurisdiction of court—Whether curtailed by statute—Solicitors Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *s.* 69 (1) (2).

In May, 1959, R. engaged a solicitor to act for him in an action against him relating to the beneficial ownership of shares in a company, threatened bankruptcy proceedings and other claims. R. understood from the solicitor that he would have to pay a maximum of about £5,000 for all the work. On October 19, 1959, the solicitor submitted a bill for almost £500 for the work in the bankruptcy proceedings, which R. paid. The action relating to the shares resulted in a settlement satisfactory to R. in that he was left with £90,000 after payment of his liabilities. On November 25, 1959, the solicitor delivered his bill for work in the action for a total of £3,805, of which £82 was for counsel's fees, £48 for disbursements, and £3,675 for solicitor's fees. R. wrote at the foot of the bill "I "agree and approve and will settle as soon as possible." On December 22, 1959, the solicitor, acting within his authority, paid himself the bill out of funds of R. in his hands. On February 28, 1960, the solicitor presented R. with ten further bills totalling £4,609 in respect of the outstanding claims, each bill including charges for work done before November, 1959, and the largest of which was later reduced from £3,517 to £2,100 by the Law Society. The bills submitted by the solicitor amounted in all to almost £9,000, of which £330 was for disbursements and the balance of £8,600 for solicitor's fees.

On a summons issued by R. on May 12, 1960, under the Solicitors Act, 1957,[1] asking that the bill of November 25, 1959, for £3,805 might be referred to the taxing master to tax and settle:—

Held, (1) that the court had no jurisdiction under section 69 (2) of the Act of 1957, to order taxation of the bill, since at the date of

[1] Solicitors Act, 1957, s. 69: "(1) "On the application, made within "one month of the delivery of a soli-"citor's bill, of the party chargeable "therewith, the High Court shall, "without requiring any sum to be "paid into court, order that the bill "shall be taxed and that no action "shall be commenced thereon until "the taxation is completed. (2) If "no such application is made within "the period mentioned in the last "foregoing subsection, then, on the "application either of the solicitor or "of the party chargeable with the "bill, the court may, upon such "terms, if any, as they think fit (not "being terms as to the costs of the "taxation), order—(*a*) that the bill "shall be taxed; (*b*) that, until the "taxation is completed, no action "shall be commenced on the bill, and "any action already commenced be "stayed: Provided that—(i) if twelve "months have expired from the "delivery of the bill, or if the bill "has been paid, or if a verdict has "been obtained or a writ of inquiry "executed in an action for the re-"covery of the costs covered thereby, "no order shall be made on the appli-"cation of the party chargeable with "the bill except in special circum-"stances and, if an order is made, it "may contain such terms as regards "the costs of the taxation as the "court may think fit; (ii) in no event "shall any such order be made after "the expiration of twelve months "from the payment of the bill."

the order more than 12 months would have passed since the bill had been paid.

(2) But that the inherent jurisdiction of the court over solicitors to tax a bill which had been paid more than 12 months before the hearing of the summons for taxation had not been taken away by the Solicitors Acts; that the size of the bill and the delivery of the ten further bills were "special circumstances" within the meaning of section 69 (2) (*b*) (i) of the Act of 1957, which would have entitled R. to an order for taxation if the summons had been heard within 12 months of the date of the payment of the bill; and that, therefore, in the exercise of its inherent jurisdiction, the court would order taxation of the solicitor's fees (post, p. 707).

Storer & Co. v. *Johnson* (1890) 15 App.Cas. 203, H.L. applied.

Per curiam. Section 66 of the Solicitors Act, 1932 (now section 69 of the Solicitors Act, 1957) effected an unintentional change in the law in that, under section 41 of the Solicitors Act, 1843, the 12-month period was 12 months before the application to tax was made and not 12 months before the order on that application was made, and it is to be hoped that the point may be considered by the appropriate authority and that, when opportunity offers, the position as it was under the Act of 1843 may be restored (post, p. 706).

Adjourned summons.

The following statement of the facts is taken from the judgment of Cross J.: Robert Affleck Robertson, the managing director of a company, Bowmakers Ltd., fraudulently converted large sums belonging to it to his own use. For this he was in April, 1957, sentenced to imprisonment for seven years. For some years previously he had been concerned with others in substantial purchases of shares in Bowmakers, and shortly before his conviction an action was started by one Harry Geoffrey Bentley against him and a number of other defendants (the "Bentley action") raising the question of the beneficial ownership of these shares. The action proceeded in a leisurely way, the statement of claim being amended and further claimants to some of the shares added as defendants, but by May, 1959, the position had been reached that Robertson would have to put in a defence if the action was not to go against him by default. To add to his difficulties Bowmakers, who had themselves brought an action against him, were threatening him with bankruptcy. Further, several other people who had claims against him were pressing them. Robertson had solicitors acting for him in the Bentley action, but in May, 1959, on the advice of Neville Coleman, the solicitor who had acted for him in his prosecution, he decided to leave them and employ Sidney Pearlman to act for him in the Bentley action, the threatened bankruptcy proceedings, and the other claims. On May 19, 1959, Pearlman had an interview with Robertson in Wormwood Scrubs prison at which Robertson explained the position of his affairs in outline and inquired what Pearlman's charges were likely to amount to. At this point there was some conflict of evidence. It was common ground that a figure of £5,000 was mentioned, but whereas Pearlman said that that was his rough estimate of his

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costs of the Bentley action, Robertson said that he understood it to be an estimate of all that he would have to pay Pearlman. It did not matter whose recollection on that point was right. The figure of £5,000 must, on any view, have been a mere guess since no one could say for certain whether the Bentley action was going to be fought or settled or what other work would have to be done. The only relevance of the matter was that Robertson got it into his head that £5,000 was roughly the maximum which he would have to pay Pearlman for getting him out of his difficulties.

Pearlman next proceeded to look into Robertson's affairs. There was a chest full of papers which he had to go through, necessarily without the assistance of his client, and there was no doubt that he put in many hours of hard work. Robertson had heavy liabilities amounting possibly to as much as £250,000. On the other hand, if he could establish his title to a sufficient number of the shares in dispute in the Bentley action he might emerge not only solvent but a comparatively wealthy man. By May 25, 1959, Pearlman was able to submit papers to Chancery counsel for advice on the position, and a few weeks later he instructed bankruptcy counsel to settle Robertson's affidavit in opposition to the petition, which had been presented on May 27. The two counsel had a joint conference attended by Pearlman on June 26. The next day, June 27, Chancery counsel and Pearlman had an interview with Robertson in prison and on July 25 Pearlman visited him in prison again, in company with bankruptcy counsel. An application had to be made to the court for leave to extend the time for Robertson's defence in the Bentley action, but that was given and a defence was put in on July 31. Pearlman visited Robertson again in prison on August 25 and October 4. In that month the bankruptcy petition which had been adjourned was dismissed by agreement with the petitioning creditors who were made to realise that they stood a better chance of being paid if they allowed Robertson to settle the Bentley action on advantageous terms than if they made him bankrupt. On November 5, Pearlman and the solicitors acting for the other parties in the Bentley action visited Wormwood Scrubs and terms of settlement were agreed. The settlement was very satisfactory from Robertson's point of view for under it he became entitled to a sufficient number of the shares, which had meanwhile risen greatly in value, to enable him to pay off all his liabilities and be left with some £90,000.

On October 19 Pearlman had sent Robertson his bill of costs in the bankruptcy proceedings, pointing out in the covering letter that this bill did not cover his costs in the Bentley action which was then still on foot. The bankruptcy bill was for a total of about £500 made up of counsel's fees, £92 odd, other disbursements, £17 odd, and a fee of £387 odd for Pearlman. The bill contained a general description of the work done by Pearlman of which the following were the most material parts: "Instructions "for affidavit in support of notice to dispute necessitating going

"through very large chest of papers left with me, sorting same "and extracting therefrom those papers and documents which "appeared to be relevant for the purposes of your affidavit, perus- "ing and considering these documents, the pleadings and volum- "inous documents relating to the action commenced by Harry "Geoffrey Bentley, the pleadings and documents in the action "brought against you by Bowmaker Ltd., against Coutts & Co., "examination of all these documents for the purpose of ascertain- "ing the issues between the parties and the points involved with "a view to finding out your general and financial position for the "purpose of disputing the petition, preparing from such informa- "tion a statement showing your financial position and a schedule "of assets and liabilities, making various inquiries regarding the "various actions and from the result of my research and investiga- "tion giving careful consideration to the position to enable me to "deal with the question of solvency. Drawing affidavit and "instructions to counsel to settle and attending him therewith." Then there was a reference to two conferences attended by counsel which were stated to have been both at Wormwood Scrubs, though one was in fact in Lincoln's Inn. The bill continued: "Preparing "application to abridge the time for the hearing of the petition. . . . "The work involved necessitated the perusal of documents com- "prising many thousands of folios and occupied the attention of "principal for approximately 22 hours. The attendances at "Wormwood Scrubs prison were each of 3½ hours duration. The "attendances upon the petitioning creditors' solicitors as to a "compromise occupied approximately 5 hours. The matter was "one of great importance, was of perplexity and required "exceptional care and skill in its conduct, the whole of the work "being done exclusively by principal."

With Robertson's approval the bankruptcy bill was debited by Pearlman against funds in his hands belonging to Robertson and Robertson did not seek to have that bill taxed. On November 25 Pearlman sent Robertson his bill of costs in the Bentley action saying that he and Coleman would visit him in prison on November 29 to discuss any matters which he might wish to discuss. The Bentley bill was for a total of £3,805 odd, made up of counsel's fees, £82 odd, other disbursements, £47 odd, and a fee of 3,500 guineas for Pearlman. The work covered by that fee was described in the bill as follows: "Fee by way of general "instructions, care and responsibility involving: Journeys to "Wormwood Scrubs prison for interviews with you on May 19, "1959, June 27, 1959, August 25, 1959, October 4, 1959, and "November 5, 1959—engaged in all 33 hours. Going through "large chest of papers handed to me and sorting out those "required for the purpose of ascertaining the position—engaged "7 hours. Perusing and considering papers sorted out for the "purposes of ascertaining the position of various matters, the "allegations made against you and your general and financial

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"position—engaged 14 hours. Perusing and considering pleadings and documents relating to this action—engaged 7 hours. "Time engaged in drafting instructions to counsel to advise and "settle pleadings—engaged 6 hours. Attendances at conferences "with counsel and with papers. Giving consideration to the "possibility of a settlement of the action and the terms upon "which such a settlement could take place to your advantage "and the documents necessary for carrying into effect any terms "of settlement agreed. The matter was one of extreme difficulty "owing to the nature of the pleadings and the number of parties "involved, and required exceptional care and skill in its handling "and attention; the amount involved was some hundreds of "thousands of pounds and was of great importance to the client. "The ultimate terms of settlement effected resulted in the whole "of the debts of the client to the extent of approximately "£200,000 being cleared and leaving him with a surplus of some "£60,000," which Cross J. thought was an under-statement. Then, after reference to the number of letters and documents involved and telephone discussions, the bill concluded: "The "degree of care and responsibility was very great, having regard "to the matters mentioned (3,500 guineas)."

At the interview in prison on November 29, Robertson and Pearlman discussed what remained to be done. That fell into two parts, the first the sale of the shares or of a sufficient number of them to discharge Robertson's liabilities, and secondly the settlement of the other outstanding claims which were comparatively small. Robertson certainly knew that he would be called upon to pay Pearlman other fees beyond the bankruptcy bill which he had paid and the Bentley bill which had been sent to him, but he said, and Cross J. accepted his evidence, that he did not expect Pearlman's further charges to exceed about a thousand pounds, though he did not discuss their amount with him. Robertson wrote at the foot of the Bentley bill: "I agree "and approve and will settle as soon as possible." When he handed back the bill to Pearlman he said that it was "shocking." Pearlman said that this was said laughingly, but Robertson disagreed. Robertson did not, however, suggest that Pearlman put any pressure on him to agree the bill or to pay it. On December 22 Pearlman paid himself the Bentley bill out of funds in his hands belonging to Robertson, and Robertson admitted that he had authority to do this. Meanwhile, Pearlman proceeded to arrange for the sale of such of the shares as Robertson desired to have sold and to settle the outstanding claims. On February 28, 1960, he went to see Robertson in prison once more and presented him with ten further bills totalling £4,609 odd. The largest of those was a bill for £3,517 odd in respect of "your affairs" which related almost entirely to the sale of the shares. The other bills were in connection with the various relatively small outstanding claims and in each case included charges for some work done before November, 1959. The total

of the bills submitted by Pearlman was therefore nearly £9,000, of which only some £330 was for disbursements, the balance of some £8,600 being Pearlman's fees. Robertson refused to agree the bills presented on February 28 and changed his solicitors. On the advice of the new solicitors the bill of £3,517 for "your "affairs" was referred to the Law Society under proviso (*a*) to the Second Schedule to the Solicitors' Remuneration Order, 1883, and on November 14, 1960, the Law Society certified that a sum of £2,100 was a reasonable charge for the work done. Pearlman, who had meanwhile paid this bill out of funds of Robertson's in his hands, at once repaid him £1,417. On March 23, 1960, an order of course was made to tax the four largest of the remaining bills. These taxations were still pending. The other bills were relatively small and had been paid by Robertson.

On May 12, 1960, Robertson issued the present summons under the Solicitors Act, 1957, against Pearlman, asking that it might be referred to the taxing master to tax and settle the bill of fees and disbursements amounting to the sum of £3,805 10s. 4d. relating to the Bentley action. Robertson's solicitors did not realise that as the bill had been paid they had to show special circumstances to justify an order for taxation, and they did not file an affidavit in the first instance. At the first appointment before the master on June 1 he directed Robertson to file evidence in 14 days and Pearlman to file evidence in reply 14 days thereafter. On June 27 Robertson's affidavit was filed. On July 11, when his time for reply was about to expire, Pearlman asked Robertson's solicitors for a further 14 days in which to file his evidence, which they granted him. In fact, however, Pearlman did not put in his evidence before the long vacation. On August 6 Robertson was released from prison and went to Australia, and on August 12 he took out another originating summons [1960 P. 1909] against Pearlman asking for the handing over of certain documents and other relief. On August 24 Buckley J., as a term of making an order with regard to the documents, directed Robertson to give security in the sum of £400 for the costs of both summonses, and on September 8 this sum was paid into court. On October 11 Robertson's solicitors wrote to Pearlman reminding him that his evidence in answer in this summons had not been filed, and saying that if it was not filed within seven days they would have to restore the summons for hearing before the master. That letter appeared to have been unanswered, and on October 19 the solicitors wrote to Pearlman again saying that they had restored the summons for November 8. On November 1 Pearlman took out a summons asking for security for the costs of the present summons. That application was entirely misconceived since the sum of £400 paid in under the order of Buckley J. related to the costs of both proceedings. On November 4 Pearlman wrote to Robertson's solicitors stating that in his view it would be premature for him to file any

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affidavit in answer in this summons until the question of security was disposed of. On November 8, when the summons again came before him the master made a peremptory order that Pearlman file his affidavit within 10 days, and in fact he filed it on November 18. On December 12 Robertson filed an affidavit in reply and the evidence was closed. Meanwhile it had dawned on Robertson's solicitors that, having regard to the wording of the proviso to section 69 (2) of the Solicitors Act, 1957, they might be in difficulty if they did not get the summons heard before December 22. An application was accordingly made to Cross J. on December 9 to fix a day for a hearing of the summons that term, but the state of his list was such that he was unable to give a day nor could the parties get a day from any other judge. On December 21 the summons came again before the master, who adjourned it into court. The plaintiff did not dispute the amount of the disbursements.

S. L. Newcombe for the plaintiff.

G. B. H. Dillon for the defendant solicitor.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Park* [2]; *Scheff* v. *Columbia Pictures Corporation Ltd.* [3]; *In re Turner's Will Trusts* [4]; *Gilbert* v. *Gilbert and Boucher.* [5]

Cur. adv. vult.

March 29. Cross J. read the following judgment: This is a summons taken out under the Solicitors Act, 1957, by Robert Affleck Robertson against his former solicitor, Sidney Pearlman, asking for taxation of a bill of fees and disbursements amounting to £3,805 delivered to him by Pearlman on November 25, 1959, and paid by him on December 22, 1959. The relevant section of the Solicitors Act, 1957, is section 69. [His Lordship read section 69 (1) and (2) and continued:] This summons was taken out on May 12, 1960, which was within 12 months of the date of payment of the bill, but it has not come before the court for decision until after the expiry of the 12 months. The points which arise and have been argued before me are: (1) Has the court jurisdiction under the Act to order taxation of this bill having regard to the fact that more than 12 months have now passed since it was paid? (2) If not, has the court power under its inherent jurisdiction over solicitors as officers of the court to make an order dealing with these costs? (3) Assuming that there is jurisdiction under one or other head, ought an order to be made?

The facts of the case are as follows. [His Lordship stated the

[2] (1889) 41 Ch.D. 336, C.A.

[3] [1938] 4 All E.R. 318, C.A.

[4] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A.

[5] [1928] P. 1; 43 T.L.R. 589, C.A.

facts and continued:] It is not perhaps surprising in the circumstances that Robertson and his advisers suspected that Pearlman had realised earlier than they did that the court might have no jurisdiction to make an order under the Solicitors Act, 1957, if the summons was not heard before December 22, and that he had been playing for time. But, having heard Pearlman give evidence on the point, I am satisfied that the first time that he realised that there might be such a point was on December 8, when the applicant's advisers raised it before the master during an appointment on summons 1960 P. 1909.

I turn now to the points at issue and, first, the construction of the proviso in question. Section 69 of the Solicitors Act, 1957, is a repetition of section 66 of the Solicitors Act, 1932. That Act was expressed to be an Act to consolidate the Solicitors Acts, 1839 to 1928, and other enactments relating to solicitors of the Supreme Court. One of the Acts repealed was the Solicitors Act, 1843, section 37 of which dealt, inter alia, with applications for taxation of solicitors' bills 12 months after their delivery, or after a judgment had been recovered on them, in the following terms: "Provided always, that no such reference as aforesaid "shall be directed upon an application made by the party charge-"able with such bill after a verdict shall have been obtained . . . "or after the expiration of 12 months after such bill shall have "been delivered . . . except under special circumstances, to be "proved to the satisfaction of the court or judge to whom the "application for such reference shall be made." Section 41 of the Act of 1843 dealt with applications for taxation of bills after payment as follows: "And be it enacted, that the payment of "any such bill as aforesaid shall in no case preclude the court "or judge to whom application shall be made from referring such "bill for taxation, if the special circumstances of the case shall "in the opinion of such court or judge appear to require the same, "upon such terms and conditions and subject to such directions "as to such court or judge shall seem right, provided the applica-"tion for such reference be made within twelve calendar months "after payment."

It will be observed that in the case both of the delivery of a bill and of the payment of a bill the 12 months' period is 12 months before the application to tax is made, and not 12 months before the order on that application is made. Did the Act of 1932 make a change in this respect? If it did, I think that the change extended not only to the taxation of paid bills but also to the taxation of bills which have been delivered but not yet paid. The Act of 1932 was, as I have said, a consolidating Act, and there is a presumption that such an Act does not change the law although that presumption will yield to plain words to the contrary (see *per* Lord Simonds in *Grey* v. *Inland Revenue Commissioners.*[1] The presumption against any change is strengthened

[1] [1960] A.C. 1, 13; [1959] 3 W.L.R. 759; [1959] 3 All E.R. 603, H.L.

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in this case by the character of the change which it is said has been made. So far as I can see, there is nothing whatever to be said in favour of making the relevant date the date of the order instead of the date of the application, and everything to be said against doing so. To make the date of the order the relevant date is to encourage an unscrupulous defendant to delay the proceedings and, as happened in this case, is liable to give rise to suspicions that the defendant is playing for time, even when he is not. Further, even if both sides have the point in mind and co-operate in pressing on with the case, they may both be defeated by the state of the list or the illness of a judge. It is altogether wrong that the rights of the parties should depend on accidents of this sort, but however sure I may be that Parliament did not intend the change, my duty is simply to construe the language of the Act. I have no power to rectify it, and with the best will in the world I cannot escape the conclusion that section 66 of the Act of 1932 contained an unintentional change in the law. To read in after the word "made" in proviso 2 the words "on an application made," which is what the plaintiff's counsel invited me to do, would, I think, be to rectify the Act, not to construe it. All that I can do on this branch of the case is to express the hope that the point may be considered by the appropriate authority, and that when opportunity offers the position as it was under the Act of 1843 may be restored.

I turn now to the question of the inherent jurisdiction. From the earliest times the various courts of law and equity exercised control over the attorneys or solicitors who practised in them. In time the profession of attorney and solicitor came to be regulated by statute but the inherent jurisdiction of the court over its officers continued to exist as a supplement to the statutory regulation. Thus, in 1806, in *Ex parte Arrowsmith*,[2] Lord Erskine L.C. held that the court had a general jurisdiction to order taxation of a solicitor's bill independently of the Act of 1729, which was the predecessor of the Act of 1843 and in *Storer & Co.* v. *Johnson*,[3] the House of Lords held that though there was no power under the Act of 1843 to order taxation of part of a solicitor's bill, such an order could be made under the inherent jurisdiction.

Counsel for the solicitor, however, argues that though the court has power under its inherent jurisdiction to make orders for taxation which are not within the scope of the current provisions of the Solicitors Acts, section 41 of the Act of 1843 (which had no counterpart in the Act of 1729) prohibited the court from dealing in any way with a bill which had been paid twelve months before the application to tax was made. Similarly, he submits that since 1932 the court has had no power to deal in any way with a bill paid more than 12 months before the application to tax it comes before the court. I cannot accept that submission. In

[2] (1806) 13 Ves. 124.

[3] (1890) 15 App.Cas. 203, H.L.

Storer & Co. v. *Johnson* Lord Halsbury L.C. said[4]: "I think it "is quite clear that the Solicitors Act did not deprive the court "of the jurisdiction which they always possessed to do justice in "the premises when dealing with one of their own officers, and "that they might therefore order that the costs should be taxed, "although not in terms of the Solicitors Act." It is true that the precise point was not before him, but I do not see why I should qualify his language and read section 41 as impliedly curtailing the inherent jurisdiction in any way. The presumption should, I think, be against any such curtailment. Further, it is to be remembered that to deal with a solicitor's costs under the inherent jurisdiction is not at all the same thing as to order a taxation of them under the Solicitors Act. In the first place, the one-sixth rule as to the costs of the taxation does not apply. Again some and not all the items in the bill can be dealt with. Finally, the standard applied will not necessarily be the same. In acting under the inherent jurisdiction the court could, I think, in a suitable case, order a "moderation" of the bill rather than a taxation of it.

The only authority to which counsel for the solicitor referred me as supporting his contention was *In re Harman & Son, Solicitors*,[5] but the question at issue in that case was whether or not a bill more than 12 months old had been paid. Eve J. decided that it had been and there may have been no ground for contending that there were any special circumstances which would justify the invocation of the inherent jurisdiction after the 12 months had expired.

On the footing that I have power to deal with this bill under the inherent jurisdiction, counsel for the plaintiff conceded that he had to show special circumstances such as would have justified me in making an order for taxation under the Act if the matter had come before me before December 22, 1960. On the other hand, counsel for the solicitor admitted that if there were such special circumstances in this case I should be justified in exercising the inherent jurisdiction, assuming it to exist, since neither party realised the effect of the proviso to section 69 until it was too late for the court to hear the case within the year, and his client had innocently caused considerable delay by failing to file his evidence in proper time.

It remains for me, therefore, to consider whether the plaintiff has shown the existence of special circumstances such as would have entitled him to an order for taxation under the Solicitors Act, 1957, if the case had been heard before December 22, 1960. At one time it was thought that the only circumstances which could justify an order to tax a paid bill were pressure accompanied with over-charges or over-charges so gross as to be evidence of fraud, but in *In re Norman*[6] the Court of Appeal rejected the idea that there were any hard and fast rules on the subject. That

[4] 15 App.Cas. 203, 206.
[5] [1912] W.N. 111.
[6] (1886) 16 Q.B.D. 673; 2 T.L.R. 272, C.A.

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does not, of course, mean that a judge can properly send a paid bill for taxation without regard to the state of mind of the client when he paid it simply because he thinks it contains or may contain some over-charges. He must take into account the circumstances of the payment on the one-hand and the size of the over-charges or possible over-charges on the other hand. Broadly speaking, I think it would be true to say that the more pressure or protest there was at the time of payment the smaller the over-charges need be to justify an order to tax, while conversely the less pressure or protest there was the larger the over-charges or possible over-charges might be.

Counsel for Pearlman argues that Robertson was subject to no pressure, that he paid the bill without any serious protest, and that the bill itself—though at first sight it may seem high—was really not unreasonable. The amount at stake was very large and the matter was of the utmost importance to the client. He was facing utter ruin and, largely through Pearlman's efforts, he emerged not only solvent but comparatively wealthy. The matter was very complex, and the fact that Robertson was in prison and that the other claimants to the shares were by no means favourably disposed towards him added to the difficulty of Pearlman's task in effecting a settlement of the action. All-in-all—it is said—a charge of 3,500 guineas cannot be said to be altogether out of the way in the circumstances.

I will deal first with the amount of the bill. I do not say that it is inconceivable that Pearlman might be able to justify it if it were taxed. But, after giving what I hope is due weight to everything that was argued in its defence, I consider that the bill is to use the words of Bowen L.J. in *In re Boycott*,[7] "redolent of "over-charge." The action did not even reach the stage of discovery, and the pleadings do not suggest to me that the litigation was (as Chancery actions go) exceptionally complicated. This impression accords with the fact that Chancery counsel of standing wrote an opinion for 20 guineas. I recognise, of course, that a comparsion between solicitor's charges and counsel's fees may be very unfair to the solicitor. A solicitor's overheads are far higher than those of counsel. Pearlman had all the labour of going through the raw material, digesting it, and setting out the relevant matter in his instructions. Again he had the arduous and very responsible task of negotiating the settlement in the light of the advice which he received. Obviously, the remuneration to which was fairly entitled was many times greater than the fees charged by counsel. But all the same, making every allowance, I think that the discrepancy between 20 guineas and 3,500 guineas is not without significance. Yet again, if one tests the matter from the point of view of hours worked, one reaches the same conclusion. For his services as regards the bankruptcy petition, which he says was a matter of great importance and perplexity requiring exceptional care and

[7] (1885) 29 Ch.D. 571, 582, C.A.

skill, Pearlman charged £387 for 22 hours work, that is £18 an hour. For the Bentley action, which in part covered the same ground as the bankruptcy bill, he charged £3,675 for 67 hours work, i.e., about £55 an hour. Finally, the fact that his bill "re your "affairs" was reduced by the Law Society from £3,517 to £2,100 shows that his idea of what constitutes reasonable remuneration for his services does not always accord with those of the governing body of his profession.

I am not, of course, deciding that this bill was too high. Possibly it could be justified. What I do say is that it is a bill which I should not be surprised to see substantially—even drastically—reduced on taxation. "Well, so be it," says counsel for Pearlman, "Robertson paid the bill without any real protest and "without any pressure from Pearlman. By doing so he waived "once and for all any right to inquire into its propriety."" There would be force in this argument if the Bentley action had been the only matter in which Pearlman was acting for Robertson. If Robertson's state of mind when he paid it had been: "Well, "this is a very heavy bill but I suppose I must pay it—after all, "Pearlman has served me very well and this will be an end of "the matter"—and if his change of mind was simply due to the fact that another solicitor later told him that the bill could and probably would be substantially reduced on taxation, it may be the size of the bill would not itself be sufficient to establish "special "circumstances," but I have not to decide that question, for Robertson's state of mind was quite different. He had paid the bankruptcy bill of about £500. He had received the Bentley bill of £3,800 odd and he expected further bills of, say, £1,000 for the comparatively small minor matters which still remained to be done. He did not judge the Bentley bill in isolation on its merits as a bill for Pearlman's services in the Bentley action. He viewed it as a step—a big step—in the build-up of the sum of about £5,000 which he expected to have to pay to Pearlman. What made him subsequently wish to have the bill taxed was not simply the fact that he had been told that it was too high, but the fact that Pearlman had meanwhile presented him with further bills for £4,609 and so shown that the total that he intended to extract from him was not £5,000 but nearly £10,000. It is true that in paying the Bentley bill Robertson did not tell Pearlman that he was paying it on the footing that the further bills were not to be more than about £1,000 or so. But what I am concerned with at this point is Robertson's state of mind, not Pearlman's. On the whole, having regard to the size of the bill and his state of mind when he paid it, I think that Robertson has established such "special circumstances" as would have justified an order for taxation of this fee of 3,500 guineas if the matter had come before me last term. I propose, therefore, to direct

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the taxation of that fee under the inherent jurisdiction. I shall reserve all questions of costs, both of this summons and of the taxation.

Direction accordingly.
Costs of summons and taxation reserved.

Solicitors: *Foyer, White & Prescott; Sidney Pearlman.*

M. G. T.

[CHANCERY DIVISION.]

1961
March 20, 23.

Buckley J.

In re P. C. (AN INFANT).

[1960 C. No. 1457.]

Infant—Ward of court—Costs—Official Solicitor as guardian ad litem of ward—Wardship proceedings—Whether costs of Official Solicitor payable by parents of ward——Supreme Court Costs Rules, 1959 (*S.I.* 1959, *No.* 1958, *sch.* 2), *rr.* 2 (5), 3 (2).

On April 20, 1960, a father issued an originating summons, to which the mother was sole respondent, asking that their infant daughter be made a ward of court and that a man named in the summons be restrained from marrying her. On the same day an ex parte injunction was granted restraining the man and the infant from inter-marrying, associating or communicating with one another until April 26 or further order. On April 22 the father applied by motion for an order committing the man for contempt for his breach of the injunction, and, by another motion, for an injunction restraining the man and the infant from inter-marrying, associating or communicating with one another until further order. At an adjourned hearing of the two motions on May 6, Buckley J. decided that the infant should be advised and represented by the Official Solicitor as her guardian ad litem. Following a further hearing on May 20, which the Official Solicitor attended on behalf of the infant, the summons was amended to make both parents applicants and the infant and the man respondents. On a notice of motion served on May 25 by the parents on the infant and the Official Solicitor as her guardian ad litem Buckley J. gave directions as to the infant's residence. On June 9 the Official Solicitor entered an appearance on behalf of the infant to the summons of April 20. The two motions of April 22 were adjourned on June 16 for further evidence but before any further hearing took place the infant and the man left the country and were married without the consent of the court in a foreign jurisdiction.

On a summons taken out by the Official Solicitor for an order [1]

[1] Supreme Court Costs Rules, 1959, r. 2 (5): "The powers and "discretion of the court as to costs "under section 50 of the Supreme "Court of Judicature (Consolidation) "Act, 1925 (which provides that the "costs of and incidental to proceed-"ings in the Supreme Court shall be "in the discretion of the court and "that the court shall have full power

that his costs incurred in the performance of his duties as guardian ad litem of the infant, including therein his costs relating to the two motions of April 22, and to the motion of May 25, be taxed and the certified amount be paid to him by the infant's parents:—

Held, that the infant's parents were in the position of plaintiffs to an action, and that, as the appointment of the Official Solicitor as guardian ad litem of the infant was necessary for the proceedings, the court in the exercise of its discretion under rule 3 (2) of the Supreme Court Costs Rules, 1959, would order that the costs of the Official Solicitor, including those relating to the two motions to which the infant was a respondent, namely, the motion of April 22 for an injunction against the infant, and the motion of May 25, be taxed and the certified amount be paid to the Official Solicitor by the parents, but that no order would be made as to the motion of April 22 for committal of the man since the infant was not a party to those proceedings.

Eady v. *Elsdon* [1901] 2 K.B. 460, C.A. applied.

Adjourned summons.

By an originating summons under the Guardianship of Infants Acts, 1886 and 1925, and the Law Reform (Miscellaneous Provisions) Act, 1949, issued on April 20, 1960, a father asked that his infant daughter, aged about 18, be made a ward of court and that a certain man named in the summons be restrained from marrying her; the mother of the infant was the only respondent to the summons. On the same day the vacation judge granted an ex parte injunction restraining the man and the infant until April 26, 1960, or until further order, from marrying, associating or having any communication or intercourse with one another. On April 22, 1960, the father of the infant applied by motion for an order committing the man for contempt for his breach of the ex parte injunction and, by another motion, for an injunction restraining the man and the infant from inter-marrying, associating or having any communication or intercourse with one another until further order. The two motions were first heard on April 26, but were adjourned to May 6, when, since the infant was some 18 or 19 years old and was not represented or receiving independent legal advice, Buckley J. took the view that she should be advised and represented by the Official Solicitor as her guardian ad litem.

The motions were heard again on May 20 when the Official Solicitor attended on behalf of the infant but had not instructed counsel; Buckley J. intimated that he thought that the originating summons should be amended to make the infant and the man respondents, and on June 3 that amendment was made and the mother of the infant was made an applicant with the father.

"to determine by whom and to what "extent the costs are to be paid), and "under the enactments relating to "the costs of criminal proceedings to "which these rules apply, shall be "exercised subject to and in accor-"dance with these rules."

R. 3 (2): "If the court in the "exercise of its discretion sees fit to "make any order as to the costs of "or incidental to any proceedings, "the court shall, subject to these "rules, order the costs to follow the "event, except when it appears to "the court that in the circumstances "of the case some other order should "be made as to the whole or any "part of the costs."

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On May 25 the infant's parents served a notice of motion on the infant and the Official Solicitor as her guardian ad litem in which they asked that directions should be given as to the residence of the infant. At that time she was not living with her parents and the Official Solicitor had not thought it desirable to disclose her whereabouts to them without the direction of the court. Buckley J. gave directions which resulted in the parents being told of the infant's whereabouts and the infant remaining where she was upon certain terms.

On June 9 the Official Solicitor entered an appearance to the originating summons of April 20 on behalf of the infant. On June 15 and 16 the two motions of April 22 again came before Buckley J. who indicated that, if the court were sufficiently satisfied that the man were able to provide financially for the infant, it might properly give its consent to their marriage. At the hearing the man said that he had good prospects of obtaining employment abroad, but as he wished to be satisfied as to the reality of those prospects, Buckley J. stood the proceedings over to enable the man to produce evidence to that effect. In fact, the matter never came before the court again as the infant and the man left the country to live abroad, and were married in a foreign jurisdiction without the consent of the court.

The Official Solicitor took out a summons for an order that his costs incurred in the performance of his duties as guardian ad litem of the infant, including therein his costs relating to the three motions, the two dated April 22, 1960, and that dated May 25, 1960, and of the present summons be taxed and the certified amount be paid to him by the infant's parents.

The summons was heard in chambers and adjourned into open court for judgment.

W. J. C. Tonge for the Official Solicitor.
Michael Essayan for the parents.

BUCKLEY J. stated the facts substantially as set out above and continued: In these circumstances the Official Solicitor wants to have his costs provided by the parents. It is submitted on his behalf that any plaintiff who starts proceedings against or relating to an infant, in which it is right that the infant should be made a party, cannot proceed therein without a guardian ad litem being appointed for the infant; and that if no one else is prepared to act as guardian ad litem, and it is necessary to seek the assistance of the Official Solicitor, the plaintiff must pay for the privilege of having the assistance of the Official Solicitor to act as guardian ad litem of the infant defendant.

First I should refer to R.S.C., Ord. 65, r. 13, as it stood in the Rules of the Supreme Court published in the Annual Practice, 1960. That rule, which has since been rescinded, provided: "Where the court or a judge appoints one of the solicitors of "the court to be guardian ad litem of an infant or person of

"unsound mind, the court or judge may direct that the costs to "be incurred in the performance of the duties of such office shall "be borne and paid either by the parties or some one or more "of the parties to the cause or matter in which such appointment "is made, or out of any fund in court in which such infant or "person of unsound mind may be interested, and may give "directions for the repayment or allowance of such costs as the "justice and circumstances of the case may require." Broadly speaking, that rule left the question of the Official Solicitor's costs in the discretion of the court.

The position is now governed by the Supreme Court Costs Rules, 1959, which are to be found in the Annual Practice, 1961, at p. 1832. Rule 2 (5) provides: "The powers and discretion of "the court as to costs under section 50 of the Supreme Court of "Judicature (Consolidation) Act, 1925 (which provides that the "costs of and incidental to proceedings in the Supreme Court "shall be in the discretion of the court and that the court shall "have full power to determine by whom and to what extent the "costs are to be paid), and under the enactments relating to the "costs of criminal proceedings to which these rules apply, shall "be exercised subject to and in accordance with these rules." Rule 3 (2) provides: "If the court in the exercise of its "discretion sees fit to make any order as to the costs of or "incidental to any proceedings, the court shall, subject to these "rules, order the costs to follow the event, except when it "appears to the court that in the circumstances of the case some "other order should be made as to the whole or any part of the "costs." There is no rule corresponding to R.S.C., Ord. 65, r. 13, specifically dealing with the costs of the Official Solicitor when he is appointed guardian ad litem. The new rules, I think, leave the question of costs as freely in the discretion of the court as they were under the old rules.

I should now refer shortly to the authorities to which my attention has been drawn. In *Eady* v. *Elsdon*,[1] where a plaintiff sued an infant defendant for damages, no appearance was entered for the infant, and on the plaintiff's application the Official Solicitor was appointed his guardian ad litem. The plaintiff succeeded in the action, and was ordered to pay the costs of the Official Solicitor as guardian ad litem to be taxed by the taxing master. The order did not specify whether those costs were to be taxed as between solicitor and client or party and party. Upon the taxing master taxing the costs on the party and party basis, the Official Solicitor objected to the taxation. That objection came before Grantham J.[2] who allowed the Official Solicitor's objections; that is to say, he intimated that by reason of the peculiar position of the Official Solicitor, he was entitled to an indemnity, and that he ought to have his costs on a solicitor and client basis. On appeal from the order of Grantham J. the

[1] [1901] 2 K.B. 460, C.A. [2] Unreported.

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Court of Appeal[3] pointed out that where the court orders any party to pay costs without saying on what basis those costs are to be taxed, they ought to be taxed on a party and party basis. There was, however, another point in that case: some evidence had been called by the Official Solicitor on behalf of the infant defendant which had not persuaded the judge to the view of the facts which the evidence was directed to establish, and the taxing master disallowed the Official Solicitor's costs relating to that issue because, he said, the Official Solicitor had failed on that part of the case. On that point the Court of Appeal said that the Official Solicitor was entitled to be paid his costs as though he were a successful party. That case, therefore, establishes the proposition that where a plaintiff secures the appointment of the Official Solicitor as guardian ad litem of an infant defendant the plaintiff is liable to be ordered to pay the Official Solicitor's costs as though the Official Solicitor has succeeded even though, in the event, the plaintiff succeeds in the action. The Court of Appeal did not seek to criticise in any way the order originally made at the trial which did not require the Official Solicitor's costs to be taxed on a solicitor and client basis. In the result, therefore, the Official Solicitor received his costs on a party and party basis as though he had been a successful party, although in fact the infant had not been successful.

The next case is *Goatly* v. *Jones*,[4] an action to set aside a settlement executed by a certain Mr. and Mrs. Jones. The plaintiff was the trustee in bankruptcy of Mr. Jones, and the infant children of the marriage had been made defendants in the action. At the trial the court held that the settlement was void against the plaintiff so far as it comprised the property of the bankrupt, but valid so far as it comprised the property of Mrs. Jones. The costs of the Official Solicitor as guardian ad litem of the infant defendants were ordered to be taxed and paid by the plaintiff, who was to add them to the costs which Mr. and Mrs. Jones were ordered to pay. There was then some discussion about the form of the order in respect of the Official Solicitor's costs; counsel for the plaintiff said that it was the settled practice to tax them as between party and party unless a special direction was given to the contrary, and that the plaintiff as trustee in bankruptcy could not consent to a solicitor and client taxation, but that he would not object to the order being in the terms of R.S.C., Ord. 65, r. 13, that is to say, that the plaintiff should pay the costs of the guardian ad litem incurred in the performance of the duties of such office. Counsel for the Official Solicitor accepted that, and accordingly Neville J. directed that the order should be made in that form.

That was followed by *Jackson* v. *Jackson*.[5] More recently, in *Gillette Safety Razor Co. and Gillette Safety Razor Ltd.* v.

[3] [1901] 2 K.B. 460, 467, C.A.
[4] [1907] W.N. 161.
[5] [1908] P. 308; 24 T.L.R. 674.

Franks [6] where the defendant was an infant, Astbury J., whose attention had not, I think, been drawn to either of the last two mentioned cases, gave the Official Solicitor his costs on a solicitor and client basis.

It seems to me that when the parent of an infant whom he or she is unable to control to his or her own satisfaction comes to the court to obtain the assistance of the court, and when the case is a proper one for the infant to be made a party to the proceedings—more particularly when, as in the present case, one of the earliest steps in the proceedings is an application by motion for an injunction restraining the infant from doing some act—such an applicant is really in the position of a plaintiff in an action suing an infant defendant. It is quite true that it is common practice in these cases not to make the infant a respondent to the summons in the first instance, and it is also very commonly the case that at an early stage in the case the infant becomes a respondent to the summons; in the present case the infant was from the beginning a respondent to the motion for an injunction. It is also true that in the present case the suggestion that the Official Solicitor should act as guardian ad litem of the infant originated not from the applicant, but from the court; but I do not think that that really makes any difference. It was necessary that the infant should be represented by a guardian ad litem for the purpose of these proceedings and it appeared that the only person suitable and available was the Official Solicitor. The appointment of the Official Solicitor as guardian ad litem was, therefore, a sine qua non to the proceedings going on and being effectively disposed of. In those circumstances it appears to me that the principle which is indicated by such cases as *Eady* v. *Elsdon* [7] is applicable to cases of this kind.

The way in which the merits of the case lie, namely, whether the parents are right in their view, or whether the infant is justified in whatever view he or she may have adopted, does not really enter into the matter. If the parents are not justified in their attitude, of course, that is all the more reason for saying that they should pay the costs incurred by other people in proceedings which they have commenced. But even if they were quite justified in their attitude, as the plaintiff in *Eady* v. *Elsdon* [8] was justified in his attitude, in my view they must bear the costs incidental to the infant being properly advised and represented.

It has been suggested by Mr. Essayan, who appears here on behalf of the parents, that I should indicate that the costs of the Official Solicitor should be borne in the first instance by the young man in question and only to the extent that they are not satisfied from that source by the parents. I do not think that I could do that, partly because he is not before me on this summons and,

[6] (1924) 40 T.L.R. 606; 41 R.P.C. 499.

[7] [1901] 2 K.B. 460.

[8] Ibid.

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therefore, is not in a position to argue the matter before me, partly because I understand, although I have not any detailed information, that he is legally aided, and partly, also, because it seems to me that this principle proceeds upon the basis that a plaintiff who sues an infant is prima facie the person who is responsible for costs of this nature, although it may be that he may have a right to recover them from someone else. I do not think, therefore, that I could throw the burden of these costs on the young man in the first instance as is suggested, and only to the extent that that order might turn out to be inadequate upon the parents.

I propose to direct that the costs of the Official Solicitor incurred in the performance of his duties as guardian ad litem of the infant, including in that his costs relating to the motion of April 22, 1960, which asked for an injunction against the infant, and his costs of the motion of May 25 relating to the residence of the infant, be taxed and paid by the applicants. That does not include the costs of the motion of April 22, 1960, the motion for committal of the young man, because the infant was not a respondent to that motion; and I do not think that even if I did order the Official Solicitor's costs relating to that motion to be taxed, there could be any such costs; the taxing master, I think, must necessarily disallow them because the infant was not a party to that motion.

Order accordingly.
Parents to pay costs as between party and party.

Solicitors: *Official Solicitor; Donald Silk & Co.*

M. G. T.

[Queen's Bench Division.]

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Salmon J.

HONGKONG FIR SHIPPING CO. LTD. *v.* KAWASAKI KISEN KAISHA LTD.

[1957 H. No. 2571.]

Shipping—Charterparty—Seaworthiness—Condition precedent, whether—Time charter—Vessel unseaworthy by reason of inadequate engine room staff—Breakdowns and delays—Vessel off hire for 5 out of 13½ weeks—Further 15 weeks required for repairs—Whether charterers entitled to rescind—Whether charter frustrated.

Contract — Frustration — Charterparty — Time charter — Delay — Time necessary to make vessel seaworthy.

Ships' Names—Hongkong Fir.

By a time charterparty, dated December 26, 1959, shipowners let and charterers hired the m.v. *Hongkong Fir,* built in 1931, for a period of 24 calendar months " . . . she being in every way fitted for

"ordinary cargo service. . . ." Clause 3 of the charterparty provided that the owners should ". . . maintain her in a thoroughly "efficient state in hull and machinery during service. . . ." The vessel was delivered to the charterers on February 13, 1957, and on that day sailed in ballast from Liverpool to Newport News, Virginia, to pick up a cargo of coal and carry it to Osaka. The vessel's machinery was in reasonably good condition at Liverpool but by reason of its age needed to be maintained by an experienced, competent, careful and adequate engine room staff. When she sailed the chief engineer was inefficient and the engine room complement insufficient, and, chiefly for that reason, there were many serious breakdowns in the machinery. On the voyage from Liverpool to Osaka she was at sea 8½ weeks, off hire for about 5 weeks and had about £21,400 spent on her for repairs. She reached Osaka on May 25 when a further period of about 15 weeks and an expenditure of £37,500 were required to make her ready for sea. The charterers repudiated the charterparty: they had no reasonable grounds for thinking that the owners would be unable to make her seaworthy by mid-September, at the latest, and in fact the vessel sailed from Osaka on September 15 with an adequate and competent engine room staff and was then admittedly in all respects seaworthy. In an action by the owners for damages for wrongful repudiation of the charterparty in which the charterers contended, inter alia, that they were entitled to repudiate by reason of breach by the owners of their obligation to deliver a seaworthy vessel and that the charterparty was frustrated by the delays and breakdowns:—

Held, (1) that a reasonably prudent owner, knowing the relevant facts, would not have allowed the vessel to put to sea with that engine room staff and that, therefore, the owners were in breach of their obligation to deliver a seaworthy vessel, and were also in breach of their obligation under clause 3 of the charterparty to maintain the vessel in a thoroughly efficient state (post, p. 723).

Clifford v. *Hunter* (1827) 1 M. & M. 103 and *Rio Tinto Co. Ltd.* v. *Seed Shipping Co.* (1925) 134 L.T. 764; 42 T.L.R. 381 applied.

(2) That the obligation to deliver a seaworthy vessel was not a condition precedent to a shipowner's rights under a charterparty, and breach of that obligation did not by itself allow a charterer to escape liability under the charter unless the delays involved in making the vessel seaworthy were, or appeared likely at the date of the repudiation to be, so great as to frustrate the commercial purpose of the charter (post, p. 726).

Tarrabochia v. *Hickie* (1856) 1 H. & N. 183 applied.

The Europa [1908] P. 84; 24 T.L.R. 151, D.C., and *J. & E. Kish* v. *Charles Taylor, Sons & Co.* [1912] A.C. 604; 28 T.L.R. 425, H.L. considered.

(3) That for that purpose there was no difference between a "reasonable time" and a "frustrating time" (post, p. 726) and that, looking at the delays and the events which had occurred against the period and other terms of the charterparty, the circumstances in which performance was called for did not render it radically different from that which was undertaken and that, therefore, the charterparty was not fustrated. The shipowners, accordingly, were entitled to damages.

Snia Societa Di Navigazione Industria e Commercio v. *Suzuki & Co.* (1924) 29 Com.Cas. 284, C.A. distinguished.

ACTION.

In December, 1958, the plaintiff shipowners, the Hongkong Fir Shipping Company Ltd., bought the m.v. *Antrim*, 5,395 tons

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gross, built in 1931, for £397,500 from the Avon Shipping Company Ltd., a subsidiary of the New Zealand Shipping Company Ltd. In the contract of sale the vessel was described as "classed at "Lloyds 100 A1. Special Survey passed July, 1955," and the contract provided that the vessel was to be delivered with its class maintained and that she should be taken with all faults and errors of description, but subject otherwise to the provisions of the contract. By a "uniform" time charter, dated December 26, 1956, the plaintiffs chartered the vessel to the defendants, Kawasaki Kisen Kaisha Ltd. That charter, so far as material provided: "It is this day mutually agreed between Hongkong "Fir Shipping Co. Ltd., Hongkong, owners of the Vessel called "'Antrim' to be renamed 'Hongkong Fir' . . . classed Lloyds "100 A1 and fully loaded capable of steaming about 12½ knots "in good weather and smooth water . . . and Messrs. Kawasaki "Kisen Kaisha, Ltd., Kobe, Japan:

"1. The owners let, and the charterers hire the vessel for a "period of 24 (with one month more or less at charterers' option) "calendar months from the time the vessel is delivered and placed "at the disposal of the charterers . . . she being in every way "fitted for ordinary cargo service. . . . 3. The owners to provide "and pay for all provisions and wages, for insurance of the vessel, "for all deck and engine-room stores and maintain her in a "thoroughly efficient state in hull and machinery during "service . . . 6. The charterers to pay as hire: 47s. per dead-"weight ton on vessel's deadweight of 9,131 tons per 30 days, "commencing in accordance with clause 1 until her redelivery "to the owners. . . .

"11. (A) In the event of drydocking or other necessary "measures to maintain the efficiency of the vessel, deficiency "of men or owners' stores, breakdown of machinery, damage "to hull or other accident, either hindering or preventing the "working of the vessel and continuing for more than 24 con-"secutive hours, no hire to be paid in respect of any time lost "thereby during the period in which the vessel is unable to per-"form the service immediately required. Any hire paid in "advance to be adjusted accordingly . . . 12. Overhauling of "machinery whenever possible to be done during service, but "if impossible the charterers to give the owners necessary time "for overhauling. Should the vessel be detained beyond 48 hours "hire to cease until again ready. 13. The owners only to be "responsible for delay in delivery of the vessel or for delay "during the currency of the charter and for loss or damage to "goods on board, if such delay or loss has been caused by want "of due diligence on the part of the owners or their manager in "making the vessel seaworthy and fitted for the voyage or any "other personal act or omission or default of the owners or their "manager or their servants. . . . 32. Any off-hire time by reason "obtained in clause 11, charterers' option to add off-hire time "to vessel's period under this charter. And such option to be

"declared one week after vessel is on hire again before expiration "of this charterparty. . . . 44. This charterparty is also subject to "the vessel being taken over by Messrs. Hongkong Fir Ship-"ping Co., Ltd., Hongkong, in Liverpool, according to purchase "agreement."

The vessel was delivered to and placed at the disposal of the charterers on February 13, 1957, and sailed in ballast from Liverpool at 6 p.m. on the afternoon of that day. The intention was that she should proceed to Newport News in Virginia and there pick up a cargo of coal and carry it to Osaka, calling on the way at Cristobal in the Panama Canal Zone. The Atlantic crossing was stormy, but by no means exceptional for the time of year. She arrived at Newport News on February 28, where she loaded her cargo, and was off hire for 1 day 19 hours, £1,180 being spent on repairs to her main engine attached pumps. She left Newport News on March 6 and arrived at Cristobal on March 15, having met with two serious accidents on the way. At Cristobal she was off hire for about 11 days. £8,220 was there spent in repairs, chiefly to No. 5 and No. 8 engines, and also to the bilge and general service pumps. She left Cristobal on March 26 en route for Osaka. She sustained another accident to No. 5 engine on March 31, and also had a major breakdown of the scavenge pump on April 2. Temporary repairs were carried out to the scavenge pump at sea, but they would not have enabled her to cross the Pacific in safety. Accordingly, she made for San Pedro, near Los Angeles, where she arrived on April 14. Here she was off hire for about 22 days, 16 hours, and a further £12,000 was spent on repairs. She left San Pedro on April 29 and arrived at Osaka on May 25. It was there discovered that her main engine and auxiliaries were in a very bad state, due chiefly to corrosion. A further £37,500 was spent on repairs and she was not ready to put to sea until September 15. Thus, between Liverpool and Osaka she was at sea for about 8½ weeks, off hire for about 5 weeks and had £21,400 spent upon her for repairs. Whilst at Osaka a further period of about 15 weeks and an expenditure of £37,500 were required to make her ready for sea.

The vessel's machinery was in reasonably good condition at Liverpool but, by reason of its age, needed to be maintained by an experienced, competent, careful and adequate engine room staff. When she sailed from Liverpool the chief engineer was inefficient and the complement of the engine room insufficient. The engine room was undermanned, there being five engineers, three fitters and seven greasers, whereas the previous owners had employed seven engineers and eight ratings, and most of those engineers had been familiar with the machinery while those who sailed from Liverpool were new to it. Had the owners taken proper steps to inform themselves they could and would have discovered that the engine room staff should have included at least seven engineers, and, in fact, when she sailed from Osaka

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on September 15, 1957, and was admittedly in all respects seaworthy, the chief and second engineers had been replaced and there were in all eight engineers, three fitters and seven greasers on board. Salmon J. found that the right conclusion as to the causes of the breakdowns and delays was that stated by the consulting engineer acting for the owners on taking over the vessel: "The engine room executive appeared to lack the necessary experience and/or perspicuity normally expected of them and in consequence the machinery was deprived of the care and attention which it would otherwise have been afforded. . . . the adverse condition of the machinery disclosed during examination on the completion of the voyage is attributable in part to heavy weather and in part to progressive negligence through a combination of what appears to have been gross dereliction of duty and inexperience on the part of the engine room personnel."

On June 5 and 6 and July 27 the charterers wrote repudiating the charter and claiming damages for breach of contract; on August 8 and 12 the owners wrote intimating that they would treat the contract as cancelled by the charterers' wrongful repudiation and claim damages. On September 11 the charterers wrote again repudiating the charter and the owners formally accepted that repudiation on September 13.

On November 8, 1957, the owners issued a writ against the charterers claiming damages for wrongful repudiation of the charterparty. The charterers alleged breaches by the plaintiffs of clauses 1, 2 and 3 of the charterparty in that, inter alia, the vessel was unseaworthy by reason of the condition of her machinery, that the owners had failed to exercise due diligence to make her seaworthy and fitted for the voyage and also that the description in the charterparty of the vessel's steaming capacity was inaccurate; alternatively, they alleged that the charterparty was frustrated by reason of the breakdowns and repairs and delays consequent thereon; the charterers also counterclaimed for damages.

Stephen Chapman Q.C., *Michael Kerr* and *C. S. Staughton* for the shipowners.

Ashton Roskill Q.C., *B. S. Eckersley* and *B. Davenport* for the charterers.

The following were among the cases cited in argument: *Standard Oil Co. of New York* v. *Clan Line Steamers Ltd.*[1] *Moore* v. *Lunn*[2]; *Rio Tinto Co. Ltd.* v. *Seed Shipping Co.*[3]; *Port Line Ltd.* v. *Ben Line Steamers Ltd.*[4]; *Davis Contractors Ltd.* v. *Fareham Urban District Council*[5]; *Tynedale Steam*

[1] [1924] A.C. 100; 40 T.L.R. 148, H.L.

[2] (1922) 38 T.L.R. 649.

[3] (1926) 134 L.T. 764; 42 T.L.R. 381.

[4] [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.

[5] [1955] 1 Q.B. 302; [1955] 2 W.L.R. 388; [1955] 1 All E.R. 275, C.A.; [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

Shipping Co. Ltd. v. *Anglo-Soviet Shipping Co. Ltd.*[6]; *F. A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*[7]; *Admiral Shipping Co. Ltd.* v. *Weidner Hopkins & Co.*[8]; *Bank Line Ltd.* v. *Capel (Arthur) & Co.*[9]; *Blane Steamships Ltd.* v. *Minister of Transport*[10]; *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[11]; *The Europa*[12]; *Behn* v. *Burness*[13]; *J. & E. Kish* v. *Charles Taylor, Sons & Co.*[14]; *Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co. (No. 1)*[15]; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 1)*[16]; *Lorentzen* v. *White Shipping Co. Ltd.*[17]; *Tate & Lyle Ltd.* v. *Hain Steamship Co. Ltd.*[18]; *Stanton* v. *Richardson*[19]; *Havelock* v. *Geddes*[20]; *Davidson* v. *Gwynne*[21]; *Freeman* v. *Taylor*[22]; *Clipsam* v. *Vertue*[23]; *Tarrabochia* v. *Hickie*[24]; *MacAndrew* v. *Chapple*[25]; *Tully* v. *Howling*[26]; *Snia Societa Di Navigazione Industria e Commercio* v. *Suzuki & Co.*[27]; *Compania Cantabrica De Navegacion* v. *Anglo-American Oil Co.*[28]; *Universal Cargo Carriers Corporation* v. *Citati*[29]; *McFadden* v. *Blue Star*[30]; *W. J. Tatem Ltd.* v. *Gamboa*[31]; *Société Franco-Tunisienne D'Armement* v. *Sidermar S.P.A.*[32]; *Forshaw* v. *Chabert*[33]; *Clifford* v. *Hunter*[34]; *Shore* v. *Bentall*[35]; and *Thames and Mersey Marine Insurance Association* v. *Gunford Ship Co.*[36]

Cur. adv. vult.

SALMON J. read the following judgment which, after stating the facts set out above, continued: It has been argued on behalf of the charterers that two letters written on the owners' behalf on September 9 and 10 respectively waived their former acceptance of the charterers' alleged wrongful repudiation. On the other hand, it has been argued on behalf of the owners that once repudiation is accepted the contract is dead, and there can be no question of waiver. It is argued that the letters relied on by the

[6] (1936) 41 Com.Cas. 206; 52 T.L.R. 304, C.A.
[7] [1916] 2 A.C. 397; 32 T.L.R. 677, H.L.
[8] [1916] 1 K.B. 429.
[9] [1919] A.C. 435; 35 T.L.R. 150, H.L.
[10] [1951] 2 K.B. 965; [1951] 2 T.L.R. 763, C.A.
[11] [1917] 2 K.B. 193, C.A.
[12] [1908] P. 84; 24 T.L.R. 151, D.C.
[13] (1863) 3 B. & S. 751.
[14] [1912] A.C. 604; 28 T.L.R. 425, H.L.
[15] [1922] 2 A.C. 250; 38 T.L.R. 534, H.L.
[16] [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471.
[17] (1943) 74 Ll.L.Rep. 161.
[18] (1930) 55 Ll.L.Rep. 159, H.L.
[19] (1872) L.R. 7 C.P. 421.
[20] (1809) 10 East 555.
[21] (1810) 12 East 381.
[22] (1831) 8 Bing. 124.
[23] (1843) 5 Q.B. 265.
[24] (1856) 1 H. & N. 183.
[25] (1866) L.R. 1 C.P. 643.
[26] (1877) 2 Q.B.D. 182, C.A.
[27] (1924) 29 Com.Cas. 284, C.A.
[28] (1923) 39 T.L.R. 614; 16 Ll.L.Rep. 235.
[29] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.
[30] [1905] 1 K.B. 697; 21 T.L.R. 345.
[31] [1939] 1 K.B. 132.
[32] [1960] 3 W.L.R. 701; [1960] 2 All E.R. 529.
[33] (1821) 3 Brod. & Bing. 158.
[34] (1827) 3 C. & P. 16; Mood. & M. 103, N.P.
[35] (Circa. 1828) 7 B. & C. 798n.
[36] [1911] A.C. 529; 27 T.L.R. 518, H.L.

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charterers as a waiver could at the most amount to a fresh offer to enter into a new contract on the same terms as the old. Without expressing any concluded view, I am inclined to think that the owners are right on this point. It does not, however, seem to be material since the charterers wrote on September 11 again repudiating the charter, and the owners formally accepted this repudiation on September 13. The position on June 6 was not materially different from that on September 11. In June it was known that a very long time would be required to repair the vessel, and then presumably a further substantial period for her trials. By September 11 the repairs and trials had been virtually completed. If the charterers were entitled to repudiate on June 6 they were equally entitled to do so on September 11.

The owners now bring this action claiming damages for wrongful repudiation of contract. The charterers' defence is that they were entitled to throw up the charter because of breaches of the charter on the part of the owners.

The breaches relied on by the charterers are (1) a breach of the obligation under clause 1 of the charterparty to deliver a seaworthy vessel. The vessel is said to have been unseaworthy in respect of her machinery and of her engine room staff; (2) a breach of the obligation under clause 3 of the charterparty to maintain the vessel properly; and (3) a breach of the obligation to deliver a vessel capable of making about 12½ knots in good weather and smooth water.

The charterers contend that any of these breaches would per se entitle them to show up the charter. Alternatively, they say that they were so entitled by the failure of the owners to remedy the breaches (a) within a reasonable time, or (b) within what has been referred to in argument as "a frustrating time," that is to say, they contend that the breaches were such that the delay involved in remedying them frustrated the commercial purpose of the charter.

One of the chief issues in this case is whether the vessel was seaworthy when it left Liverpool on February 13. Mr. Roskill, relying on the facts outlined at the beginning of this judgment, says that the owners are on the horns of a dilemma: either the machinery was in a thoroughly bad condition at the start, or it was wrecked by the incompetence of the engine room staff during the course of the voyage. Mr. Chapman says that everything can be explained on the basis of heavy weather, bad luck and, perhaps, one isolated piece of negligence on the part of the chief engineer.

There is certainly no direct evidence that the vessel was unseaworthy as to her machinery on February 13, 1957. The charterers' case in this regard depends entirely upon the inference to be drawn from the behaviour of the machinery on the voyage to Osaka and its condition when it arrived there. The eminent consulting marine engineers, who have given the most helpful evidence before me, differ in their views. [His Lordship considered

the evidence on this issue and continued:] In my judgment the machinery was in a reasonably good condition at Liverpool but, by reason of its age, it needed to be maintained by an experienced, competent, careful and adequate engine room staff.

The next question to be considered is whether the vessel was unseaworthy on February 13 by reason of the incompetence or insufficiency of her engine room staff. The test is: would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this engine room staff?: see *Clifford* v. *Hunter*[1]; *Rio Tinto Co. Ltd.* v. *Seed Shipping Co.*[2] I have no doubt that the true answer to this question is "No." It is obvious from the owners' associated company's letter of December 28, 1956, to the owners' Hongkong agents that the owners were informed that as the engines were very old it was necessary to engage an engine room staff "of exceptional ability, "experience and dependability."

[His Lordship considered the evidence relating to the breakdowns, reached the conclusion set out above, and continued:] I find, without any doubt, that on February 13, 1957, the engine room staff of this vessel was incompetent and insufficient in numbers. Accordingly, the owners were in breach of their obligation under clause 1 of the charter. There is no escape for them under clause 13, since for the reasons I have already stated the breach was caused by want of due diligence on their part. It is only fair to say that as soon as the troubles caused by this breach came to the owners' attention they took the most energetic steps to remedy it. No money was spared on repairs during the voyage or on the very thorough overhaul which the vessel underwent at Osaka. Moreover, the chief engineer was dismissed and a most competent, experienced and reliable chief engineer engaged in his place. I am satisfied that by September 15 this vessel had a thoroughly competent and ample engine room staff.

It follows from my findings that the owners were also in breach of their obligation under clause 3 of the charter to maintain the vessel in a thoroughly efficient state. Since this failure to maintain was caused by the negligence of the owners' servants, that is to say the engine room staff, ex hypothesi clause 13 does not protect the owners.

The only question of fact remaining to be considered is whether this vessel, in the ordinary and natural meaning of the words "fully loaded (was) capable of steaming about 12½ knots in "good weather and smooth water." Two witnesses, who know the vessel very well, say that she was so capable when trading for her former owners. I accept their evidence. Is there any evidence that could justify me in finding that the vessel was not so capable on December 26, 1956 (the date of the charterparty) or on February 13, 1957, when she was handed over to the

[1] (1827) 1 M. & M. 103.

[2] (1926) 134 L.T. 764; 42 T.L.R. 381.

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charterers? [His Lordship considered this evidence and continued:] It seems to me impossible to hold that this vessel was incapable at the material times when fully loaded of steaming at about 12½ knots in good weather and smooth water.

There remains to be considered the effect in law of the findings of fact at which I have arrived. Mr. Roskill argues that the obligation to deliver a seaworthy vessel is a condition precedent to the charterer's liability under the charterparty, and that the breach of this obligation is a fundamental breach of contract which, since it was never waived, per se entitles the charterers to throw up the charterparty. There is no reported case of a breach of the owner's obligation to deliver a seaworthy vessel being held by itself to entitle the charterer to escape from the charterparty. On the other hand, there is a considerable body of authority over the last 150 years for the proposition that such a breach does not allow the charterer to escape unless the delay involved in remedying the breach would frustrate the commercial purpose of the charter. Although it is argued by Mr. Roskill that *Havelock* v. *Geddes* [3] was decided on the basis that the charterers had waived the term as to seaworthiness, in my view the judgment of Lord Ellenborough C.J. is clearly based on the ground that the seaworthiness clause is not a condition precedent to the owner's rights under the charterparty. *Tarrabochia* v. *Hickie* [4] is a decision directly contrary to Mr. Roskill's contention. He seeks to distinguish it on the ground that it concerned a voyage charter. It is difficult to see why seaworthiness should be a condition precedent in a time charter if it is not a condition precedent in a voyage charter. In *Tully* v. *Howling*,[5] where there was a time charter for 12 months from a certain date, the owners were unable to deliver their vessel until two months after that date, the intervening time being necessary to make her seaworthy. Mellor J. in the court below [6] and Brett J. in the Court of Appeal [7] found for the charterers on the ground that the time required to make the vessel seaworthy frustrated the object of the charterparty. The other judges based their judgment on the ground that the charterers, having contracted to take the vessel for 12 months, could not be obliged to take her for 10 months. In *Stanton* v. *Richardson* [8] the decision in *Tarrabochia* v. *Hickie* [9] was approved. Brett J. observed [10] "that the conclusion to be drawn "from all the cases analogous to this is, that if the breach of con-"tract by the shipowner be such as to justify the charterer in not "putting the cargo on board at the moment of the breach, and "it cannot be remedied within such a time as not to frustrate "the object of the voyage, this absolves the charterer altogether." Devlin J. has expressed the view, with which I respectfully agree,

[3] (1809) 10 East 555.
[4] (1856) 1 H. & N. 183.
[5] (1877) 2 Q.B.D. 182, C.A.
[6] 2 Q.B.D. 182, 184.
[7] Ibid. 188.
[8] (1872) L.R. 7 C.P. 421; (1874) L.R. 9 C.P. 390, C.A.
[9] 1 H. & N. 183.
[10] L.R. 2 C.P. 421, 437.

that these authorities are conclusive, see *Universal Cargo Carriers Corporation* v. *Citati*.[11] If further authority were needed I would refer to the judgment of Bailhache J. in *Compania Cantabrica de Navegacion* v. *Anglo-American Oil Co.*,[12] and to the judgments of Bankes and Scrutton L.JJ. in *Snia Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.*[13] Mr. Roskill, however, relies on certain dicta of Bucknill J. in *The Europa*.[14] But I think that these amount to no more than a statement that if a ship is unseaworthy at the time of loading the charterer is not obliged to load whilst she remains so, and not that he may rescind the contract. Indeed, the very basis of the decision in *The Europa*[14] is that the term as to seaworthiness is not a condition precedent to the charterer's obligations under the contract. Mr. Roskill also relies strongly on the following passage in the speech of Lord Atkinson in *J. & E. Kish* v. *Charles Taylor, Sons & Co.*[15]: "The fact that "a ship is . . . from any cause unseaworthy when about to start "on her voyage, will justify the charterer . . . in repudiating his "contract and refusing to be bound by it." But the House of Lords in *J. & E. Kish* v. *Charles Taylor, Sons & Co.*[15] expressly affirmed and followed *The Europa*.[16] Indeed, Lord Atkinson said[17]: "It was held by Bucknill and Bargreave Dean L.JJ., on "a line of reasoning which appears to me convincing, that the "charterparty, notwithstanding this unseaworthiness, was not "displaced." I cannot think that Lord Atkinson intended the passage on which Mr. Roskill relies to be read in the wide sense for which Mr. Roskill contends. If he did, it was obiter and inconsistent with the authorities including the decision in *J. & E. Kish* v. *Charles Taylor, Sons & Co.*[18] itself. I think, however, that Lord Atkinson meant to refer only to the charterer's obligation to load. Mr. Roskill next relies on the following passage in the speech of Lord Sumner in *Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co.*[19]: "Underlying the whole contract of "affreightment there is an implied condition upon the operation "of the usual exceptions from liability—namely, that the ship-"owners shall have provided a seaworthy ship." It is argued that this passage is in effect a statement that the term as to seaworthiness goes to the whole root of the contract and that, therefore, any breach of this term must entitle the charterers to rescind. Lord Sumner, however, was, in my judgment, considering no such problem. The point before him was whether an exception clause governed the implied term as to seaworthiness, and the perhaps strange rule of construction was reaffirmed that, whilst an express term as to seaworthiness must be read in the

[11] [1957] 2 Q.B. 401, 433; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.

[12] (1923) 16 Ll.L.R. 235, 236; 39 T.L.R. 614.

[13] (1924) 29 Com.Cas. 284, 289, 294, C.A.

[14] [1908] P. 84, 93; 24 T.L.R. 151, D.C.

[15] [1912] A.C. 604, 617, H.L.

[16] [1908] P. 84.

[17] [1912] A.C. 604, 616, H.L.

[18] [1912] A.C. 604; 28 T.L.R. 425, H.L.

[19] [1922] 2 A.C. 250, 260; 38 T.L.R. 534, H.L.

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light of the exception clause, an implied term as to seaworthiness because it underlies the whole contract of affreightment is unaffected by the exception clause.

Mr. Roskill finally relied on *Tate & Lyle Ltd.* v. *Hain Steamship Co. Ltd.*,[20] where Lord Atkin stated[21] that any departure from the voyage contracted, however slight the deviation, is of such a serious character that the other party to the contract is entitled to treat it as going to the root of the contract and to declare himself no longer bound by it. Mr. Roskill says that unseaworthiness is at least as important as deviation and accordingly by analogy must have the same result. I do not accept this contention. Lord Atkin was dealing solely with deviation, and analogies are sometimes dangerous—not least in this branch of the law.

It may be that on principle it is difficult, as Mr. Roskill contends, to see why any breach of so important an obligation as that relating to seaworthiness should not by itself give the charterers the right to rescind as soon as they become aware of it. On the other hand, it would be strange if, for example, a charterer after receiving satisfactory service from a vessel could repudiate the charterparty on learning that she was in fact unseaworthy in some minor particular and had been so at the date of delivery under the time charter notwithstanding that she could easily and speedily be rendered seaworthy. However this may be, the authorities which I have reviewed and by which I am bound in my judgment clearly establish that unseaworthiness by itself gives the charterers no right to rescind, and I accordingly so hold. A fortiori a breach of the condition to maintain the vessel in a thoroughly efficient state cannot by itself entitle the charterers to rescind.

It follows that the charterers cannot succeed in their defence unless the delay in making the vessel seaworthy was or appeared likely at the date of the repudiation to be so great as to frustrate the commercial purpose of the charter. Mr. Roskill argues that the delay must be judged by whether it was reasonable or unreasonable and that it is not necessary for him to show that it would frustrate the contract. If he means that a reasonable time may be shorter than a time that works frustration, I do not agree with him. For this purpose, there can be no real difference between the "reasonable time" yardstick and the "frustrating "time" yardstick. As Devlin J. observed in the *Citati* case,[22] "The truth is that there is nothing wrong with using a reasonable "time as a yardstick provided you determine what is reasonable by "considering whether or not there has been unreasonable delay "in the light of the object which the parties had in mind. It "is only when the two yardsticks have in effect been shown "to be the same that the courts have accepted the test of

[20] (1930) 55 Ll.L.R. 159, H.L.
[21] Ibid. 173.
[22] [1957] 2 Q.B. 401, 434.

"reasonableness. Where they have been contrasted . . . the "test of reasonable time has been rejected."

I have every sympathy with the charterers in the natural irritation they must have felt at the inconvenience and possible hardship caused to them by this vessel's halting voyage to Osaka and the prospect of the vessel being detained there some months for further substantial repairs. Nevertheless, as Lord Radcliffe pointed out in *Davis Contractors Ltd.* v. *Fareham Urban District Council*,[23]: " . . . it is not hardship or inconvenience or material "loss itself which calls the principle of frustration into play. "There must be as well such a change in the significance of the "obligation that the thing undertaken would, if performed, be a "different thing from that contracted for." I appreciate also that there was a catastrophic fall in the freight market between February and June, 1957, and that it would only be natural in these circumstances for the charterers to wish to escape from the charterparty if they lawfully may. I do not think, however, that in considering the issue of frustration the fall in the market can be material. Neither on the other hand are the clauses dealing with off-hire of particular materiality. It is true that they show that some substantial periods for repairs and overhaul during the currency of the charter were contemplated and that these off-hire periods might, at the charterer's option, be added on to the charter time, but they do not mean that the parties intended the contract to bind, no matter how long the off-hire periods might last. These clauses would not have prevented the charterparty from being frustrated if, for example, the vessel had been out of commission for the whole of 1957. I am not sure whether it is permissible to equate time lost for repair on account of the owner's breach of contract with time lost through some supervening cause such as requisition for which the owner is blameless. The authorities are not very helpful on this point. It might be thought that an owner should be in a better position if the delay is in no way attributable to him than if it is wholly his fault. On the other hand, it is perhaps difficult to see why logically there should be any difference qua frustration between the two cases. Apart from the *Snia* v. *Suzuki* case [24] there does not appear to to be any reported case where a charter has been held to be frustrated on account of unseaworthiness after the charterers have received some service under it. The facts in that case were exceptional. The charterers, after the failure of repeated efforts of the owners to make the vessel seaworthy, had good reason to believe that the shipowners would never be able to do so. If in this case the engine room crew engaged at Osaka had proved to be incompetent and as a result the engine had again suffered serious breakdown, this case would have been much more analogous to the *Snia* v. *Suzuki* case,[24] for then there would have been

[23] [1956] A.C. 696, 729; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

[24] 29 Com.Cas. 284.

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reasonable grounds to suppose that the shipowners could never make the vessel seaworthy and that accordingly for the remaining period of the charterparty the charterers would receive no substantial benefit under it. As it is, the vessel was being repaired and undergoing sea trials for over three months at Osaka, but on September 15 she was admittedly in every respect seaworthy and was then still available for about 17 months under the charterparty. In my view the charterers had no reasonable grounds in June for thinking that the owners would be unable to make the vessel seaworthy at the latest by mid-September. That they had in fact elected not to exercise their option under clause 32 to add on the off-hire periods is of no significance, since obviously they would, in no circumstances, have done so, having regard to the then state of the freight market. Like Diplock J. in *Port Line Ltd.* v. *Ben Line Steamers Ltd.*,[25] I shrink from adding to what Lord Radcliffe [26] described as an anthology of phrases by attempting any restatement of the principle of frustration.

Whether one applies the test enunciated by Lord Loreburn in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*,[27] or that by Lord Dunedin in *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.*,[28] or the test of the implied term, the basic idea is the same. In the end the problem is to look at the delay and the events that have occurred against the period and other terms of the charterparty and decide whether in truth the circumstances in which performance is called for would render it a thing radically different from that which was undertaken. I reach the conclusion that they do not and that, accordingly, the charterparty has not been frustrated.

It follows that the charterers had no legal right to repudiate the charterparty. They would, however, be entitled to such damage as they suffered by reason of delay caused by the owners' breaches of the charterparty, but the counterclaim under this head has been abandoned. There must accordingly be judgment for the owners for the agreed sum of £158,729 with interest as agreed at 6 per cent. from May 31, 1958, and the counterclaim must be dismissed.

Judgment for the plaintiffs.
Counterclaim dismissed.
Plaintiffs to have four-fifths of the costs.

Solicitors: *William A. Crump & Son; Constant & Constant.*

J. F. L.

[25] [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.

[26] In *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696, 727.

[27] [1916] 2 A.C. 397, 402; 32 T.L.R. 677, H.L.

[28] [1918] A.C. 119, 127; 34 T.L.R. 113, H.L.

[COURT OF APPEAL.]

T. K. WORGAN & SON LTD. *v.* GLOUCESTERSHIRE COUNTY COUNCIL.

[Plaint No. P. 2136.]

H. LANCASTER & CO. LTD. *v.* SAME.

[Plaint No. P. 2137.]

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Feb. 28;
March 1, 2.

Lord Evershed M.R., Upjohn and Pearson L.JJ.

Road Traffic — Licence — Goods vehicle — Haulage — Traction vehicle drawing trailer loaded with felled timber—"Constructed and used ". . . for haulage solely"—Vehicles (Excise) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *ss.* 4 (2) (*f*), 5 (1) (2), 27.

The plaintiff sought a declaration that tractor vehicles used for hauling trailers loaded with felled timber on the public roads were chargeable to excise duty under section 4 (2) (*f*) of the Vehicles (Excise) Act, 1949, as haulage vehicles and not under section 5 (2) as goods vehicles drawing trailers:—

Held, (1) that if a vehicle was fairly and squarely within the scope of section 4 (2) (*f*) because it was being used as constructed for haulage solely then it was outside the scope of the expression "goods vehicle used for drawing a trailer" in section 5 (2), and the phrase "conveyance of goods" in section 27 did not extend to operations which were purely haulage.

James v. *Davies* [1953] 1 Q.B. 8; [1952] 2 T.L.R. 662; [1952] 2 All E.R. 758, D.C. distinguished.

(2) That, dragging the timber to the trailer, trimming where necessary, and loading, were merely essential ancillaries to haulage, and the vehicles in question were within section 4 (2) (*f*).

APPEAL from Judge Ifor Lloyd sitting at Gloucester County Court.

T. K. Worgan & Son Ltd. were timber hauliers, and H. Lancaster & Co. Ltd. timber merchants and sawmillers in Gloucestershire. They brought proceedings against the Gloucestershire County Council claiming in both cases that the defendants had wrongfully refused to issue licences to them under the Vehicles (Excise) Act, 1949, in respect of tractor vehicles known as Matadors, unless they paid duty in accordance with the rate imposed for a "goods vehicle drawing a trailer" by section 5 (2).[1]

[1] Vehicles (Excise) Act, 1949, s. 4: "(1) The duty chargeable in "respect of a mechanically propelled "vehicle to which this section applies ". . . be at the rate specified in "relation to a vehicle of that descrip- "tion . . . [in the Third Schedule]. "(2) This section applies to the "following mechanically propelled "vehicles, that is to say— . . . "(*f*) vehicles . . . [the omitted words "were amended by section 13 (2) of "the Finance Act, 1950: they do "not affect the issue] which are con- "structed and used on public roads "for haulage solely and not for "the purpose of carrying or having "superimposed upon them any load "except such as is necessary for their "propulsion or equipment."

S. 5: "(1) Subject to the pro- "visions of this Act, the duty charge- "able in respect of a goods vehicle of "a description specified . . . in Part I

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The plaintiffs submitted that the vehicles were chargeable for the lower rate of duty under section 4 (2) (*f*) as tractors. In both cases they asked for a declaration and repayment of the excess duty (£143 for two vehicles in the first case, and £253 for three in the second). The vehicles, all of a similar kind, had been acquired from the War Department and each was fitted with a built-in winch. The plaintiffs had subsequently fitted a jib fixed at the base to a framework of angle-iron bolted to the chassis, and they had removed the floor boards. The county court judge found that the vehicles were not constructed or adapted for use for the conveyance of goods, and anything placed on the floor would have fallen past the gearing to the ground. Evidence was given on behalf of both plaintiffs, however, that loose equipment, articles necessary for loading timber or for trimming it preparatory to loading, such as chains, blocks, handsaws, mechanical saws and axes, and sometimes the notice boards used to warn the passing traffic were carried. The vehicles were used to haul the felled timber which was loaded on to trailers attached behind. The nature of the vehicles' functions is described in greater detail in the judgment of Lord Evershed M.R. The county court judge decided in favour of the plaintiffs and made the declaration asked for. The county council appealed.

J. E. M. Irvine for the county council.
F. Blennerhassett for the plaintiff companies.

In addition to the cases referred to in the judgments, the following were cited in argument: *London County Council* v. *Hay's Wharf Cartage Co. Ltd.*[2]; *Carrimore Six-Wheelers Ltd.* v. *Arnold*[3]; *Taylor* v. *Thompson*[4]; *Burmingham* v. *Lindsell.*[5]

Lord Evershed M.R. The question raised by this appeal falls indeed within a small compass and at first sight might be said not to appear very difficult. It relates to the proper rates of taxation for certain vehicles used by the two respondents to the two appeals in their respective businesses of sawmillers in Gloucestershire. It appears that they were formerly military vehicles and were acquired by the two respondents for their business purposes. The judge in a careful judgment has stated what in fact the functions of these vehicles were and I cannot do better than refer

"of the Fourth Schedule . . . shall "... be at the rate specified ... [in "that Schedule by reference to the "unladen weight]. (2) Subject to "the provisions of this Act, if a goods "vehicle is used for drawing a trailer "there shall be chargeable in respect "thereof [duty additional to that "charged under subsection (1)]."

S. 27: "'goods vehicle' means "a mechanically propelled vehicle ... "constructed or adapted for use and "used for the conveyance of goods or "burden of any description, whether "in the course of trade or otherwise."

[2] [1953] 1 W.L.R. 677; [1953] 2 All E.R. 34.

[3] [1949] W.N. 349; 65 T.L.R. 506; [1949] 2 All E.R. 416, D.C.

[4] [1956] 1 W.L.R. 167; [1956] 1 All E.R. 352, D.C.

[5] [1936] 2 All E.R. 159, D.C.

to what he there says: "In view of a submission by counsel for "the defendants"—that is, the county council—"that the "tractors in these cases are not used for haulage solely but also "for the operations of dragging timber along the ground and "lifting it and loading it on to the trailer, it is perhaps desirable "that I should briefly describe the loading operation, although "Mr. Gardner in his evidence took the view, not very sur-"prisingly, that the process of loading is an essential preliminary "and an integral part, of the process of haulage. What happens "in practice is that sometimes tree trunks lying some little way "from the tractor or its trailer, are dragged along the ground to "where the trailer is standing by means of a wire rope worked "from the winch on the tractor, and passing below the base of "the jib. The winch itself is connected through to the motor "power of the tractor. In the process of lifting tree trunks or "branches on to the trailer, the jib is used, the wire rope passing "from the winch over the pulley at the top of the jib, and being "placed round the timber, lifting it from the ground, and finally "lowering it on to the trailer." I add to that description that the vehicles, or some of them at any rate, are also fitted with what have been described as anchors so that during the dragging operations the vehicles will remain stable. Apart, however, from those preliminary operations described in the passage I have read, it has not been disputed by Mr. Irvine for the county council that for the rest what these vehicles do, and particularly what they do upon public roads, is that they haul the felled timber, such felled timber being loaded on the trailers attached to the tractors.

I turn at this stage to make some references to the Vehicles (Excise) Act, 1949. The Act has in certain respects been amended, and though we have noted the amendments, they do not affect the questions now before us. Section 4 (2) provides: "This section applies to the following mechanically propelled "vehicles, that is to say— . . . (*f*) vehicles (other than "vehicles" there referred to, and there has been a slight amendment to the original parenthesis, not affecting the present case) "which are constructed and used on public roads for haulage "solely and not for the purpose of carrying or having super-"imposed upon them any load except such as is necessary for their "propulsion or equipment." If the vehicle is within that category, then, as provided by subsection (1), the duty chargeable in respect of it is to be ascertained by reference to the Third Schedule of the Act. Section 5 in its first and second subsections provides, first, for the duty chargeable in respect of "goods "vehicles" as specified in another of the schedules, and, secondly: "Subject to the provisions of this Act, if a goods "vehicle is used for drawing a trailer there shall be chargeable in "respect thereof" the rather higher duty earlier indicated.

Reverting to the subject-matter of this appeal, we are here undoubtedly concerned with a vehicle drawing a trailer, and the real question in the end I think comes down to this: are these

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tractors vehicles constructed and used for haulage solely within paragraph (*f*) of section 4 (2); or are they "goods vehicles" drawing trailers as defined in subsection (2) of section 5? One step which must be taken in answering that problem is to see what is meant by "goods vehicles" according to the definition section, section 27 (1): [His Lordship read the subsection and continued:] I have emphasised in reading that definition the words "for the "conveyance of goods," and it will be borne in mind that the relevant paragraph in section 4 speaks of "carrying" a load. Mr. Irvine, in a most ingenious and gallant argument, if he will allow me to say so, has argued first of all that the problem is a matter of fact. He says that, as the judge held and as is admittedly true, the operations with which those vehicles are concerned cannot be properly described as operations of "haulage solely," and that is a reference to the operations which I have described in my reading of the judgment. The operations of dragging the felled timber to the trailer and sometimes trimming the trees, and thereafter placing them or stacking them in the trailer are operations which, says Mr. Irvine, are not strictly speaking haulage, and which involve (and this portion of his argument is important) the presence on these vehicles of the winches, the jibs and the anchors. Mr. Irvine in summarising his argument has contended that these vehicles are not fairly within the description I have read from paragraph (*f*) of subsection (2) of section 4 of the Act, and are not within that definition or description for two reasons which are complementary the one to the other: first, as I have already indicated, because they are neither constructed nor used for haulage solely, and, second, because they carry or have superimposed upon them a load other than such as is necessary for their propulsion or equipment, that is, for their equipment within the meaning of the paragraph, videlicet equipment for haulage purposes only. And so Mr. Irvine has said that the presence on these vehicles of the winch, the jib and the anchor constitute a load outside the scope of paragraph (*f*) in section 4 (2), or, alternatively, when we come to look at the later sections 5 and 27, goods or possibly a burden which, not being within the strict limitation of paragraph (*f*) of section 4 (2), bring the case within section 5.

Mr. Irvine referred us to a number of cases which have come before the Divisional Court and also a case which came before Gorman J. I shall not, I hope, be thought disrespectful of Mr. Irvine's argument if I do not narrate all those cases and do not attempt to make glosses upon what they decided: but I think I must make a brief reference to two. The first is *James* v. *Davies*,[1] in which a Land Rover, a vehicle which, having named it, I hope is sufficiently familiar nowadays to everyone, and is by its construction made and adapted for carrying goods, was found to be drawing a trailer. No goods at all were loaded in the Land Rover itself, but goods were loaded in the trailer.

[1] [1953] 1 Q.B. 8; [1952] 2 T.L.R. 662; [1952] 2 All E.R. 758, D.C.

It was contended by the proprietor of the Land Rover that the vehicle did not fall within section 5 of the Act because it was not a goods vehicle within the meaning of the definition section. That argument was rejected. Lord Goddard C.J. said[2]: "if "the view which commended itself to the justices," namely, that it was not a goods vehicle within the definition, "were "right it would follow that furniture removers could move fur- "niture in great pantechnicon trailers, and if they drew such "trailers by a vehicle which, though constructed to carry goods, "had no furniture in it, it could be said that they were not "liable to pay the heavier rate of duty for goods vehicles. I "think that once a mechanically propelled vehicle is conveying "goods, although it conveys them by means of a trailer, the "question becomes easy. The Land Rover was adapted for "that use and was being used for the conveying of goods or "burden because it was moving potato trays from one place to "another."

The second case was *Regina* v. *Berkshire County Council, Ex parte Berkshire Lime Co. (Childrey) Ltd.*[3] That case related to an agricultural engine which was at the relevant time being used for the purpose of conveying lime from one place to another, the party concerned being, I gather, as a business matter, a dealer in lime. The vehicles were lime-spreading vehicles. The question arose whether the vehicles fell within section 4 or section 5 or possibly both. The court consisted of Lord Goddard C.J., Parker and Donovan JJ. I should state that the paragraph of section 4 (2) to which the *Berkshire* case[3] related was paragraph (*a*), not of course paragraph (*f*) with which we are concerned, the relevant language of paragraph (*a*) being "agricultural tractors and other agricultural engines, which are "not used on public roads for hauling any objects except . . . (i) for "hauling their own necessary gear, threshing appliances, farming "implements . . . or supplies of water or fuel required for the "purposes of the vehicle or for agricultural purposes; (ii) for "hauling from one part of a farm in the occupation of the person "in whose name the vehicle is registered under this Act to "another part of that farm, agricultural produce," etc.

Lord Goddard C.J. drew attention to the broad purpose exemplified by the first section of this Act, namely, to make a distinction between classes of vehicles for tax purposes, first, vehicles used on public roads and then other kinds of vehicles, and as regards the former a heavier rate of tax is payable unless the vehicle comes within one or other of what Lord Goddard C.J. called the exemptions. "Once," said Lord Goddard C.J.[4] "it "comes on a road it becomes liable to tax unless it can be "brought within an exemption. Section 4 (2) is dealing with "mechanically propelled agricultural vehicles which may from

[2] [1953] 1 Q.B. 8, 12.
[3] [1953] 1 W.L.R. 1146; [1953] 2 All E.R. 779, D.C.
[4] [1953] 1 W.L.R. 1146, 1148.

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"time to time come on to the public roads. They will remain "taxable at the lower rate so long as they only are used on the "roads for the purpose of hauling, but if they are on the roads, "and are used for carrying goods, I can find no ground for saying "that they are not taxable as goods-carrying vehicles. They "must not be used on public roads for hauling any objects except "those set out specifically in [section 4 (2)], and this subsection "so far as it relates to agricultural vehicles is dealing with "haulage and nothing but haulage. The Act clearly distinguishes "between haulage and carriage." Parker J. agreed with that judgment. Donovan J. also came to the same conclusion, but in the course of his judgment he expressed the view that one might have in respect of these sections an overlapping and he gave some reasons for thinking the sections might have to be construed so that one would get from time to time vehicles which might fall both within section 4 and section 5. So far as the vehicles before him were concerned, he was satisfied that they were, at any rate, within section 5.

I have referred to those two cases because one of the problems of difficulty which the present case and these other cases have presented turns upon the language of the definition of "goods "vehicle" in section 27, and, in particular, upon the words which I emphasised in reading—"used for the conveyance of goods." And the difficulty is of this nature. If one takes the decisions which I have mentioned as examples, and in particular *James* v. *Davies*,[5] the Divisional Court there said that a vehicle is no less conveying goods or used for the conveyance of goods because it does so, as it were, at one remove, because it does so not by having them loaded on its own back but by having them loaded upon a trailer which it is itself drawing, being itself unloaded. And so one is faced with the difficulty that if that is right, then how does one make a sensible distinction between a conveyance of goods such as was exemplified in *James* v. *Davies*[5] and a conveyance of goods by a vehicle, such as those with which we are concerned, dragging a trailer on which is loaded felled timber?

I do not find it necessary to attempt any exposition of all the interactions of the various sections of this complicated piece of legislation, and certainly nothing that I am saying should be taken as casting any doubt on the correctness of the Divisional Court's decisions to which I have alluded, decisions which I should have thought, if I may respectfully say so, were plainly in accordance with the common sense and justice of the cases which came before the court. But for my part I think also this, that whether or not Donovan J. was right in saying that there may be possible overlapping, I think that to the formula "used for the conveyance of "goods" there should, at any rate, be understood this limitation: that if one has a vehicle which is plainly within the four corners of paragraph (*f*) of section 4 (2), that is, a vehicle constructed and

[5] [1953] 1 Q.B. 8.

used not itself for carrying goods but for haulage solely, then that vehicle is outside the scope and intended scope of the formula "goods vehicle." In other words, however wide the natural sense of "conveyance of goods" may be, it does, by necessary interaction of the various sections, stop short of covering an operation which is properly within the words of paragraph (*f*), namely, "haulage solely." That view I think involves no inconsistency with *James* v. *Davies* [6] having regard to the facts of that case. I recall that there the court was dealing with a Land Rover, a vehicle constructed for the carriage of goods itself, and the court was saying that it was no less performing the functions for which it had been constructed when the goods it was conveying were being conveyed, as I ventured to put it earlier, at one remove. As I said earlier, the day and age in which we live is one of complexity and there are undoubtedly problems which these sections present by way of construction which are not entirely easy. It is tempting to ask (but not tempting to answer when it is not necessary to do so): why, for example, has subsection (3) of section 4 expressly excluded from section 5 vehicles to which one only of the paragraphs of the preceding section applied? Similarly, when one gets to section 5, why does only subsection (3) contain the proviso excluding from that section vehicles which were chargeable with duty under another section? But the subject-matter is a difficult one and in the age of the internal-combustion engine the ingenuity no doubt of manufacturers of vehicles presents a problem for those who are concerned with drafting the statutes imposing duties upon those vehicles.

It is, however, proper to apply, as far as one can, common sense to the construction of these provisions, and I would start, at any rate, with the view that something which is quite clearly brought within one section to which one rate of duty is applicable ought not easily to be said to attract some other rate of duty because one might by some construction of the language bring it also into another section. I do not want to involve myself further with possible overlapping. I found my judgment upon this, that if a vehicle is brought fairly and squarely within paragraph (*f*) of subsection (2) of section 4, that is, because it is being used as it was constructed, for haulage solely, then it is outside the scope of the definition of "goods vehicle" and the phrase in the definition "conveyance of goods" does not extend to purely haulage operations. I add that the problem of the interaction of section 4 and section 5 was not before the court in *James* v. *Davies* [7] and Lord Goddard C.J. had not in that case to consider the matter which is now before us. The interaction of the two sections was, however, before the court in the second case to which I have referred, the *Berkshire County Council* case [8] and

[6] [1953] 1 Q.B. 8.
[7] Ibid.
[8] [1953] 1 W.L.R. 1146.

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the passage which I have quoted from Lord Goddard C.J.'s judgment there included the phrase "The Act clearly distinguishes "between haulage and carriage."

Having got so far, it then must, I think, follow that the sole remaining question is whether on the facts as I have stated them it is correct to say, as the judge held, that this vehicle is fairly and squarely within section 4 (2) (*f*). I agree with the judge in thinking that that question must be affirmatively answered.

I follow Mr. Irvine's point that in so far as these vehicles are constructed to enable work to be done other than hauling pure and simple, namely, to enable to be done the operations essentially preliminary to the hauling, they might be said to go beyond paragraph (*f*). But I think so to hold would be to make an unnecessarily fine distinction between one kind of vehicle and another, the main and real purpose of which is haulage and haulage properly so called. To disqualify the vehicle from the scope of paragraph (*f*) merely because its construction enables the essential preliminaries to be performed, namely, dragging the timber up to the trailer, trimming it where necessary and by the jib putting it on, I would find irrational. I think the whole operation is in substance and in truth haulage and that these added operations are merely essential ancillaries. One may no doubt reach a point where one would say that the other operations which the tractors are designed to perform have got too far removed from haulage; but I do not think in this case that that stage has been reached.

Taking that view (and it is, after all, a matter in the end which is only capable of very short exposition) I would hold that these vehicles do fall fairly and squarely within paragraph (*f*). I am not forgetting other points Mr. Irvine indicated—his reference to the use of the word "burden" in the definition section, section 27—but I have not found that those other points further assist. The real question, once the interaction of the two sections is determined, is that which I have last stated and attempted to answer: having regard to the operations which these vehicles are designed to perform or to enable to be performed, are they or are they not vehicles "constructed and used on public roads for "haulage solely," etc.? I think that they are, and taking that view, being the view expounded by the county court judge, I would dismiss this appeal.

Upjohn L.J. I agree. The first question to be answered is whether the vehicles in question fall within section 4 (2) (*f*). It seems to me that the haulage vehicles referred to in that subsection are in contrast to the goods vehicles referred to in section 5. As a matter of commercial common sense, a haulage vehicle must have the necessary mechanism to drag the load from wherever it is situate to the trailer, to load it and arrange it on the trailer and to unload it at the other end, and it is quite clear from the terms of the county court judge's judgment that all the

equipment, fixed and movable, on these vehicles was necessary for that purpose. Apart from such equipment they had no floor boards and were incapable of carrying goods.

The argument to the contrary, which was put very attractively by Mr. Irvine, involves the proposition that to obtain the benefit of taxation by falling within paragraph (*f*), the vehicle can only haul a fully loaded trailer, and having towed it to the other end, it cannot unload it. That seems to me to be extravagant. It seems to me, therefore, that these vehicles plainly fall fairly and squarely within the sub-paragraph.

The other question to be answered is whether these vehicles are "goods vehicles" within section 27. My answer to that is that these vehicles are not, because they are not constructed or adapted for use or used for the conveyance of goods; they are constructed and used for the haulage of goods, and that is the fundamental distinction between sections 4 and 5. *James* v. *Davies* [9] and *Pearson* v. *Boyes* [10] were both dealing with vehicles constructed themselves to carry goods. Those cases show that where a vehicle is constructed itself to carry goods, the vehicle does not escape liability for the higher rate of duty under section 5 by hauling the goods rather than carrying them itself, but they do not in my judgment bear upon the problem that we have to decide.

For those reasons and for the reasons given by my Lord and by the county court judge, I agree that this appeal should be dismissed.

Pearson L.J. I agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Field, Roscoe & Co. for Guy H. Davies, Clerk to the Gloucester County Council; J. Foley Egginton & Co., Sutton Coldfield.*

E. D.

[9] [1953] 1 Q.B. 8.

[10] [1953] 1 W.L.R. 384; [1953] 1 All E.R. 492, D.C.

[QUEEN'S BENCH DIVISION.]

UNITED DAIRIES (LONDON) LTD. *v.* BECKENHAM CORPORATION.
SAME *v.* E. FISHER & SONS LTD.

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Jan. 24, 25, 26.

Lord Parker C.J., Salmon and Winn JJ.

Food and Drugs—Milk—Cleanliness of bottle—Milk bottled by producer in distributor's bottles—Ash found in bottle—Liability of distributor—"Immediately before use"—"Use"—Milk and Dairies (General) Regulations, 1959 (*S.I.* 1959, *No.* 277), *reg.* 27 (1).

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Food and Drugs—Act or default of third person—Regulations, offences against—Sale of contaminated milk bottled by producer—Distributor charged—Information by distributor against producer—Whether appropriate procedure—Food and Drugs Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 16), *s.* 113.

Regulation 27 (1) of the Milk and Dairies (General) Regulations, 1959, provides: "Every dairy farmer or distributor shall "ensure that every vessel (including the lid) used for containing "milk shall, immediately before use by him, be in a state of thorough "cleanliness . . ." Part I of the Second Schedule of the Milk (Special Designation) (Raw Milk) Regulations, 1949, deals with tuberculin tested milk and paragraph 7 of A thereof provides: "The milk in relation to which the special designation is used "shall—(*a*) be placed in bottles by the licensed producer and the "conditions of paragraph C. 1 of this part of this Schedule shall "apply; . . ." Paragraph 1 of B of the Second Schedule provides: "Every licensed dealer who receives the milk in retail containers "shall sell it in those containers with the seals or other fastenings "unbroken." Paragraph 1 of C of the Second Schedule provides: "Every bottle containing the milk in relation to which the special "designation is used shall be tightly closed and shall be securely "fastened either with a cap overlapping the lip of the bottle or in "some other suitable manner approved by the licensing "authority."

In September, 1959, the appellants, who were distributors of milk, delivered a pint bottle of raw farm-bottled tuberculin tested milk to a customer, which bottle was subsequently found to contain a black granular material thought to be ash. The milk in the bottle was raw milk which the appellants had bought from the third parties, the producers, and which had been bottled and capped by the producers at their farm. Although the milk was put into the distributors' bottles, which had been cleaned at their premises and then delivered in a partially open lorry to the producers' farm, there was no evidence that the bottles were ever washed or cleaned by the producers. The milk was sold by the appellants to their customers under the designation "Farm Bottled Milk."

The appellants were convicted by justices of an offence under regulation 27 (1) of the regulations of 1959. An information under s. 113 of the Food and Drugs Act, 1955, laid by the appellants against the third parties, by which they alleged that any contravention of the 1959 regulations was due to the act or default of the third parties, was dismissed by the justices. On appeal:—

Held, that on the true construction of regulation 27 (1) of the regulations of 1959, the obligation of ensuring that every vessel used for containing milk shall, immediately before use, be in a state of thorough cleanliness, rested in the case of farm-bottled milk on the producer at the farm and not on the distributor.

Quality Dairies (York) Ltd. v. *Pedley* [1952] 1 K.B. 275; [1952] 1 T.L.R. 376; [1952] 1 All E.R. 380, D.C. distinguished.

Per curiam. Unless specifically incorporated in the regulations, the procedure laid down in s. 113 of the Food and Drugs Act, 1955, did not apply to proceedings charging offences under regulations made under the Act (post, p. 748).

Case stated by Kent justices sitting at Bromley.

An information was preferred against the appellants, United Dairies (London) Ltd. for that they on or about September 1, 1959, being distributors of milk did fail to ensure that a bottle

used for containing milk immediately before such use by them was in a state of thorough cleanliness contrary to regulations 27 (1) and 34 of the Milk and Dairies (General) Regulations, 1959.

The appellants preferred an information under section 113 of the Food and Drugs Act, 1955, against the third parties, E. Fisher & Sons Ltd., farmers (hereinafter called the producers), wherein the appellants alleged that any contravention by the appellants of the regulations of 1959 was due to the act or default of the producers.

The appellants pleaded not guilty and it was submitted as a preliminary point of procedure that the producers should thereupon be called upon to plead to the information preferred against them under the Act of 1955 on the grounds that they should be given the opportunity of cross-examining the prosecutor's and the appellants' witnesses. The justices were of opinion that the producers should not be called upon to plead to the information against them unless and until the contravention of the regulations had been proved by the prosecution against the appellants and they were satisfied after the evidence for the prosecutors and the appellants had been heard by them that section 113 was applicable to a contravention of the regulations. They accordingly proceeded to hear the evidence called on behalf of the prosecutor and on behalf of the appellants.

The following facts were found by the justices. The appellants were distributors of milk. The milk was of two kinds. First, pasteurised milk, being raw and untreated milk bought by the appellants in bulk from the Milk Marketing Board and being pasteurised and bottled by the appellants before distribution. Secondly, raw milk bought by the appellants from farmers and sold by the appellants as such which milk must by virtue of the Milk (Special Designation) (Raw Milk) Regulations, 1949, and the Milk and Dairies (General) Regulations, 1959, be bottled and capped at the farm at which it is produced by the producer. The raw milk bottled and capped by the farmers was sold to customers by the appellants under the prescribed designation "Farm Bottled Milk." The producers were dairy farmers and as such producers of tuberculin tested milk, and were duly licensed as producers pursuant to the said Raw Milk Regulations of 1949. They had at their farm apparatus for bottling milk produced by them. Prior to September 1959 the appellants had agreed with Mrs. Bela Anderson to deliver daily to her house a bottle of raw farm-bottled tuberculin tested milk.

On or about September 1, 1959, the appellants, in pursuance of the agreement delivered to Mrs. Anderson's house a pint bottle of milk. The bottle was embossed with the appellants' name and was capped with a metal cap embossed with the producers' name but not with that of the appellants. When milk was delivered it was capped very securely and there was no evidence that at the time of the delivery the cap had been removed or interfered with

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since being placed in position. The bottle contained raw tuberculin tested milk which had been produced by the producers who, at their farm, had filled the bottle with the milk and thereafter placed the cap into position. Two or three days after delivery of the bottle to Mrs. Anderson and after about one-third of the milk, including the cream, had been used Mrs. Anderson saw resting on the bottom of the inside of the bottle some black granular material which on subsequent microscopic analysis was proved to be a carbonised residue from a burnt plant, that is to say, ash. It was impossible to say whether the material was burnt tobacco ash, or some other similar burnt fibrous ash. The ash was in the bottle when it was delivered by the appellants to Mrs. Anderson. The ash was not adherent to the bottle but was floating freely in the milk, moving with the milk, and when the bottle was shaken, dispersing in the milk. Apart from the presence of the ash in the milk, there was no evidence that the bottle was not clean when it was delivered to Mrs. Anderson. It was conceded by the Chief Public Health Inspector of Beckenham Corporation that the ash may have been in the milk when it was put in the bottle, and that he knew of no lawful steps the appellants could have taken to ensure there was no ash in the bottle.

At the close of the case for the prosecutor it was submitted on behalf of the appellants that they had no case to answer but the justices were of opinion that the appellants had a case to answer, and the following further facts were then found by the justices. Over 25 years ago it had been agreed between the appellants and the producers that the appellants would buy from the producers milk produced by the latter in such quantities as thereafter might be agreed from time to time and that such milk would be delivered either in bulk to the appellants for pasteurisation and bottling by them or would be bottled raw and untreated by the producers at their farm into bottles supplied by the appellants. This agreement had been contained in letters between the parties all of which had since been lost but the appellants had ever since been buying milk from the producers and had paid them the price therefor, never paying to or receiving from the producers any sum by way of commission, the relationship between them being throughout solely that of vendor and purchaser, in relation to the purchase of milk, although the justices took the view that it was to enable the appellants to sell the milk that it was put by the producers into the appellants' bottles.

On September 17, 1954, the appellants by letter had informed the producers that it was the latter's duty to ensure that bottles were clean before they filled them. The letter was acknowledged by the producers by letter dated September 21, 1954.

The bottle delivered to Mrs. Anderson was a bottle which some days prior to September 1959 the appellants had collected from a customer. After collection it was, together with numerous

other bottles, washed and cleaned by the appellants and then, together with 19 other bottles similarly washed and cleaned, placed in an open wire crate uncapped and upright with the open ends uppermost. The crate was then stacked with 34 other similar crates on a loading bay to await delivery to the producers. The loading bay was made of concrete and was open and exposed on one side and persons habitually walked thereon or near thereto while the crates were awaiting delivery to the producers. After being placed on the loading bay the crates, including the bottle the subject of the dispute, were loaded by the appellants' servants into a lorry of the appellants, which lorry had a covered top but its sides were open and exposed. The lorry was then driven by a servant of the appellants to the producers' farm, a distance of about 15 miles. The driver of the lorry never smoked near the milk, but sometimes smoked a cigarette in his driver's cab and cigarette ash could blow out of the window of the lorry. After arrival at the producers' farm the crates were unloaded from the lorry by the driver with the assistance of the producers' farm hands. The crates were then stacked in the farmyard while the lorry was loaded with 35 other similar crates containing bottles filled with raw milk which had been capped by the producers after filling by them, and which were then driven back to the appellants' premises for eventual delivery to customers. After the crate containing the bottles had been stacked in the yard it was taken into the filling room for filling. There was no evidence as to the length of time that elapsed between the removal of the crate from the yard and the filling thereof with milk, nor concerning the place, if any, to which the crate was removed after being unloaded and before being taken into the filling room. The process and apparatus at the farm for filling the bottles was that the raw milk was poured into a container holding about 5 gallons of milk, under which there were 5 nozzles in a line. The milk supply to each of the nozzles from the container was controlled by a valve, a lever at the side opening and shutting all five valves simultaneously. Each of the crates containing the empty bottles was slid underneath the nozzles so that by pulling the lever five bottles were filled at the same time. The crate was then pulled forward so that another row of five bottles was underneath the nozzles, the process being repeated until all the bottles in the crate were filled. The operator then, by hand, placed a cap on the top of each bottle, the crate of full bottles then being removed and stored ready for collection by the appellants. None of the persons operating the filling apparatus at the farm was employed by the appellants. There was no evidence that at the farm the milk was filtered before being placed in the bottles or that the bottles were at any time washed or cleaned at the farm. After complaint by Mrs. Anderson the appellants examined a number of bottles of farm bottled milk supplied by the producers and bottled by them at their farm. Four such bottles were found

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to contain some deposit stated to be dust or ash similar to the ash found in the bottle in dispute. The cap of the bottle in dispute was not removed between being collected by the appellants from the farm and being delivered to Mrs. Anderson so that the deposit did not enter the bottle during that period of time, but there was no proof at what stage the deposit did enter the bottle, whether when in the physical possession of the appellants or the producers.

It was submitted on behalf of the appellants that there was no evidence that the bottle in dispute had at any time been otherwise than in a state of thorough cleanliness; that the most probable explanation of the presence of the ash in the bottle was that it had fallen into the milk before it was placed in the bottle during the milking process or while the milk was being poured into the container, or alternatively, that the ash fell into the bottle after it had been filled but before being capped; that the relationship between the appellants and the producers was simply that of purchaser and vendor and that the former were not vicariously responsible for the acts or omissions of the producers.

It was contended for the prosecutor that assuming "use" stopped at the moment when the milk entered the bottle, if the justices found that the deposit entered the bottle before the milk entered it, there was a breach of the regulations, and that if entry was or might have been through the default of the producers, then the appellants were still liable for the ash; alternatively, that use by the appellants covered the use of the bottle right up to the time of delivery and even if the principle of vicarious liability did not apply guilt was still established.

The justices were of opinion that the contravention of the regulations by the appellants had been proved for the following reasons: that regulation 27 (1) of the Milk and Dairies (General) Regulations, 1959, imposed an absolute duty on distributors of milk to ensure that a bottle used for containing milk immediately before such use by them was in a state of thorough cleanliness; that as uncovered bottles, after being washed by the appellants, were transported some 12 to 15 miles through the streets by a lorry to the producers' farm before they were filled with milk, there was always a possibility that dirt or other foreign matter could enter the bottles before they were filled with milk and capped, and it was the duty of the appellants to take adequate steps to deal with such a contingency, while the letter dated September 17, 1954, from the appellants to the producers was evidence of the fact that the appellants were aware that bottles would inevitably be contaminated during the journey to, or subsequent storage at, the farm; that after bottles left their depot the appellants remained at all times responsible for the cleanliness of the bottles before use for containing milk; that the bottle of milk delivered to Mrs. Anderson contained ash; that there was no evidence that the cap of the bottle had been

removed after it was placed in position at the producers' farm, nor any evidence that the ash was in the milk at the time the milk was put in the bottle, that the correct conclusion to be drawn from the facts of the case was that the appellants had failed to ensure the bottle in dispute was in a state of thorough cleanliness immediately before use for containing milk and, accordingly, the justices found the appellants had contravened the regulations.

The justices were of the further opinion that section 113 of the Food and Drugs Act, 1955, did not apply to proceedings brought under the regulations of 1959 and accordingly they convicted the appellants of the offence set out in the information and dismissed the information preferred by the appellants against the producers without calling upon the producers to plead thereto.

The appellants appealed.

Stephen Chapman Q.C. and *M. Ahern* for the appellants.

R. V. Cusack Q.C. and *J. W. Miskin* for the prosecutors.

Christmas Humphreys Q.C. and *B. L. Leary* for the producers.

The following cases were referred to in argument which are not mentioned in the judgment: *Reynolds* v. *G. H. Austin & Sons Ltd.*[1]; *Parker* v. *Alder.*[2]

LORD PARKER C.J. stated the facts and continued: Regulation 4 (1) of the Milk (Special Designation) (Raw Milk) Regulations, 1949, deals with licences, and provides: "Any person who "intends to use in relation to milk a special designation authorised "by these regulations shall apply in accordance with the "provisions of these regulations to the licensing authority for a "licence to use such special designation." Regulation 6 (1) provides: "Every licence granted under these regulations shall "be subject to the general conditions set out in the First Schedule "to these regulations, and to such of the special conditions set "out in Parts I and II of the Second Schedule to these regulations "as are applicable thereto."

On turning to the Second Schedule one finds that Part I is dealing with tuberculin tested milk, and paragraph 7 of A, which is dealing with conditions applicable to producers' licences provides: "The milk in relation to which the special designation "is used shall—(*a*) be placed in bottles by the licensed producer "and the conditions of paragraph C.1 of this part of this Schedule "shall apply. . . ." Paragraph C.1 provides: "Every bottle "containing the milk in relation to which the special designation "is used shall be tightly closed and shall be securely fastened "either with a cap overlapping the lip of the bottle or in some "other suitable manner approved by the licensing authority."

[1] [1951] 2 K.B. 135; [1951] 1 T.L.R. 614; [1951] 1 All E.R. 606, D.C.

[2] [1899] 1 Q.B. 20; 15 T.L.R. 3, D.C.

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It then goes on to provide that the cap shall bear the address of the premises at which the milk is bottled and the words "Tuberculin Tested Milk." Section B, which is dealing with conditions applicable to dealers' licences only, provides in paragraph 1: "Every licensed dealer who receives the milk in retail "containers shall sell it in those containers with the seals or "other fastenings unbroken."

Accordingly, it will be seen that under these regulations it is the producer, in this case the third parties, who is made responsible for the bottling of the milk and that the dealer, in this case the appellants, is forbidden to break the seals or other fastenings once the bottle has been filled and capped.

At the close of the case for the prosecution a submission was made that there was no case to answer. The justices who, I might say, have evidently dealt with this case with the greatest care, decided that a prima facie case had been raised and accordingly the appellants then called evidence. They showed, first, that for over 25 years they had been buying milk in this way from the third parties which the third parties had put into their, the appellants', bottles and that the relationship between them was that of vendor and purchaser. The method in which the bottles were dealt with was also proved. It was shown that when empty bottles were collected from customers, the appellants in fact themselves washed and cleaned them, that they were then put in open crates and stacked on a loading bay to await delivery to the producers. The bottles were at all times open to the air. They would then be transported in a lorry, the property of the appellants, for delivery to the producers, the lorry having a covered top but the sides being open and exposed. They would be transported to the third parties' farm, some 15 miles away. The crates were then stacked in the third parties' yard and an equivalent load of full bottles was taken back by the lorry. The method of filling at the third parties' premises was that there was a container which held about five gallons of milk with five nozzles, and a crate would be put under the nozzles in such a way that five of the empty bottles were under the five nozzles which were then filled. An employee of the producers would then cap those five. He would then move the crate so that the next five bottles came under and the process would be repeated. There was apparently no evidence that the third parties themselves ever washed or cleaned the bottles.

It was in those circumstances that the justices held that there had been a breach by the appellants of regulation 27 (1) of the Milk and Dairies (General) Regulations, 1959, to which I must refer in a moment, which deal specifically with the cleaning of bottles.

The justices, having found the offence proved, convicted the appellants and fined them. Thereupon the appellants sought to show, in what I may call the third-party proceedings, that the persons really to blame were the producers, but the justices held

that the third-party procedure, which is a procedure laid down in section 113 of the Food and Drugs Act, 1955, did not apply where the offence found to be proved was an offence under the regulations.

A number of questions are left for the opinion of this court, but the first and vital question concerns the true interpretation of regulation 27 (1) of the regulations of 1959. So far as it is material that regulation provides: "Every dairy farmer or distributor shall ensure that every vessel (including the lid) used for containing milk shall, immediately before use by him, be in a state of thorough cleanliness. . . ." I think those words have a plain meaning. They are, in my view, dealing with the point of time immediately before a bottle is filled, and the obligation is placed upon the person responsible for the filling of the bottle. I say that because it seems to me that in the ordinary way one would give the word "use" in connection with "immediately before use" the same connotation as the word "used" appearing earlier in the sentence in the sense of used for containing milk. I should have thought that the natural meaning was that the farmer or distributor should ensure that every vessel used for containing milk shall immediately before use for that purpose by him to be in a state of thorough cleanliness.

If that be so, in the circumstances of this case the only persons upon whom that obligation rests would be the producers, and the appellants would have been wrongly convicted. As against that, however, it is said that the word "use" has a wider meaning than merely use for containing milk and that it applies to any point of time when the bottle is being used for whatever purpose. Thus, it is first submitted, as I understand it, that the appellants used it at all points of time from the moment when their driver collected the full crate containing the bottles from the producers' yard until it was delivered to the customer, Mrs. Anderson, and that the obligation in regard to cleanliness persisted at every point of time during that period. I can see no warrant for such a construction, and indeed it seems to me that it is directly opposed to the sense of the provision, in particular, the sense conveyed by the words "immediately before use."

It is then said that at any rate it applies to the point of time when the appellants' driver took the crate and the bottle from the yard; that collecting the bottle at the yard was use within this provision by the appellants, and that there arose a duty to ensure that, immediately before the time when he took up the crate, the bottles were in a state of thorough cleanliness. I cannot accede to that argument. It seems to me that "use" there is use for containing milk and that the provision is applying at the point of time when the bottle is about to be filled; but if there be any ambiguity it seems to me that one is entitled to look at what would be involved in the rival construction. It would involve this, that at that point of time when the

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distributors, in this case the appellants, had to ensure that the bottle was clean, it was not only impossible for them to do so because the bottle was firmly capped and sealed, but also because it was illegal for them to do so under the other regulations to which I have referred saying that distributors must not tamper with the seals. Of course this provision is laying down an absolute duty, and there may clearly be cases where for the protection of the public an absolute duty is put upon someone which it is impossible for him physically to perform. That is undoubtedly true, but here the public, as it seems to me, have their protection, because it is the farmer, the producer, upon whom is put this obligation. Accordingly, as it seems to me, in considering this provision which is dealing amongst other things with this tuberculin tested milk, it is a relevant consideration that it would be impossible and, indeed, illegal for the appellants to comply with it at the point of time when they take delivery.

I come to the conclusion, therefore, that the provision should be construed in the sense which I have said, namely, in regard to the point of time when its use for containing milk is begun.

An alternative submission is made on behalf of the prosecution that in this case even if that meaning is given to the word "use," the use for containing milk to which the bottle was put when it was filled was really a use by the appellants, in that the producers were acting as their agents in filling the bottles. It is, as I understand it, said that though there may have been a relation of vendor and purchaser in regard to the milk, yet in regard to the filling of the bottles the producers were acting as the appellants' agents. I cannot accept that submission. It does not seem to me to represent the true position here. In any event, it is difficult to see how the producers could be acting as agents for the appellants when it was the producers' responsibility under the other set of regulations to do the bottling.

Finally, it is said that this case is governed by the decision of this court in *Quality Dairies (York) Ltd.* v. *Pedley*.[1] The facts, so far as they are relevant, in that case were that the appellants, Quality Dairies (York) Ltd., were distributors of milk and had a contract with a hospital. They performed their contract with the hospital by getting York Producers Ltd. to supply milk in bottles and deliver the same to the hospital. The question arose under regulation 26 of the Milk and Dairies Regulations, 1949, dealing with cleanliness, and it was held by this court that Quality Dairies (York) Ltd. were responsible, in effect, for the failure of York Producers Ltd. to ensure that the bottles were clean. It is to be observed that in that case, on the facts, York Producers, Ltd. were the agents of Quality Dairies (York) Ltd., but the judgment of this court, for which I fear I was responsible, went further than that and dealt with the matter on the basis

[1] [1952] 1 K.B. 275; [1952] 1 T.L.R. 376; [1952] 1 All E.R. 380, D.C.

of delegation. I said[2]: "These regulations, as it seems to "us, were made to ensure, so far as possible, that milk delivered "to the consumer should be as clean as possible, and by this "particular regulation an obligation is put, inter alia, on the dis-"tributor to ensure the thorough cleanliness of all vessels used "in the preparation of milk for sale, including, of course, the "bottles in which the milk is delivered. It seems to us, therefore, "that applying the principle referred to above, the legislation in "question has the effect of imposing an absolute duty so that a "principal would be liable for the acts of his servant, or agent, "done within his authority. Further, as was pointed out by Lord "Goddard C.J. in *Linnett* v. *Metropolitan Police Commissioner*,[3] "the principle set out in *Mousell Brothers Ltd.* v. *London and* "*North Western Railway Co.*,[4] as applied in the various decisions "thereon 'does not depend on the legal relationship existing "'between master and servant or between principal and agent; "'it depends on the fact that the person who is responsible in "'law, as for example, a licensee under the Licensing Acts, has "'chosen to delegate his duties, powers and authority to "'another.'"

It may be that that passage is strictly obiter to that decision, but assuming it is right, and nobody has sought to say that it is not, it seems to me that it cannot apply to the present case. Having regard to the Milk (Special Designation) (Raw Milk) Regulations, 1949, to which I have referred, it would really involve this, that in the present case these appellants were delegating something, the bottling, which they were forbidden to do by the regulations, to somebody else, the producers, who alone were responsible for the bottling. In my judgment that part of the decision in *Pedley's* case[5] cannot apply on the facts of the present case. Accordingly, I have come to the conclusion that on the true construction of regulation 27 (1) of the Milk and Dairies (General) Regulations, 1959, no offence was committed by the appellants. It therefore becomes unnecessary to consider what would be the next question, that is, whether it had been proved that the ash was in the bottle immediately before the milk was put in or whether the ask got into the milk after the milk had been put into a perfectly clean bottle, and the further submission which was being made by the prosecution, that even if the latter was the true position the ash must be treated as in part adhering to the bottle, thus making the bottle dirty. It is unnecessary to consider those matters.

It is also strictly unnecessary to consider whether section 113 applies, but as the matter has been fully argued I think it would be right to express an opinion on it. Section 113 (1) of the Food and Drugs Act, 1955, sets out what is often referred to as the

[2] [1952] 1 K.B. 275, 278.
[3] [1946] K.B. 290, 294; 62 T.L.R. 203; [1946] 1 All E.R. 380, D.C.
[4] [1917] 2 K.B. 836, 845, D.C.
[5] [1952] 1 K.B. 275.

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third-party procedure. The subsection begins in this way: "A "person against whom proceedings are brought under this Act "shall, upon information duly laid by him and on giving to the "prosecution not less than three clear days' notice of his "intention, be entitled to have any person to whose act or "default he alleges that the contravention of the provisions in "question was due brought before the court in the proceedings."

The narrow point here is whether the words "A person against "whom proceedings are brought under this Act" cover proceedings brought charging offences under the regulations made under this Act, because regulation 27 of the Milk and Dairies (General) Regulations, 1959, is clearly made under section 29 of the Food and Drugs Act, 1955. I should have thought, on reading those words alone, that they are really dealing with proceedings brought in regard to offences under the Act, whereas a reference to the regulations in question shows that there is a provision, regulation 34, making contravention of the regulations an offence, and laying down the penalty. There is a clear difference betweeen proceedings brought for offences under the Act and proceedings brought for offences under the regulations. It, however, appears from certain other sections, in particular sections 114 and 115, that the draftsman had this distinction in mind, yet he did not draw any such distinction in section 113. Nevertheless, I still feel that section 113 is really only dealing with proceedings brought charging offences under the Act, and it is to be observed that by section 123 provision is made for the regulations themselves applying provisions of the Act. Section 123 (1) so far as it is material, provides: "Regulations made under Part I of this Act, Milk and "Dairies Regulations and Milk (Special Designation) Regula-"tions, without prejudice to the generality of the provisions "under which they are made, may . . . (*b*) apply, as respects "matters to be dealt with by the regulations, any provision in "any Act (including this Act) dealing with the like matters, "with the necessary modifications and adaptations."

We have been referred to a number of regulations which have been made and which are referred to in Bell's Sale of Food and Drugs (13th ed.), where section 113, or procedures similar to that laid down in section 113, have been specifically applied and incorporated in the regulations. In particular, we were referred by Mr. Humphreys to the Milk and Dairies (Channel Islands and South Devon Milk) Regulations, 1956 (S.I. 1956, No. 119), reg. 6.

In these circumstances, I am confirmed in the view I take that section 113, unless specifically incorporated in the regulations in question, does not apply to proceedings brought charging offences against these regulations.

Finally, a point was raised on which the court was asked to express an opinion, namely, as to what is the proper procedure

to be adopted by justices in dealing with these third-party proceedings. Having regard to the view I take that third-party proceedings are inapplicable, it would clearly be wrong for this court to express any opinion as to the proper procedure if they did apply. Accordingly, I have come to the conclusion that the appeal succeeds and that the conviction must be quashed.

Salmon J. I agree. It is common ground that regulation 27 imposes an absolute duty on every dairy farmer and distributor who fills bottles with milk, to ensure that immediately before the bottles are so filled they shall be thoroughly clean. It is manifest that the imposition of such a duty is necessary for the protection of the public. If the bottles are dirty immediately before they are filled, there is obviously a risk that the milk will become contaminated. If, on the other hand, the bottles are thoroughly clean at that moment, it seems unlikely that thereafter any part of the bottle which is in contact with the milk can become dirty before the bottle is opened by the ultimate customer.

It has been argued that regulation 27 imposes a further obligation on the distributor who handles the bottles of milk after they have been filled. It is suggested that such a distributor uses the bottle of milk within the meaning of regulation 17 when he takes delivery of it and, as I understand it, at every moment of time till he parts with possession of it. If the regulation does impose such an obligation, I find it difficult to see why the duty should be upon such a distributor to ensure that the bottle is thoroughly clean immediately before he takes delivery. I should have thought that if the legislature intended to impose a duty on one who handles the milk bottle after it is filled, the obligation to ensure cleanliness would have been not before taking delivery but before parting with possession of the bottle. Moreover, if the word "used" in the regulation is to be given the meaning for which the respondents contend, then the distributor who handles the bottle to examine it before he takes delivery is using it and thereby committing an offence if it be dirty. It would, accordingly, be impossible for him to comply with the regulation.

No doubt the legislature could, and sometimes does, impose an obligation with which it may be impossible to comply, but only when the imposition of such an obligation is necessary for the protection of the public. Here the public is adequately protected by the duty imposed on the person filling the bottle to ensure that the bottle is clean immediately before it is filled. Moreover, had it been intended to impose the stringent obligation on the distributor for which the respondents contend, I feel that very much plainer language would have been used in the regulation.

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On the ordinary and natural meaning of this regulation the appellants are entitled to succeed and the appeal should be allowed.

Winn J. I agree with both the judgments which have been delivered, but mainly because we are differing from the justices on their construction of regulation 27, I feel it right that I should say, indicating some sympathy with the justices, that it is only in the ultimate analysis of the matters and for the reasons my Lords have given, that I have come to the conclusion that the word "use" in the regulation has the particular meaning my Lords have declared. I must admit, contrary to what the Lord Chief Justice has said, I should have thought that the natural meaning of the words "used for containing milk shall, imme-"diately before use," taken by themselves as language, would have been any use, the purpose or essential function of which was that milk should be contained in the vessel, and upon that interpretation the carriage of the milk in the vessel would be use of the vessel for containing milk. It does not seem at all natural to use the words here as synonymous with "used for receiving "milk," or "used for having milk poured into the vessel." It does not seem to me so plain that the policy of the legislature might not have been to impose an absolute obligation upon a person not able legally himself to open the vessel in order to see whether it was clean.

I think it possible that there may be, though I have not gone into the question, other particular forms of legislation dealing with such articles as cartridges or gunpowder, where a double responsibility may not be imposed. One instance does occur to one, and that is the overriding responsibility of the master of a merchant ship even in waters where he has compulsorily to take a pilot on the bridge. But in this context I do feel for the reasons given, which I will not repeat, that the more limited meaning must be given to the word "use." It is to be noted that the context is not all that clear because the preceding regulation refers to the use for treatment or handling of milk, which must be wider than having milk poured into the vessel.

In my view, apart from the other instances referred to later, regulation 27 is prima facie to be construed as meaning such use as is referred to in regulation 26, just as one has in regulation 27 (2) a clear indication that the use referred to in the last line of that paragraph is any use which will bring the appliance into contact with the milk.

Another reason why the regulation is somewhat unsatisfactorily drafted is that in paragraph (6) (*a*) the words "such milk tanker, "vessel or appliance shall as soon after use as is practicable," must, one would suppose, mean so soon after its use for carrying milk has ceased, whereas before it is used again presumably means before it is again brought into contact with milk by being

filled. Having regard to the concluding words, I have come to the conclusion that the whole subject-matter of regulation 27 is to be regarded as use by bringing milk into contact with it, that is to say, so soon as milk is again brought into contact with the vessel.

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Appeal allowed with costs against the prosecutors.
Appellant to pay costs of producers.

Solicitors: *Scott & Son; Sharpe, Pritchard & Co. for Town Clerk of Beckenham; Latter & Willett, Bromley.*

J. D. P.

[PROBATE, ETC., DIVISION.]

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Jan. 17, 18; *Feb.* 27.

Lord Merriman P. and Scarman J.

Husband and Wife—Maintenance—Wilful neglect to maintain—Residence together of parties—Spouses residing in same house but living separately—Whether deserting wife entitled to order for wilful neglect of herself or children—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 6—*Summary Jurisdiction (Separation and Maintenance) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1 (4).

The parties were married in 1945 and there were two children of the marriage. In March, 1960, divorce proceedings between them were dismissed and immediately after the conclusion of the hearing the wife, by casting off her wedding ring, indicated to the husband her intention of no longer being a wife to him. Thereafter, although the parties continued to live in the matrimonial home, they led entirely separate lives, they occupied separate bedrooms, no sexual intercourse took place between them and the wife performed no wifely duties. The husband refused to make any housekeeping allowance to the wife on the ground that she was wholly failing to look after him, although apart from a brief period, he did make reasonable weekly payments to her in respect of each child. A complaint by the wife that the husband had wilfully neglected to maintain her and her infant children was dismissed by the justices, who found the wife to be in a state of desertion. From this finding the wife appealed:—

Held, (1) that, in all the circumstances, the finding of the justices that the wife was in desertion must be upheld.

Hopes v. *Hopes* [1949] P. 227; 64 T.L.R. 623; [1948] 2 All E.R. 920, C.A. followed.

Evans v. *Evans* [1948] 1 K.B. 175; 63 T.L.R. 638; [1947] 2 All E.R. 656 not followed.

(2) That, notwithstanding that section 6 of the Summary Jurisdiction (Married Women) Act, 1895,[1] which imposed a statutory

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 6: "No orders "shall be made under this Act on "the application of a married woman "if it shall be proved that such "married woman has committed an "act of adultery: provided that the "husband has not condoned, or con-"nived at, or by his wilful neglect "or misconduct conduced to such act "of adultery."

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bar upon the making of a maintenance order in favour of a wife who had committed adultery, was silent as to the position of a deserting wife, it had been clearly established by decided authorities that desertion by a wife was as complete a bar to the recovery of maintenance as adultery.

Jones v. *Guardians of Newton & Llanidloes* [1920] 3 K.B. 381; 36 T.L.R. 753, D.C.; *National Assistance Board* v. *Parkes* [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1, C.A. followed.

(3) That since an order made on the ground of wilful neglect to provide reasonable maintenance in respect of children was an order made in favour of the wife it was not open to a deserting wife to obtain such an order. The decision of the justices was, therefore, correct and the appeal must be dismissed.

Kinnane v. *Kinnane* [1954] P. 41; [1953] 3 W.L.R. 782; [1953] 2 All E.R. 1144, D.C. applied.

Per curiam. The Court of Appeal has accepted the view expressed in the Divorce Division, contrary to that expressed in the Queen's Bench Division, that it is self-contradictory to hold that two spouses one of whom is in desertion are "residing with" each other for the purposes of section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925 [2] (post, p. 765).

APPEAL from justices.

The parties were married in January, 1945, and there were two children of the marriage, a girl born in 1945 and a boy in 1947. The matrimonial home was owned jointly by the parties subject to a mortgage, the repayment instalments of which were met by the husband. In February, 1959, the wife commenced divorce proceedings on the ground of her husband's cruelty, and the husband, in his answer, cross-prayed on the ground of the wife's cruelty. At about the same time the parties started to occupy separate bedrooms and sexual intercourse between them ceased in or before July 1959, but the husband continued to pay the wife a housekeeping allowance which, at the hearing of the divorce suit in March, 1960, was at the rate of £8 10s. per week. Both the petition and the cross-prayer were dismissed, and on March 29, 1960, when the husband returned to the matrimonial home after the conclusion of the hearing a quarrel took place, during the course of which the wife, by taking off her wedding ring, indicated to her husband her intention of no longer being a wife to him. Thereafter the husband allowed the mortgage repayments to fall into arrears and made only one further payment of £8 10s. to his wife, complaining, through his solicitors, that the wife was wholly failing to look after him. From March to September, 1960, the parties, although living in the matrimonial home, were living separate lives, the wife performed no wifely duties, never again wore her wedding ring, and there was a complete absence of any communal or family life. In September, 1960, the justices of the

[2] Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4): "No order made under the "principal Act shall be enforceable "and no liability shall accrue under "any such order whilst the married "woman with respect to whom the "order was made resides with her "husband, and any such order shall "cease to have effect if for a period "of three months after it is made the "married woman continues to reside "with her husband."

Borough of Kingston-upon-Thames dismissed the wife's complaint that her husband had wilfully neglected to maintain her and the two children of the marriage on the ground that the wife was in desertion.

From this decision the wife appealed.

K. Bruce Campbell for the wife.
W. R. K. Merrylees and *F. J. Cridlan* for the husband.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Feb. 27. LORD MERRIMAN P., delivering the judgment of the court, referred to the facts substantially as set out above and continued: On these facts the following questions arise: First, was there evidence to support the finding of the justices that the wife had deserted the husband? This question really falls to be sub-divided under two heads: (1) (a) At the time when the wife's complaint was issued on July 26, 1960, were the parties living, though under the same roof, in two separate households, or were they still living together; and (b) if separately, there being no suggestion that it was a consensual separation, was this state of things the fault of the husband or the fault of the wife? Secondly, if the wife was in desertion at the time when she issued her complaints in respect of wilful neglect, does her desertion bar her from obtaining an order of maintenance for herself or in respect of the children?

We can deal at the outset with question 1 (b) whether the separation, if any, was the fault of the husband or the wife. In our opinion the effect of the justices' findings is as follows: By the time of the quarrel on March 29, 1960, the wife had already formed the intention of no longer being a wife to her husband. This intention informed all her subsequent actions and it was her endeavour thereafter to make his life so unbearable that he would leave the house. It is material to observe that the wife's intention to abandon her husband was formed before April 2, when the husband made his last payment on account of housekeeping, and that this payment was immediately followed by complaints made through his solicitors of the wife's failure to perform wifely services. The justices clearly took the view that the money ceased because of the wife's conduct and not that the wife only behaved as she did because of the absence of the money. We are of the opinion that these findings are amply supported by the evidence. If, therefore, there was a separation between these spouses, we are of the opinion that it arose not because of a failure by the husband to provide reasonable maintenance, but because, without just cause (her case of cruelty having failed), she intended no longer to live with him. The money was withheld after April 2,

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only because the wife by words and actions had made her intention clear.

For these reasons we think the justices were fully entitled to consider any separation that there was to be the fault of the wife, and that the wife had formed an intention to desert her husband. Thus the real issue becomes whether her intention was realised—that is to say, whether there was, in fact, a separation. Before, however, we turn to this question, we should add that we are not impressed by the reason of the justices which relates to the joint intention of the parties to put up the matrimonial home for sale, and which finds that the husband was justified in thinking that his wife's share of the proceeds of the sale would sufficiently provide for her. We do not accept this finding: we are, however, satisfied that it has occasioned the wife no real injustice since the rest of the evidence, coloured as it is by the wife's gesture with the wedding ring, suffices to establish that any separation that there was came about by the fault of the wife.

This brings us to question 1 (a). The question of desertion by one spouse of the other when the spouses are living under the same roof has to be determined in the light of a conflict between, on the one hand, decisions in the Divorce Court in *Smith* v. *Smith*,[1] *Wilkes* v. *Wilkes*,[2] and in the Divisional Court of the Divorce Division in *Angel* v. *Angel*,[3] following and approving those two decisions, and, on the other hand, decisions in the Divisional Court of the King's Bench Division in *Evans* v. *Evans*,[4] *Wheatley* v. *Wheatley*,[5] and *Hewitt* v. *Hewitt*,[6] affirming *Evans* v. *Evans*,[7] and finally in the light thrown upon this conflict by the decision of the Court of Appeal in *Hopes* v. *Hopes*.[8]

The point of conflict arose as follows: In the *Smith*,[9] *Wilkes*[10] and *Angel*[11] cases it had been held that one spouse could desert the other, although they were residing in the same house, if, to quote Bucknill L.J. in *Hopes* v. *Hopes*,[12] " . . . the court can say " that the spouses were living lives separate and apart from one " another." Essentially, the same test is adopted by Denning L.J. in the same case, where he said[13]: " It is most important to draw " a clear line between desertion, which is a ground for divorce, " and gross neglect or chronic discord, which is not. That line " is drawn at the point where the parties are living separately and " apart. In cases where they are living under the same roof, that " point is reached when they cease to be one household and be- " come two households; or, in other words, when they are no

[1] [1940] P. 49; 56 T.L.R. 97; [1939] 4 All E.R. 533.

[2] [1943] P. 41; 59 T.L.R. 199; [1943] 1 All E.R. 433.

[3] (1946) 62 T.L.R. 755; [1946] 2 All E.R. 635, D.C.

[4] [1948] 1 K.B. 175; 63 T.L.R. 638; [1947] 2 All E.R. 656, D.C.

[5] [1950] 1 K.B. 39; 65 T.L.R. 602; [1949] 2 All E.R. 428, D.C.

[6] [1952] 2 Q.B. 627; [1952] 2 T.L.R. 1; [1952] 2 All E.R. 250, D.C.

[7] [1948] 1 K.B. 175.

[8] [1949] P. 227; 64 T.L.R. 623; [1948] 2 All E.R. 920, C.A.

[9] [1940] P. 49.

[10] [1943] P. 41.

[11] 62 T.L.R. 755.

[12] [1949] P. 227, 234.

[13] Ibid. 235, 236.

"longer residing with one another or cohabiting with one "another."

Put in very broad terms, the conflict is whether a wife who is rightly found to be deserted by her husband, in spite of the fact that they are living in the same house, must be held to "reside "with" her husband because they are living in the same house.

The judges of the Divorce Division have taken the view that such a finding is impossible. The Queen's Bench Divisional Court has held, in the case of *Evans* v. *Evans*,[14] and the other cases mentioned, that it is not only possible, but that they are bound so to hold.

It is perhaps worth noting at the outset that this conflict was one of the main reasons for the amendment in 1953 of R.S.C., Ord. 59, by the addition to rule 29 of paragraph 2 (*a*), transferring to a Divisional Court of the Divorce Division appeals against any order or determination by justices in regard to the enforcement of, inter alia, an order for the payment of money made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. One object in this change of the rules was to entrust the enforcement of maintenance orders, and the like, to judges who are accustomed to administer the matrimonial law governing the making of such orders.

In *Evans* v. *Evans* [15] it appears from the report of the judgment of Lord Goddard C.J. that the original order in favour of the wife had been made on the grounds of cruelty and desertion, and that the order contained a non-cohabitation clause, though, it was said, that neither of these facts was stated in the case. The report in the All England Reports [16] states that there was a separation order on the ground of desertion. If a non-cohabitation clause was in fact included it had, as will appear, no effect on the situation of the spouses.

As regards desertion, it is elementary that it is an essential ingredient of that offence that there is de facto separation of the spouses at the material time. It is plain from the justices' findings in the case stated in *Evans* v. *Evans* [17] upon the wife's complaint to enforce her order, that the desertion depended on the findings of fact that there was no common household and that, in every sense, the husband and wife were living separate and apart from each other and using separate parts of the house. The finding of desertion was obviously based on the decisions in the *Smith*,[18] *Wilkes* [19] or *Angel* [20] cases, or all three. The cases of *Smith* [21] and *Wilkes* [22] were cited to the Divisional Court in support of the argument for the wife. The justices also stated as a fact that there had been no change in the relations between

[14] [1948] 1 K.B. 175.
[15] Ibid. 178.
[16] [1947] 2 All E.R. 656.
[17] [1948] 1 K.B. 175.
[18] [1940] P. 49.
[19] [1943] P. 41.
[20] 62 T.L.R. 755.
[21] [1940] P. 49.
[22] [1943] P. 41.

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husband and wife since the date of the making of the original order. That is to say, there had been no appeal from that order and the spouses were still living separate and apart from each other and using separate parts of the house. Nevertheless, the wife's complaint for enforcement was resisted, on the ground that she was "residing with her husband" within the meaning of section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925.[23] This view, although rejected by the justices, prevailed with Lord Goddard C.J. and Humphreys J., Croom-Johnson J. dissenting.

Lord Goddard C.J. said [24] that he was willing to assume that if the facts came de novo before a court of the Divorce Division it might, and perhaps would, be held that the husband deserted the wife. In spite of this qualified recognition of the divorce cases, there was apparently no examination of their possible application to the facts stated by the justices, and, in spite of those findings, Lord Goddard C.J. held that the wife was residing with the husband. He said [24] that he knew of no case in which before this Act was passed it had been held that a woman could come to the court and say "I have left my husband and I am living "separately from him, although I am living in the same house."

Humphreys J. said [25] that counsel for the wife had referred to cases in the Divorce Division, but was quite unable to answer the question "What is the meaning of the words 'resides with her "'husband' if they do not mean 'resides in the same house as "'her husband'?" In our opinion the answer to this question was given correctly by Croom-Johnson J.,[26] who recognised that the key word was "with." He thought that the question whether the wife was residing with her husband was one of fact for the justices to determine. In our opinion it is immaterial that the "desertion" is found on the wife's complaint under section 4 of the Summary Jurisdiction (Married Women) Act, 1895,[27] and the "residing with" is found by virtue of section 1 (4) of the Act of 1925 on a complaint for enforcement of the order made on the ground of that desertion, for we think that there is no escape from the point made by Denning L.J. in *Hopes* v. *Hopes* [28] that to say, of two spouses in identical circumstances, that the husband has deserted and is still deserting the wife, and that the wife is "residing with" the husband, is self-contradictory. Moreover, in our opinion, Lord Goddard C.J. was mistaken in saying, as he did, in *Wheatley* v. *Wheatley*,[29] that the part of the judgment of Denning L.J. in *Hopes* v. *Hopes*,[30] in which he criticised the decision in *Evans* v. *Evans*,[31] was "entirely obiter." Whatever may be said about other parts of that judgment of Denning L.J.,

[23] Now repealed and replaced by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960.
[24] [1948] 1 K.B. 175, 178.
[25] Ibid. 181.
[26] Ibid. 183.
[27] See footnote 23.
[28] [1949] P. 227, 236.
[29] [1950] 1 K.B. 39, 41.
[30] [1949] P. 227, 236.
[31] [1948] 1 K.B. 175.

we think that this part was at the crux of the decision of the Court of Appeal in *Hopes* v. *Hopes*,[32] as we hope to show when we examine that case more closely later.

We will begin by examining the three cases, *Smith* v. *Smith*,[33] *Wilkes* v. *Wilkes*[34] and *Angel* v. *Angel*,[35] already referred to.

In *Smith* v. *Smith*[36] the facts were somewhat complicated, and the assistance of the King's Proctor was invoked. The statutory period in respect of which the wife alleged desertion was from February, 1935, to February, 1938, when the petition was presented. The separation had lasted, however, much longer than that. The parties were married in 1922, and in 1925, despite the wife's remonstrances, the husband withdrew from cohabitation. The house belonged to him, and his mother was occupying the basement: the husband went to live with her, but slept with his son on the first floor, leaving the ground floor to the wife, save only that he had to pass through it on the way from the basement to his sleeping quarters. Down to 1933 he paid his wife £1 a week. The mother died in 1932, and in the summer of 1933 the husband suddenly stopped the weekly payments which he had made for 8½ years. The wife made a complaint of wilful neglect to maintain her. This was defended by the husband on the ground that he had withheld payments because, in effect, the wife was rendering him no services in return for the payment, and the justices dismissed her complaint on this ground. This finding unquestionably formed a considerable obstacle to any assertion by the wife that up to this point two separate households had been formed. However, it became clear that, thereafter, an attempt at reconciliation, at the instance of the justices, failed, the wife being ready and willing to make a fresh start, while the husband made it equally clear that he was not willing to take his wife back. From that point the living and sleeping arrangements were the same as they had been before. The husband, of course, no longer lived with his mother, but he continued to live in the basement which had been occupied by her, and the wife continued to occupy the first floor. As regards money, though there was no regular payment of a fixed amount, nor any further suggestion that the wife was to render any services in return, it appeared that the husband just gave the wife 5s. or 10s., as the case might be, and put that money in some place where she could pick it up without any word being said between them. She had no option in the matter; she just took it or left it. That, for all practical purposes, was the only form of communication between the spouses from the time when the attempt at reconciliation failed in 1933 until the presentation of the petition in 1938.

The court came to the conclusion[37] that it was impossible, in the circumstances, to describe the parties as living together, where

[32] [1949] P. 227.
[33] [1940] P. 49.
[34] [1943] P. 41.
[35] 62 T.L.R. 755.
[36] [1940] P. 49.
[37] Ibid. 54.

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the only element of living together was that they were actually residing in one house, though there was no physical separation between the parts of the house in which they were living respectively. This conclusion was reached after a very full examination of the authorities which were put before the court by Mr. S. E. Karminski on behalf of the King's Proctor.

In the present case the period of separation is very much shorter, beginning as it does with the dismissal of the petition and the cross-prayer on March 29, 1960, and ending with the complaint on July 26, 1960—although it is, of course, legitimate to take account of the situation as it existed at the time of the hearing on September 5. The shortness of the period, as such, is immaterial, because here we are not concerned with any statutory period ending with the presentation of the petition, and it is a commonplace to say that desertion is a matrimonial offence irrespective of its duration: see *Beard* v. *Beard*,[38] *per* Scott L.J., and that it has the same meaning in whatever court the issue arises.

In *Wilkes* v. *Wilkes*,[39] the circumstances which induced Hodson J. to follow *Smith* v. *Smith*[40] bore a strong resemblance to the facts in this case, especially inasmuch as the period of alleged desertion by the husband began with his saying: "This "is the end," thereby putting into words that which was conveyed in this case by the discarding of the wedding ring.

Hodson L.J. also referred[41] to the judgment of Hill J. in *Jackson* v. *Jackson*,[42] where he said[43]: "There may be desertion "though the husband continues to live under the same roof with "the wife, but in such case the facts must be very strong. They "must show that the husband really causes the wife to live apart "against her will—not only sleep apart, but to live apart."

Hodson J. also referred[44] to what Hill J. had said[45] about his earlier decision in *Diver* v. *Diver*,[46] a case in which it was necessary to prove desertion for two years. The husband had actually departed physically for one year and ten months from where the wife lived. Hill J. said[47]: "The only question was whether the "separation had begun a few months sooner than the date when "he actually left the house. It appeared that not only was he "insisting upon sleeping in a separate room, but that he never "spoke to the wife, that when the wife spoke to him he "never answered her, and when she asked him why he so treated "her, he knocked her down. It does not seem to me that in that "case it was a very strong inference to draw that he had already "begun his desertion two months before he left the house."

In *Angel* v. *Angel*,[48] it appears from the headnote that early in January, 1946, the wife arrived back in England after a period

[38] [1946] P. 8, 21; 61 T.L.R. 555, 559; [1945] 2 All E.R. 306, 314, C.A.
[39] [1943] P. 41.
[40] [1940] P. 49.
[41] [1943] P. 41, 42.
[42] [1924] P. 19; 40 T.L.R. 45.
[43] [1924] P. 19, 26.
[44] [1943] P. 41, 42.
[45] [1924] P. 19, 28.
[46] Unreported.
[47] [1924] P. 19, 28.
[48] [1946] 2 All E.R. 635.

in South Africa, and lived in the same house as the husband, but sexual relations were never resumed; that in February, 1946, the husband took one room in the house for his own use, locked himself in it away from his wife, and got his meals outside the house. On the appeal from the dismissal by the justices of the complaint of desertion, this case was regarded as one of considerable importance, for it raised for the first time in any appellate court the question whether or not a wife was precluded from asserting a charge of desertion by the mere fact that she and her husband were residing in the same house. As the justices had, for a wrong reason, stopped the case, it was necessary to order a rehearing, but both members of the court were of opinion that *Smith* v. *Smith*[49] and *Wilkes* v. *Wilkes*[50] were rightly decided as instances of what must necessarily be the rare class of case where it is possible for one spouse or the other to assert desertion in spite of the fact that the spouses are physically living in the same house.

The case of *Wheatley* v. *Wheatley*,[51] according to the judgment of Lord Goddard C.J.,[52] raised exactly the same question as arose in *Evans* v. *Evans*.[53] This is so, inasmuch as the case stated arose out of a wife's complaint for enforcement of an order for £2 a week, variously described in the Law Reports[54] as "a "maintenance order," and in the headnote of the All England Reports[55] as "a separation order on the ground of desertion," and that the complaint was resisted on the ground, in reliance on *Evans* v. *Evans*,[56] that the wife was residing with her husband. The justices, according to the Law Reports,[57] found that the spouses were not living as one household, but as two households. Their attention had been called to the criticism which Denning L.J. had directed against the decision of *Evans* v. *Evans*,[58] in the Court of Appeal in *Hopes* v. *Hopes*.[59] On the assumption that the original order was on the ground of desertion, the same inconsistency arose between the finding in proof of that complaint that the spouses were living in two households, and, as a ground for resisting the complaint for enforcement of the order, that the wife was residing with the husband. The facts on which desertion was found may not have been so cogent as those in *Evans* v. *Evans*.[60] However that may be, the justices in the case stated found,[61] following *Hopes* v. *Hopes*,[62] that the spouses were not living as one household but as two households.

Lord Goddard C.J. said[63] that he did not propose in the present case to canvass the question whether or not, if the parties were before a court which had jurisdiction in the matter, the court would, on the facts proved, come to the conclusion that there was

[49] [1940] P. 49.
[50] [1943] P. 41.
[51] [1950] 1 K.B. 39.
[52] Ibid. 41.
[53] [1948] 1 K.B. 175.
[54] [1950] 1 K.B. 39.
[55] [1949] 2 All E.R. 428.
[56] [1948] 1 K.B. 175.
[57] [1950] 1 K.B. 39, 40.
[58] [1948] 1 K.B. 175.
[59] [1949] P. 227, 237, 238.
[60] [1948] 1 K.B. 175.
[61] [1950] 1 K.B. 39.
[62] [1949] P. 227.
[63] [1950] 1 K.B. 39, 41.

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desertion or no desertion. He did, however, repeat the assumption made in *Evans* v. *Evans*[64] that if these facts came de novo before the Divorce Division it might, and perhaps would, be held that the husband had deserted the wife. With all respect, this seems to overlook the fact that he was actually dealing with a finding of desertion by a court which by virtue of section 4 of the Summary Jurisdiction (Married Women) Act, 1895, had jurisdiction to decide a complaint of desertion. Lord Goddard C.J.[65] added that what the court had to do was to construe not the Matrimonial Causes Act, 1937, but the Summary Jurisdiction (Separation and Maintenance) Act, 1925. This is quite true, but we would observe that both Acts deal with matrimonial offences between husband and wife, and, although the relief afforded differs, the law about the principal offences themselves is the same, and in particular that, duration apart, desertion means the same thing in whichever jurisdiction it comes in question. Thus, the absurdity of justices holding in identical circumstances that the spouses were living separate and apart from each other for the purpose of determining the issue of desertion, but were residing with each other in connection with the enforcement of an order based on that desertion, is as great whether the issue of desertion arises in the High Court under the Matrimonial Causes Act, or in a magistrates' court under the Summary Jurisdiction (Separation and Maintenance) Acts. This is forcibly pointed out by Denning L.J. in *Hopes* v. *Hopes*.[66] This led him to say[66]: "There are really only three courses open, either to say that the "line of decisions in the Divorce Division is wrong, or to say that "the decision in *Evans* v. *Evans*[67] is wrong, or to say that a "deserted wife cannot enforce her maintenance order."

We agree, if we may say so respectfully, that Lord Goddard C.J. was right in criticising, as he did in *Wheatley* v. *Wheatley*,[68] certain observations of Denning L.J. in *Hopes* v. *Hopes*,[69] on the inability to distinguish between "residence" and "cohabitation." It may be that this introduced an element of confusion into an issue which was otherwise clear-cut. The comments of Stable J. in *Wheatley* v. *Wheatley*[70] on this aspect of the matter, with which we are in agreement, tend to support this suggestion. Lord Goddard C.J. had, in effect, said the same thing in *Wheatley* v. *Wheatley*,[71] and in *Evans* v. *Evans*.[72] Before leaving *Wheatley* v. *Wheatley*[73] we must deal with the concluding paragraph of the judgment of Lord Goddard C.J., which reads as follows[74]: "At "any rate, *Evans* v. *Evans*[75] has not been overruled, and it is "therefore the duty of the justices to follow that decision unless "and until it is overruled. If that case comes directly before the

[64] [1948] 1 K.B. 175, 178.
[65] [1950] 1 K.B. 39, 42.
[66] [1949] P. 227, 238.
[67] [1948] 1 K.B. 175.
[68] [1950] 1 K.B. 39, 43.
[69] [1949] P. 227, 237.
[70] [1950] 1 K.B. 39, 46.
[71] Ibid. 43.
[72] [1948] 1 K.B. 175, 180.
[73] [1950] 1 K.B. 39.
[74] Ibid. 45.
[75] [1948] 1 K.B. 175.

"Court of Appeal in some way, and the Court of Appeal over-"rules it, this court will loyally follow the decision of the Court "of Appeal, even although it may have come before them in a "divorce case. If the Court of Appeal, as a court, had said that "*Evans* v. *Evans* [75] was wrong, the position would have been "different, but at present that case has not been overruled by the "Court of Appeal. The position is merely that one member of "the Court of Appeal has expressed disapproval of the case, and "that that expression of disapproval was obiter. For myself, I "confess that at the moment I am unrepentant. I think that the "decision in *Evans* v. *Evans* [75] was right. It has not been over-"ruled, and therefore the appeal in this case must be allowed."

With all due deference to Lord Goddard C.J., the question was not that of loyally following some future decision of the Court of Appeal, "*even although it may have come before them in a* "*divorce case*" (the italics are ours), but of appreciating the point that, on the first occasion on which the topic had come before them, albeit in a divorce case, the Court of Appeal as a whole had held that spouses could be living separate and apart from each other, and that one could be deserting the other, although they were living in the same house, and that by approving specifically the case of *Smith* v. *Smith*,[76] as the criterion by which the degree of separation necessary to constitute desertion is to be decided. the Court of Appeal had cut at the root of the decision in *Evans* v. *Evans*,[77] that "residence with" means the same as "living "in the same house as." It was to rebut this very suggestion that *Smith* v. *Smith* [78] and *Wilkes* v. *Wilkes* [79] had been cited in *Evans* v. *Evans*,[80] but ignored. It does not appear to have been mentioned, however, that these two cases had been expressly approved by this court in *Angel* v. *Angel*.[81]

In *Hopes* v. *Hopes* [82] it was held, allowing the appeal from a commissioner who had pronounced a decree nisi in favour of the husband on the ground of the wife's desertion, that there was no de facto separation. The headnote shows that there was one household in the sense that the husband, wife and two daughters shared the same living room, kitchen, stairs, passages, and offices, although the spouses always occupied separate bedrooms and the wife behaved in such a way to her husband as to indicate that she wished him to depart from the house and not return there. There was a very full review of the authorities, including *Smith* v. *Smith*,[83] *Wilkes* v. *Wilkes* [84] and *Angel* v. *Angel*.[85] Just as *Angel* v. *Angel* [85] was the first time that the problem of desertion while spouses are living in the same house had been considered by any appellate court, so this, so far as we know, was the first time it had

[75] [1948] 1 K.B. 175.
[76] [1940] P. 49.
[77] [1948] 1 K.B. 175.
[78] [1940] P. 49.
[79] [1943] P. 41.
[80] [1948] 1 K.B. 175.
[81] 62 T.L.R. 755.
[82] [1949] P. 227.
[83] [1940] P. 49.
[84] [1943] P. 41.
[85] 62 T.L.R. 755.

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been considered by the Court of Appeal. This relieves the President, as he decided *Smith* v. *Smith* [86] and presided in this court when *Angel* v. *Angel* [87] was decided, from the embarrassment of relying solely on his own decisions.

Bucknill L.J. said [88] that the case under consideration raised the question whether there could be desertion while the parties were living under the same roof. He thought the most helpful case was *Smith* v. *Smith*,[89] and at the end of his judgment, after a full examination of the cases, including also *Wilkes* v. *Wilkes* [90] and *Angel* v. *Angel*,[91] he said [92]: "The cases to which I have "referred establish that there may be desertion, although hus- "band and wife are living in the same dwelling, if there is such a "forsaking and abandonment by one spouse of the other that the "court can say that the spouses were living lives separate and "apart from one another. On the other hand, when husband and "wife are living together, as they were in the present case, it "seems that to grant a decree of divorce on the ground of conduct "by the wife, which ex hypothesi did not amount to cruelty, and "which did not amount to a life separate and apart from her "husband, would be to introduce a new ground for divorce."

As a preface to the passage already quoted from his judgment, Denning L.J. said [93]: "The matrimonial offences of cruelty and "adultery can, of course, be committed by the guilty party (and "be not condoned by the innocent party) whilst they are living "under the same roof; but, can the matrimonial offence of deser- "tion be committed? One of the essential elements of desertion "is the fact of separation. Can that exist whilst the parties are "living under the same roof? My answer is: 'Yes.' The hus- "band who shuts himself up in one or two rooms of his house, "and ceases to have anything to do with his wife, is living "separately and apart from her as effectively as if they were "separated by the outer door of a flat. They may meet on the "stairs or in the passageway, but so they might if they each had "separate flats in one building. If that separation is brought "about by his fault, why is that not desertion? He has forsaken "and abandoned his wife as effectively as if he had gone into "lodgings. The converse is equally true. If the wife ceases to "have anything to do with, or for, the husband and he is left to "look after himself in his own rooms, why is not that desertion? "She has forsaken and abandoned him as effectively as if she had "gone to live with her relatives. The judges of the Divorce Divi- "sion have adopted this realistic view with complete unanimity "right from the decision of Hill J. in *Diver* v. *Diver* [94] to the "decision of the Divisional Court of the Probate, Divorce and

[86] [1940] P. 49.
[87] 62 T.L.R. 755.
[88] [1949] P. 227, 231.
[89] [1940] P. 49.
[90] [1943] P. 41.
[91] 62 T.L.R. 755.
[92] [1949] P. 227, 234.
[93] Ibid. 235.
[94] Unreported: mentioned by Hill J. in *Jackson* v. *Jackson* [1924] P. 19.

"Admiralty Division in *Angel* v. *Angel*.[95] I find myself in agreement with all the decisions of the Divorce Division except "perhaps *Wanbon* v. *Wanbon*[96] where the parties were said to be "still in one household. If that means that, although living at "arm's length, they were still sharing the same living-room, eating at the same table and sitting by the same fire, then I cannot "agree with the finding of desertion." And at the end of his judgment Denning L.J. said[97]: "Relieved of *Wanbon* v. *Wanbon*[98] and *Evans* v. *Evans*[99] the law becomes consistent on this "subject; and I agree with all that Bucknill L.J. has said about "it, and as to the application of it to the facts of this case."

Harman J., agreeing that there was no desertion and that the appeal must be allowed, said[100]: "It is, however, well settled "now that there can be desertion, though the same roof has "covered the parties even up to the time when the petition is "heard. . . . Desertion must connote, in my judgment, a real separation of one spouse from the other; there must be something "more than a mere intention or design to end the conjugal society. "That no doubt is the animus, but it is not the factum of "desertion, and both elements are necessary, as the judgment of "Lord Greene M.R. in *Buchler* v. *Buchler*[101] clearly shows." And he said[102]: "The degree of separation necessary to constitute "desertion has been discussed in a number of cases. Of these "I would wish to rely on *Smith* v. *Smith*,[103] a case decided by "Sir Boyd Merriman P. after a careful argument addressed to "him at his request on the part of the King's Proctor. This case "decided that there could be separation where the spouses lived "in different parts of the same house, but it is to be noted that "there was nothing else in common between them." After expressing a doubt about *Wanbon* v. *Wanbon*[104] he said[105]: "This "was an undefended cause and is not fully reported. It may well "be that the facts brought it within the limits of *Smith* v. "*Smith*[106] and, if so, the decision was justified. If not, I "should not be disposed to follow it. I am of opinion that the "true criterion is that of *Smith* v. *Smith*,[106] not, of course, that "the facts must be the same, but the degree of separation, and, "judged by that, the petitioner here must fail."

It was of the essence of the appeal in *Hopes* v. *Hopes*[107] to determine whether or not the degree of separation proved was sufficient to constitute desertion; it was vital, therefore, to examine *Smith* v. *Smith*,[108] *Wilkes* v. *Wilkes*,[109] and *Angel* v. *Angel*,[110] in which both decisions had been approved by this court. But

[95] 62 T.L.R. 755.
[96] [1946] 2 All E.R. 366.
[97] [1949] P. 227, 238.
[98] [1946] 2 All E.R. 366.
[99] [1948] 1 K.B. 175.
[100] [1949] P. 227, 238.
[101] [1947] P. 25, 28; 63 T.L.R. 100, 101; [1947] 1 All E.R. 319, 320, C.A.
[102] [1949] P. 227, 239.
[103] [1940] P. 49.
[104] [1946] 2 All E.R. 366.
[105] [1949] P. 227, 239.
[106] [1940] P. 49.
[107] [1949] P. 227.
[108] [1940] P. 49.
[109] [1943] P. 41.
[110] 62 T.L.R. 755.

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when it is said [111] that *Evans* v. *Evans* [112] was mentioned by Denning L.J. only, and that his observations were "entirely "obiter," it seems to us that once the Court of Appeal had become aware, whether by citation by counsel (of which no trace appears in the report) or by its own researches, that it had been held by a Divisional Court of the King's Bench Division that in spite of the findings of the justices a wife was "residing with" her husband because they were living in the same house the court would have been obliged to consider the case before approving *Smith* v. *Smith* [113] and other like decisions. The mere fact that Denning L.J. alone mentioned *Evans* v. *Evans* [114] seems to us to be immaterial. If the other members of the court thought that it had been introduced irrelevantly or erroneously they could have said so. On the contrary, we think that, so far from the comments on *Evans* v. *Evans* [114] being entirely obiter, it would have been wrong if the case had not been dealt with in the Court of Appeal at all.

Nevertheless, *Evans* v. *Evans* [114] managed to survive and even flourish as an authority notwithstanding these criticisms, and was followed in *Cutrin* v. *Curtin* [115] and *Hewitt* v. *Hewitt*.[116] At the beginning of his judgment in *Hewitt* v. *Hewitt* Devlin J. said [117]: "The presumed object of section 1 (4) of the Summary "Jurisdiction (Separation and Maintenance) Act, 1925, has been "several times stated by this court and cannot be in doubt. Par-"liament intended to relieve a wife of the necessity of having to "leave home without knowing what support she could count on. "It followed that she must be given a reasonable time (which "Parliament considered to be three months) after she obtained her "order within which to arrange for another dwelling." In this passage, and, for example, in *Wheatley* v. *Wheatley*, *per* Lord Goddard C.J.,[118] it seems to have been overlooked that the condition in section 4 of the Act of 1895 about the husband having caused the wife to leave and live separately and apart applied only to his cruelty or neglect to maintain, but not to any of the other causes of complaint in the section, including desertion. The repeal of that condition by section 1 of the Act of 1925, therefore, made no difference as regards desertion. There was no impediment at any time after the Act of 1895 to a deserted wife obtaining an order on that ground. Moreover, when it is suggested, as it was in *Evans* v. *Evans*,[119] that there was no precedent for saying that before the Act of 1925 spouses could be living separate and apart though under the same roof, we would refer to what Hill J. said in *Jackson* v. *Jackson*,[120] already quoted, and his earlier decision in *Diver* v. *Diver*.[121] It seems to us that if what is connoted by

[111] [1950] 1 K.B. 39, 41.
[112] [1948] 1 K.B. 175.
[113] [1940] P. 49.
[114] [1948] 1 K.B. 175.
[115] [1952] 2 Q.B. 552; [1952] 1 T.L.R. 1394; [1952] 1 All E.R. 1348, D.C.
[116] [1952] 2 Q.B. 627.
[117] Ibid. 633.
[118] [1950] 1 K.B. 39, 42.
[119] [1948] 1 K.B. 175, 178.
[120] [1924] P. 19, 26.
[121] Unreported.

the term "desertion" may develop, as it appears to be conceded in *Evans* v. *Evans*,[122] so as to include social circumstances unknown to an earlier generation of lawyers, so likewise must the connotation of the corresponding term "residing with." In *Evans* v. *Evans* [122] the court was concerned with a couple of whom it was found as a fact that they were living separately and apart. The facts summarised in the headnote were not controverted, and it was even assumed—rightly, as we have attempted to show—that the facts so found would satisfy the degree of separation required by law for divorce on the ground of desertion. Yet the Divisional Court of the King's Bench Division found that, in law, they must hold that Mrs. Evans was residing with Mr. Evans on the ground that "residing with" means "living in the same house."

We think it emerges quite clearly from a review of all the foregoing cases that the Court of Appeal has accepted the view of the divorce judges to the effect that it is self-contradictory, even though the contradiction arises when construing different statutory provisions, to declare that two spouses, one of whom remains in a state of desertion, are residing with each other. We recently expressed the same opinion, incidentally, in *Hay* v. *Hay*,[123] but that appeal was decided on another ground. In the present case we think the justices were right in their finding of desertion because we take the view that these two spouses were at least from the end of March, 1960, leading entirely separate lives, residing separately from each other, albeit under the same roof. We, therefore, hold that there is no ground for differing from their finding that the wife was guilty of desertion.

Secondly, we must consider the consequences of the wife's desertion. It is necessary to go fully into the position of a deserting wife in regard to maintenance because Mr. Campbell has pressed the argument that whereas by section 6 of the Summary Jurisdiction (Married Women) Act, 1895, adultery, unless condoned, connived at, or conduced to, is a bar to the making of any order under that Act in favour of a wife, there is no such provision in the Act in the case of her desertion. Therefore, it is suggested that Parliament cannot have meant that the judicial expositions of the common law on this subject should take effect in respect of orders under this Act. The position at common law of a wife who has deserted her husband, but with no suggestion of adultery, is explained in the judgment of Lord Reading C.J. in *Jones* v. *Guardians of Newtown and Llanidloes* [124]: "There is no doubt that at common law if a wife chooses "wilfully and without justification to live away from her hus-"band she cannot, so long as she continues absent, render him "liable for necessaries supplied to her, or for her maintenance "by the union, for the reason that she has of her own free will "deprived herself of the opportunity which the husband was

[122] [1948] 1 K.B. 175.
[123] Unreported.
[124] [1920] 3 K.B. 381, 384; 36 T.L.R. 758, D.C.

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"affording her of being maintained in the home. But the relief "of the husband from the obligation of maintenance continues "only so long as she voluntarily remains absent. Her absence, "although wrongful, does not affect the relationship of husband "and wife. She is entitled after however long a period of absence "to return at any time." This passage was quoted and relied upon by Hodson L.J. in *Price* v. *Price*.[125] He said: "A wife has "no right to separate maintenance in a different home unless she "can justify the fact that she is living apart from her husband," adding ". . . the right to separate maintenance is not destroyed but "suspended, and as soon as she expresses her willingness to go "back, if that offer is rejected, that suspension comes to an end." In the following paragraph Hodson L.J. said[126]: ". . . if a wife "becomes a deserter she would not be entitled to maintenance "just because she is a wife, that is to say, to separate mainten-"ance." And he added: "The question of her right to "maintenance may depend on whether she is a deserter or whether "she is deserted or whether there is a contract between them. "I do not think that the law recognises a sort of undefined con-"dition where parties are living apart in conditions which may "be described as of drift, or in some not very clearly defined con-"dition in so far as rights to maintenance are concerned. It is "necessary that those conditions should be clearly defined, and I "think that they were clearly defined by Lord Reading C.J. in "*Jones* v. *Newtown and Llanidloes Guardians*."[127] Somervell L.J. agreed[128] with what Hodson L.J. had said.

It is important to note that, unlike the case of a wife's adultery, the disability may be only temporary, since the wife may, if the circumstances permit, be able to put herself right by being ready and willing to resume cohabitation. But so long as the separation has the quality of desertion on her part the bar to recovery is, in our opinion, as complete as in the case of adultery. This state of the law is recognised in *National Assistance Board* v. *Parkes*.[129] In that case the Court of Appeal affirmed the decision of the Divisional Court of the Queen's Bench Division.[130] In both courts the decision was unanimous that section 42 (1) (*a*) of the National Assistance Act, 1948, gave the National Assistance Board an independent right to recover from a husband money paid by way of assistance to the wife; and that a separation agreement, whether for a fixed, or insufficient, or no maintenance, did not relieve a husband of this obligation; but, on the other hand, that if the wife has committed adultery, or remains in a state of desertion, the husband is not bound to support her, and therefore the National Assistance Board, if they support her, cannot recover from the husband: *per* Lord Goddard C.J.[131] In the Court of

[125] [1951] P. 413, 421; [1951] 2 All E.R. 580n., C.A.

[126] Ibid.

[127] [1920] 3 K.B. 381, 384.

[128] [1951] P. 413, 422.

[129] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1, C.A.

[130] [1955] 1 Q.B. 486; [1955] 1 All E.R. 700.

[131] [1955] 1 Q.B. 486, 496, 497.

Appeal [132] this result is said to depend on section 43 (2), which provides that the court "shall have regard to all the circumstances." With reference to these words, Denning L.J. said [133]: "I think that under that provision the court must have "regard, among other things, to any circumstances recognised by "the law as sufficient to relieve a husband of his obligation to "maintain his wife. From the very earliest times, both in the "ecclesiastical courts and in the common law courts, a husband "has been under no liability to maintain his wife if she has been "guilty of adultery or desertion; and when various statutes have "been passed, putting an obligation on the husband, the courts "have held that his statutory duty is subject to the same exception." Continuing the quotation: "Likewise it has been held "by the Divisional Court in *National Assistance Board* v. *Wilkinson* [134] that a husband has an answer in law to any summons by "the National Assistance Board if his wife has been guilty of "adultery or desertion. That decision, I think, was perfectly "right, on this ground, that her guilt is one of the circumstances "of the case to which the magistrates must have regard. It is so "strong a circumstance that it affords an answer in law to the "claim." This being the common law, we find ourselves unable to accede to the suggestion that greater weight must be attributed to the statutory bar under section 6 of the Act of 1895 in the case of adultery than to the bar imposed by the common law, so long as the wife continues in a state of desertion. We have no doubt, therefore, that it is not open to the wife who is in a state of desertion to obtain an order on a complaint of wilful neglect to provide maintenance for herself.

There remains, however, the question of wilful neglect to provide reasonable maintenance for the children whom the husband is legally liable to maintain. About the legal liability to maintain there can no longer be any doubt, having regard to section 43 (1) (*a*) of the National Assistance Act, 1948. In dealing with the adverse effect of her desertion on the wife's rights under the Act of 1895 and the amending Acts, excluding the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, which was not in force at the material time, it is important to bear in mind what this court laid down in *Kinnane* v. *Kinnane*,[135] from which we quote below. In *Starkie* v. *Starkie*,[136] where it was held that the wife had failed to prove her complaint of neglect to maintain herself, but had proved her complaint of neglect to maintain the child in respect of whom the maximum sum of 30s. had been awarded, it was held proper to award a nominal sum only in respect of maintenance for herself. The latter case left open the question, which now falls to be determined, whether a deserting wife could succeed on a complaint of

[132] [1955] 2 Q.B. 506.
[133] Ibid. 515.
[134] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255, D.C.
[135] [1954] P. 41; [1953] 3 W.L.R. 782; [1953] 2 All E.R. 1144, D.C.
[136] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519, D.C.

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wilful neglect to maintain the child alone.[137] In our opinion, the same considerations about the scheme of the Married Women (Separation and Maintenance) Acts apply equally to both orders. The principle upon which both these cases was decided was described as the underlying basis of the Acts. In a sentence, see *Kinnane* v. *Kinnane*,[138] this was " . . . that it is the wife who is " the applicant; it is in favour of the wife and of nobody but the " wife that whichever of the permitted orders the court decides to " make is made. We talk loosely of an order for the children. " It is not an order for the children. . . . Any sum awarded for " the maintenance of the wife, and any sum ordered to be paid " to the wife for the support of the children is, as it always has " been, an order for the wife; and, speaking generally, any of " these orders . . . can be made and can only be made, if it is " established that one of the complaints made by her under the " code is found to be proved."

It is plain that under section 6 of the Act of 1895 an adulterous wife, unless the proviso applies, cannot even have an order committing the legal custody of any children of the marriage to her, still less an order providing that the husband shall pay her a weekly sum for the maintenance of each such child. Nor, in our opinion, could such a wife succeed on a complaint for wilful neglect to provide reasonable maintenance for a child. At the same time, it is common practice in such cases to resort to the Guardianship of Infants Acts, 1886–1951, under which Acts her misconduct does not disentitle the wife to an order if the court is satisfied that the welfare of the infant is best provided for by entrusting the wife with the guardianship. It is well recognised that if the wife's complaint under the Act of 1895 fails for any reason it is customary, by consent, to allow the complaint under the Guardianship of Infants Acts to be issued forthwith and served in court, so that the question of custody can be dealt with without further delay or expense. We find it difficult to appreciate the argument that in contrast with section 6 of the Act of 1895 ln relation to adultery, desertion as a bar depends on judge-made law; still less the concomitant plea about the injustice of " leaving the poor children " unsupported." The law is of the same force and effect whether it depends on statute or on the common law, and as we have already pointed out, if a wife cannot get an order of any sort under the Act of 1895 because she has committed adultery, the inevitable result is that no order can be made for maintenance in respect of the children, and the remedy is to proceed under the Guardianship of Infants Acts. There is no more hardship in her being obliged to do that because she is a deserter than because she is an adulteress. The power to award maintenance is identical in either case, while, as regards her own conduct, she is in a rather more favourable position, inasmuch as she may be able, by her own act, to terminate the desertion. In our opinion a deserting wife

[137] [1953] 2 All E.R. 1519, 1521. [138] [1954] P. 41, 43.

cannot obtain an order on a complaint of neglect to maintain the children.

In so far as the wife claims an order in respect of the children, there is, however, a narrower ground on which she fails. The husband, as we have mentioned, pleaded guilty to wilful neglect in that respect. Nevertheless, from August 19, 1960, he had instructed his solicitors to pay regularly to the wife's solicitors 30s. in respect of each child, which was accepted as adequate. This payment was continuing at the time of the hearing before the justices and, we were informed, was still continuing at the time of the appeal. In these circumstances it was urged that the wife, having proved wilful neglect to maintain the children between the above dates, was entitled, subject to the possible defence of desertion, to an order for their maintenance. We will assume, contrary to our view, that desertion is no defence. Nevertheless, section 5 of the Act of 1895 provides that the justices "may" make an order; this, for all practical purposes, would operate prospectively. The section confers a discretion; we appreciate that the discretion must be exercised judicially (*Dawson* v. *Dawson* [139]), but we think that the circumstances of this case, including the fact that the neglect was of short duration and had ended before the hearing, and that there was no reason either to criticise the amount being paid or to doubt the husband's intention to maintain the payments, justified the exercise of the discretion in the husband's favour. That is to say, there were reasonable grounds for refusing the order. For these reasons, we think the justices were right in finding the wife to have deserted her husband, and in holding that desertion was a bar to her complaint in respect of both herself and the children. We therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *George C. Carter & Co.; Marcan & Dean.*

E. J.

[139] (1929) 93 J.P. 187; 45 T.L.R. 397, D.C.

[CHANCERY DIVISION.]

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March 16.
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[1960 D. No. 1846.]

Revenue—Estate duty—Aggregation—Settlement—Advance to remaindermen—Death of tenant for life leaving free estate of less than £10,000—Whether sums advanced to be aggregated with settled property—Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 41 (1)—*Finance Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 44), *s.* 33 (1).

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By his will, a testator, who died in 1940, provided that two-thirds of his residuary estate should be held on trust for his son for life and after his death on trust for his issue. Between June and December, 1956, the trustees of the will advanced sums totalling £2,626 0s. 2d. to or for the benefit of the children of the tenant for life. The tenant for life died in December, 1956. At his death, the value of the property settled by the will exclusive of the sums advanced was £101,924 6s. 6d. and his free estate for the purposes of estate duty amounted to £6,292 18s. 4d. By virtue of section 43 of the Finance Act, 1940,[1] the sums advanced were deemed to be included in the property passing on the death of the tenant for life.

On a summons to determine whether the sums advanced were, at the death of the tenant for life, settled property for the purposes of section 16 of the Finance Act, 1894, as amended by section 33 (1) of the Finance Act, 1954,[2] so as to be aggregable with the settled property passing on his death or formed part of the other property of the tenant for life so passing:—

Held, (1) that section 43 of the Finance Act, 1940, did not require that the property in question should be treated as if the disposition had not been made, but that the effect of the section was that the property should be treated as having been taken out of the settlement but nevertheless as being included in the property passing on the relevant death.

(2) That, under section 33 of the Finance Act, 1954, if at the date when it was necessary to ascertain whether estate duty was payable or not the property was comprised in a settlement, it should be dealt with as settled property but, if it was not, the character of settled property should not be attributed to it merely because it had been at some time subject to a settlement; and that, therefore, the sums advanced were not settled property and were not to be aggregated with the property settled by the testator's will but formed part of the other property of the tenant for life for the purposes of section 16 of the Finance Act, 1894, as amended.

Iveagh v. *Inland Revenue Commissioners* [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609 and *In re Demarest's Settlement Trusts* [1940] Ch. 661; 56 T.L.R. 602 considered.

[1] Finance Act, 1940, s. 43 (1): "Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession,—(*a*) if apart from the disposition or determination the property in which the interest subsisted would have passed on the death under section one of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death; . . ."

[2] Finance Act, 1954, s. 33 (1): "For subsection (3) of section 16 of the Finance Act, 1894, there shall be substituted the following subsection:—'(3) Where the property 'passing on the deceased's death 'includes any such settled property 'as is hereinafter mentioned, then— '(*a*) if the other property passing 'on the death, exclusive of that 'settled property and exclusive also 'of any property in respect of 'which estate duty neither is payable on the death nor would be if 'the duty were payable on estates 'of however small a principal value, 'is of a net value not exceeding ten 'thousand pounds, it shall not be 'aggregated with that settled property, but shall be an estate by 'itself . . .'"

ADJOURNED SUMMONS

By his will dated November 9, 1938, Henry Dennis Readett-Bayley, K.B.E., directed, inter alia, that the trustees of the will should hold two-thirds of his residuary estate as therein defined on trust for his son, Thomas Dennis Readett-Bayley, for life and after his death on trust for his issue as therein declared. The testator died on February 28, 1940, and the will was proved by the executors and trustees named therein on October 22, 1940.

Between June and December, 1956, the then trustees of the will, in exercise of the statutory power of advancement conferred upon them by section 32 of the Trustee Act, 1925, advanced sums totalling £2,500 to Robin Readett-Bayley, the son of the tenant for life, and a sum of £126 0s. 2d. to Jane Readett-Bayley, the daughter of the tenant for life.

The tenant for life died on December 7, 1956. At that date, the value of the two-thirds share in the testator's residuary estate in which the tenant for life was interested was £101,924 6s. 6d. and the free estate of the tenant for life for the purposes of estate duty amounted to £6,292 18s. 4d. The sums advanced by the trustees in 1956 to the children of the tenant for life were, by virtue of section 43 of the Finance Act, 1940, deemed to be included as to the whole thereof in the property passing on the death of the tenant for life. If those sums were to be aggregated with the settled property the amount of estate duty to be paid would be about £2,000 more than if they were not to be so aggregated but formed part of the other property passing on the death of the tenant for life for the purpose of section 16 of the Finance Act, 1894, as amended.

The present trustees of the will, Wilfred Lewis Dunn and Henry Norman Hanson, issued a summons asking the court to determine whether the sums advanced in 1956 by the then trustees of the will should be aggregated with the free estate of the tenant for life or with the settled property for the purpose of determining the estate duty for which the trustees were accountable on the death of the tenant for life.

H. H. Monroe Q.C. and *R. Buchanan-Dunlop* for the trustees.
E. Blanshard Stamp for the Crown.

The cases cited in argument are referred to in the judgment.

WILBERFORCE J. stated the facts and continued: The relevant sections which I have to consider are basically two. There is first of all section 43 of the Finance Act, 1940, which imposes estate duty on property which has been the subject of dispositions such as those in this case, and the other relevant section is section 33 of the Finance Act, 1954, which, replacing section 16 of the Finance Act, 1894, provides for an exemption from aggregation with settled property of property other than settled property below a certain

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amount. The question I have to decide is fundamentally one of construction of those two sections.

Section 43 (1) of the Finance Act, 1940, reads: "Subject to "the provisions of this section, where an interest limited to cease "on a death has been disposed of or has determined, whether by "surrender, assurance, divesting, forfeiture or in any other manner "(except by the expiration of a fixed period at the expiration of "which the interest was limited to cease), whether wholly or "partly, and whether for value or not, after becoming an interest "in possession,—(*a*) if apart from the disposition or determination "the property in which the interest subsisted would have passed "on the death under section one of the Finance Act, 1894, that "property shall be deemed by virtue of this section to be included "as to the whole thereof in the property passing on the death." Section 33 (1) of the Act of 1954 reads: "For subsection (3) of "section 16 of the Finance Act, 1894, there shall be substituted "the following subsection:—'(3) Where the property passing on "'the deceased's death includes any such settled property as is "'hereinafter mentioned, then—(*a*) if the other property passing "'on the death, exclusive of that settled property and exclusive "'also of any property in respect of which estate duty neither is "'payable on the death nor would be if the duty were payable on "'estates of however small a principal value, is of a net value not "'exceeding ten thousand pounds, it shall not be aggregated with "'that settled property, but shall be an estate by itself.'"

The sums with which I am directly concerned are the two sums totalling £2,626 0s. 2d., which in fact at the death of the tenant for life (that is the relevant date) were in the hands of the children of the tenant for life or of persons to whom they had been paid by or on behalf of those children; and it seems to me, thinking first of the natural meaning of words, that it would not be appropriate to describe those sums as settled property. On the contrary, they were property which had been taken out of settlement, and they were in the absolute disposition of the person or persons in whose hands they were. It seems to me that, if the Crown is to succeed in establishing that they are to be treated as settled property, it must do so either on the construction of section 43 or of section 33.

I take first section 43 of the Finance Act, 1940, and I see that subsection 1 (*a*) is divided into two parts. The first part lays down the conditions under which a charge can be made under that section, which, briefly, is that the property would have passed on the death, under section 1, if there had been no disposition of the kind mentioned by the section. That introduces a hypothesis which has to be superimposed on the existing state of affairs; and it requires me to assume for this purpose that the advance had not been made. Making that assumption, I of course come to the conclusion that the property would have passed on the death under section 1; and it seems to me that I am enabled thereby to identify the property which would have passed as the property which was the subject of the disposition, namely the two sums of money.

That is the first step. Then, having established the condition of liability, I have to find out what is the nature of the liability which is imposed, and the section says that the property shall be deemed by virtue of the section "to be included as to the whole thereof "in the property passing on the death." It seems to me that, although this is a deeming section, the effect of it is reasonably clear. It is simply to bring the property in question within the various categories of property which are included in the property which is to be charged under section 1 of the Finance Act, 1894, in much the same way as section 2 of that Act brings in other categories of property; and it does not require me to find that the property was to be treated precisely as if the disposition had not been made. I am not required under that section to go further than to say that the property passes on the death; I am not obliged to assume that the property remains settled property. On the contrary, I have to deal with it on the basis that it is not settled property but is property taken out of settlement, but, nevertheless, that is to be included in the property charged. Therefore, it does not seem to me that section 43 (1) (*a*) produces the result of requiring me to treat these sums in question as notionally settled property for the purposes of estate duty.

I pass, then, to section 33 of the Finance Act, 1954, in order to ascertain whether under that section I should treat these sums of money as settled property. I find that subsection (3) refers to "any such settled property as is hereinafter mentioned," and looking to see what is hereinafter mentioned I find the words "The "settled property above referred to is any settled property," with certain exceptions, so that I do not derive much elucidation from the section itself.

Then, it being provided by section 35 of the Act that the Act is to be construed together with the Finance Act, 1894, I look back at the principal Act in order to see whether I can derive any assistance as to what is meant by settled property and in section 22 (1) (*h*) I find that the words "settled property" are defined as meaning "property comprised in a settlement." That fits in with the wording of section 33, because immediately after the so-called definition to which I have referred, one of the exceptions is of property comprised in a settlement made by the deceased.

It seems to me that, reading that section in its natural meaning, in particular paying attention to the words "property com-"prised in the settlement," I am called on to inquire what is the status of the property in question at the date when it is necessary to ascertain whether estate duty is payable or not, that is at the relevant death. If it is at that date comprised in a settlement or is settled property, it seems appropriate to deal with it as settled property, but, if it is not settled property, then I do not think that I am justified by this language in attributing to it the character of settled property simply because it has been at some time subject to a settlement.

Reliance was placed by the Crown, in supporting a rather

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extended interpretation of the expression "settled property," upon the previous section which was replaced by section 33, that is section 16 (3) of the Finance Act, 1894. That subsection, which provided a similar type of relieving provision, uses the expression "exclusive of property settled otherwise than by the will of the "deceased." I compare that with the language in section 33. I see that the exception has been to some extent altered by the later section, but I do not find any reason for attributing to the words in the earlier section "settled otherwise than by the will of "the deceased" the meaning which the Crown wishes me to place on the later section. Exactly the same problem would be raised under the earlier section of deciding what is the relevant date on which I have to ascertain the character of the property. Therefore I get no guidance as to the problem which I have to solve from the superseded provision.

Certain authorities have been referred to, which I must mention. The first, which is of importance and possibly of relevance, is the decision of Upjohn J. in *Iveagh* v. *Inland Revenue Commissioners*.[1] That case was concerned, so far as respects the second point, with a question of identification of the property which was claimed to be subject to estate duty; and, therefore, the problem with which the court was faced was a somewhat different problem from that which I have to consider, but Upjohn J. did examine and analyse section 43 of the Finance Act, 1940, and there are some expressions there which have been invoked by either side in this case. He said,[2] dealing with section 43, that the section was a "deeming" section, and continued: "It poses a hypothetical "state of affairs because 'the property' mentioned in the section "is property in which the interest subsisting would have passed "on the death. Therefore the section appears to contemplate the "continuance of a hypothetical state of affairs, that is, a continu-"ance of the trusts of the settlement until the death." And again, after quoting from *Sneddon* v. *Lord Advocate*,[3] in the House of Lords, he says[4]: ". . . in considering section 43, one must "deal with it on the hypothesis that the property in that section "which would have passed is the property which was the actual "property that was transferred to the remainderman, and one "must assume that it would have remained in the settlement "down to the date of death."

Those passages were invoked by the Crown as supporting an argument that the settlement must be treated as notionally continuing until the death and, therefore, as to some extent affording support for the argument that property of this kind taken out of settlement is to be treated as notionally settled property. I do not think that Upjohn J. was dealing with or had in mind the particular problem which I have to consider. He was concerned

[1] [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609.
[2] [1954] Ch. 364, 380.
[3] [1954] A.C. 257; [1954] 2 W.L.R. 211; [1954] 1 All E.R. 255, H.L.
[4] [1954] Ch. 364, 382.

with identifying the property which is to be the subject of the charge and that, as I have already pointed out, depends on the first part of the section in question, section 43 (1) (*a*), whereas the problem I have to deal with depends on the second part which says that the property is deemed to be included in the property passing on the death. It does not seem to me that the passages cited are concerned with the latter problem.

The taxpayer relies on *Iveagh* v. *Inland Revenue Commissioners* [5] for a passage where Upjohn J. said [6]: "Again, speaking "for myself, I see nothing inconsistent with that interpretation of "the word 'property' where the trust continues with the inter-"pretation which I have already given to that word where upon "the release the trust does not continue, for the simple reason "that the conception of the trust property must necessarily come "to an end when the property ceases to be trust property, and "becomes the absolute property of the remainderman." So it is said here that, when the advances were made, the sums of money in question ceased to be settled property and became the absolute property of the remaindermen, and that was their status at the relevant death, namely the death of the tenant for life. While I would agree that that does seem to support to some extent the argument for the taxpayer, I feel that the problem which Upjohn J. had to consider in the *Iveagh* case [7] was different from that which I have to consider, and I would prefer to base my opinion on the wording of the section as related to the facts arising in this particular case.

The other authority cited was *In re Demarest's Settlement Trusts*,[8] a case concerned with estate duty on exempt securities. It is common ground that the actual decision in that case, depending, as it did, on the construction of section 47 of the Finance (No. 2) Act, 1915, is not of assistance here, but it was cited on behalf of the taxpayer for the argument in the case, which was concerned with the effect of the provisions of the estate duty legislation dealing with gifts and in which two rival views were canvassed in relation to gifts inter vivos; either that the subject-matter of gifts inter vivos is to be treated as if they had not been made and remained in the hands of the donor, or, on the other hand, that the subject-matter of the gift is taxed on the precise footing that it is not property of the donor and requires to be taxed under a special provision. I appreciate the analogy of the argument, but I do not think that there is any basis in judicial decision for saying one is more correct than the other, and I do not think that the decision assists me in the solution of the interpretation of section 33.

Certain anomalies have been urged as likely to arise from the construction which the taxpayer puts on this provision. In particular, it has been suggested that it is anomalous that the question

[5] [1954] Ch. 364.
[6] [1954] Ch. 364, 382.
[7] [1954] Ch. 364.
[8] [1940] Ch. 661; 56 T.L.R. 602.

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of aggregation, and consequently of the rate of duty, should depend on action which may be taken by trustees of a settlement over whom the tenant for life has no control. It is, moreover, pointed out that the question into which compartment particular property may fall, whether settled property or non-settled property, may in certain cases depend upon what the recipients of the property in question may decide to do with it. I appreciate these anomalies and feel great difficulty about them; but it seems to me that it is likely, or at any rate possible, that the section in question had not in mind the particular case where property is taken out of settlement by means of advancement and that it is justifiable to assume that not all the consequences which might flow from such an action have been taken into account. At any rate, I do not feel that the existence of these anomalies provides me with sufficient basis for doing what in effect the Crown asks me to do, which is to treat these two sums of money, which de facto were not settled property at the death, as being for the purposes of this legislation settled property. If they were to be treated as settled property, it seems to me that I ought to find some section somewhere in the legislation which says that they are to be treated as settled property, and I do not find that either in the Finance Act, 1940, or in the Finance Act, 1954. Therefore, I must give effect to the section as it stands, leaving the anomalies, if any, which may arise to be faced as and when they arise and to be cured, if necessary, by the legislature.

Declaration that the sums advanced formed part of the other property of the deceased tenant for life for the purposes of section 16 (3) *of the Finance Act,* 1894, *as amended.*

Plaintiffs' costs to be paid by the Crown.

Solicitors: *Johnson, Weatherall & Sturt for Acton, Simpson & Hanson of Nottingham; Solicitor of Inland Revenue.*

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[COURT OF APPEAL.]

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Lord Evershed M.R., Upjohn and Pearson L.JJ.

In re PILKINGTON'S WILL TRUSTS. PILKINGTON and Others *v.* PILKINGTON and Another.

[1959 P. No. 987.]

Trusts—Power of advancement—Exercise of power—Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement—

Avoidance of death duties—Whether advancement for benefit of object of power—Whether rule against perpetuities infringed—Whether valid exercise of power of advancement—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Perpetuity Rule—Power of advancement—Power used for resettlement—Application of perpetuity rule.

Power of Appointment—Power of advancement—Perpetuity rule.

By his will dated December 14, 1934, a testator directed his trustees to hold the income of his residuary estate upon protective trusts in equal shares for all his nephews and nieces living at his death with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after the death of a nephew or niece to hold the capital and income of such beneficiary's share for his or her children or remoter issue as he or she should appoint and in default of appointment for his or her children at 21. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925.[1] The testator died on February 8, 1935. One of his nephews was married and had three infant children. The second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely. If she should die under that age the trust fund was to be held upon trust for her children who should attain the age of 21 years and, subject as aforesaid, upon trust for the nephew's other children.

Danckwerts J. held that the power of advancement might be legitimately exercised by transferring a capital sum to the trustees of the proposed settlement.

Held, (1) that the power conferred by section 32 of the Trustee Act, 1925, to apply capital moneys for the "advancement or "benefit" of a person entitled to the capital of trust property could only be exercised by reference to the actual circumstances of the object of the power requiring to be benefited at the time of the exercise of the power; and that it did not authorise a resettlement in the guise of an advancement by the creation of new trusts merely because the trustees thought that such new trusts would be more beneficial to the object of the power than those which the settlor had declared and that there were no circumstances in reference to the nephew's young daughter which justified at the present time the invocation of the powers conferred by section 32.

Lowther v. *Bentinck* (1874) L.R. 19 Eq. 166; *In re Joicey* [1915] 2 Ch. 115, C.A.; *In re Halsted's Will Trusts* [1937] 2 All E.R. 70; *In re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902;

[1] Trustee Act, 1925, s. 32. "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advance-"ment or benefit, in such manner as "they may, in their absolute discre-"tion, think fit, of any person "entitled to the capital of the trust "property . . . Provided that—(*a*) "the money so paid or applied for the "advancement or benefit of any "person shall not exceed altogether "in amount one-half of the pre-"sumptive or vested share or interest "of that person in the trust "property . . ."

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[1956] 3 All E.R. 332; *In re Will's Will Trusts* [1959] Ch. 1; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472 and *In re Collard's Will Trusts* [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 considered.

Per Upjohn L.J.: The power of advancement conferred by section 32 of the Trustee Act, 1925, is a special power and must be exercised within the period permitted by the rule against remoteness and its exercise must, for the purpose of the rule, be written into the instrument creating the power so that, if section 32 empowers trustees to make a settlement, they are exercising a special power subject to the rule against perpetuities; accordingly, that the trusts of the resettlement proposed by the trustees must be read into the testator's will and so read they infringe the rule and even if section 163 of the Law of Property Act, 1925, would save the settlement by directing the trustees to hold the fund upon trust for the daughter at 21 years instead of at 30 years, it has not been shown that the trustees thought that a resettlement so cut down was for "the advancement or benefit" of the daughter. The proposed transfer to the trustees of the new settlement was on this ground also beyond the powers of the trustees (post, p. 792).

Decision of Danckwerts J. [1959] Ch. 699; [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623 reversed.

APPEAL from Danckwerts J.[2]

By his will dated December 14, 1934, a testator, William Norman Pilkington, directed his trustees to invest his residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, therein defined as "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington, living at his death who should attain the age of 21 years or being female marry under that age. The share of each beneficiary was, so far as is here material, settled upon express protective trusts for the benefit of the beneficiary during his or her life, with a provision that his or her consent to any exercise of any applicable power of advancement should not cause a forfeiture of the interest. After the death of a beneficiary the capital and future income of the share of such beneficiary was to be held in trust for the children or remoter issue of such beneficiary as he should appoint with a trust in default of appointment for the beneficiary's children on attaining the age of 21 years or marriage. If the trusts of the share of a beneficiary should fail then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925. The testator died on February 8, 1935, and his will was duly proved by his executors.

The first defendant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second defendant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope

[2] [1959] Ch. 699; [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623.

and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925, by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund with power to apply all or part of the accumulations as if they were income of the current year; if she should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions the trustees were to hold the fund in trust for all or any the children or child of Richard Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925, was expressly made applicable.

By this summons the trustees of the will asked whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925, in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital of such interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

Danckwerts J. held that the power of advancement might be legitimately exercised by paying some part of the capital of Penelope's share (not exceeding one moiety) to the trustees of the

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proposed settlement and so as to make it subject to the trusts, powers and provisions of such settlement and, since the power of advancement took the property advanced out of the original settlement, the relevant period for the purposes of the rule against perpetuities was to be determined by reference to the proposed settlement and the power could accordingly be exercised in the manner proposed.

On July 18, 1960, the Court of Appeal, on the motion of the plaintiffs, ordered that the Commissioners of Inland Revenue might be added as parties and further that (notwithstanding that the time for appealing had expired) the plaintiffs or the commissioners might be at liberty to appeal from the order of Danckwerts J.

The Commissioners of Inland Revenue appealed. The grounds of their appeal was that the order was wrong in law:

(1) Because the proposed transaction was nothing less than a resettlement of the capital over which it extended upon trusts and with and subject to powers and discretions not contained or contemplated by the testator's will and not authorised by the power of advancement contained in section 32 and because it was irrelevant that the trustees thought that it was for the benefit of Penelope that it should be so resettled.

(2) Because to resettle any part of the capital of the share of a beneficiary was not within the meaning of the phrase "to pay "or apply any capital money" subject to a trust.

(3) Because upon the true construction of the section the power of advancement thereby conferred upon trustees to pay or apply any capital money subject to a trust for the advancement or benefit of any person entitled to the capital of the trust property or of any share therein did not extend to enable such trustees to deprive such person of the interest in property conferred upon him by the trust instrument or to declare new or other trusts affecting such capital or share or to do any act or thing in relation to the trust property which would operate to deprive such person of such interest or to subject such capital or share to such new or other trusts.

(4) Because the power of advancement might only be exercised to accelerate and, if necessary, enlarge the interest of the person sought to be advanced and not to postpone or reduce it.

(5) Because the effect of the proposed transaction would be to deprive Penelope of her existing contingent interest in the capital sought to be subjected to the trusts of the proposed new settlement and to subject such capital to trusts which differed from those declared by the will and to postpone and reduce Penelope's interest in such capital.

(6) Because *In re Fox*[3] and *In re Joicey*[4] are authority for the proposition that a power of advancement did not enable the

[3] [1904] 1 Ch. 480. [4] [1915] 2 Ch. 115.

trustees to alter the devolution of the estate or to destroy the contingent interest of the person sought to be advanced.

(7) Because the authorities upon which Danckwerts J. relied, properly understood, did not decide the contrary or, if they did were wrongly decided.

(8) Because, if contrary to the contention of the Commissioners of Inland Revenue the said power of advancement extended to enable the trustees to subject the capital to new or other trusts, and thereby to postpone or reduce the interest of Penelope, the validity or otherwise of any such new or other trusts in relation to the rule against perpetuities fell to be tested by considering whether they would have been within the rule if they had been declared by the testator's will.

(9) Because the trusts in favour of Penelope and her children declared by the proposed new settlement would have been void for remoteness if contained in the testator's will.

(10) Because the subjection of any part of the capital of the expectant share of Penelope to the trusts, powers and provisions of the proposed new settlement would be an unlawful delegation of the trusts, powers and provisions of the will.

(11) Because under the trusts of the proposed new settlement persons who were not objects of the power of advancement (and in particular Penelope's children) were beneficiaries, and the proposed transaction was accordingly a transaction in excess of the said power.

Peter Foster Q.C. and *E. Blanshard Stamp* for the appellants, the Commissioners of Inland Revenue.

B. L. Bathurst Q.C. and *James Cunliffe* for the plaintiff trustees.

Sir Milner Holland Q.C. and *Eric Griffith* for the defendants Richard Godfrey Pilkington and Penelope Margaret Pilkington.

The following cases were referred to in argument, which are not mentioned in the judgments: *In re Gosset's Will Trusts* [5]; *Hood* v. *Franklin* [6]; *In re Aldridge* [7]; *In re Churchill* [8]; *In re Greenslade* [9]; *In re May's Settlement* [10]; *In re Boulton's Settlement Trusts* [11]; *In re Morris Settlement Trusts* [12]; *In re Vestey's Settlement.* [13]

LORD EVERSHED M.R. The problem raised by this appeal is, so far as reported authority goes, in large degree novel, as it is novel in form. The Crown have been added as parties for the purposes of this appeal and have, therefore, argued the case before us for the view that what is intended is something outside

[5] (1854) 19 B. 529.
[6] (1873) L.R. 16 Eq. 496.
[7] (1886) 55 L.T. 554.
[8] [1909] 2 Ch. 431.
[9] [1915] 1 Ch. 155.
[10] [1926] Ch. 136.
[11] [1928] Ch. 703.
[12] [1951] 2 All E.R. 528, C.A.
[13] [1951] Ch. 209; [1952] 2 All E.R. 891, C.A.

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the scope of the statutory power of advancement contained in the relevant will. That will was made some two months before his death in February, 1935, by William Norman Pilkington. It is a will of considerable elaboration, and, after a number of legacies and other provisions, the residue of his estate was left upon trust in equal shares if more than one for all or any of his nephews and nieces, being children of three named brothers, living at his death, who should attain the age of 21 years or marry under that age. The gift of residue as expressed was followed by a number of other clauses which had the effect of qualifying what appeared to be the absolute gift to these nephews and nieces so that their interests, though remaining contingent on attaining 21, became life interests with final gifts in favour of their children, that is, to the testator's grand nephews and grand nieces. There were included the usual powers of appointment, of applying income for maintenance and the like. The power of advancement, as it is commonly and briefly called, was incorporated into the will from section 32 of the Trustee Act, 1925, and it is, therefore, essential that I should refer at once to the language of the first subsection: "Trustees "may at any time or times pay or apply any capital money "subject to a trust, for the advancement or benefit, in such "manner as they may, in their absolute discretion, think fit, of "any person entitled to the capital of the trust property or of any "share thereof, whether absolutely or contingently on his attain-"ing any specified age or on the occurrence of any other event, "or subject to a gift over on his death under any specified age or "on the occurrence of any other event, and whether in possession "or in remainder or reversion, and such payment or application "may be made notwithstanding that the interest of such person "is liable to be defeated by the exercise of a power of appoint-"ment or revocation, or to be diminished by the increase of the "class to which he belongs." It is said that the language which I have read from the Trustee Act, 1925, substantially reflects what had become the practice of conveyancers of inserting into settlements or wills powers of advancement, and again I use the convenient label. To what extent that is so, is a matter upon which I am not confident that I could express any very firm view, more particularly since I do have in mind what was said by Jessel M.R. in the case of *Lowther* v. *Bentinck*.[1] The corresponding power in the will there before the court was thus: "the testator declared that it should be lawful for the trustees "at any time or times during the life of Francis William Lowther, "to levy and raise any part of the trust moneys, stocks, funds, "and securities, not exceeding in the whole one moiety thereof, "and to apply the same in or towards the preferment or "advancement of Francis William Lowther, or otherwise for his "benefit, in such manner as the trustees should in their dis-"cretion think fit." Mr. Cookson, in argument before Jessel

[1] (1874) L.R. 12 Eq. 167.

M.R., said: "This is not an ordinary advancement clause, such "as is found in wills or settlements containing provisions for the "benefit of infants." And it is certain that Jessel M.R.'s view was that the words of the clause there before him should be given their sense according to the English language. "It seems "to me," he said,[2] "that the words 'or otherwise for his benefit' "are evidently put in for the purpose of not confining the "trustees to preferment or advancement; and therefore, so far "from finding any context which restricts the words, I think "the context shows that the words could not mean something "of the same kind." That is to say, he rejected the view that "or otherwise for his benefit" was to be treated as meaning something ejusdem generis with what might be called, in a strict use of the word, advancement.

Is the transaction then with which we are concerned within the contemplation of that phraseology? I have found this matter one of considerable difficulty. I am conscious that views have been taken about this matter which may have affected many settlements, and it is a subject upon which practitioners in the Chancery Division, I gather, have taken sometimes one view and sometimes another. After, I confess, some changes of view in the course of the argument, I have in the end come to the conclusion that the question now before us, which I have tried to pose, ought to be answered in the negative. I think the question has been formulated most properly, and for my purposes most conveniently, in the first paragraph of the notice of appeal. The ground for the appeal is stated in this form: "Because the pro-"posed transaction is nothing less than a resettlement of the "capital over which it extends upon trusts and with and subject "to powers and discretions not contained or contemplated by the "testator's will and not authorised by the power of advancement "contained in the said section, and because it is irrelevant that "the trustees think it for the benefit of the defendant Penelope "Margaret Pilkington that it should be so resettled."

It is obviously necessary at this stage that I should say something about the transaction, as I have called it, which is here in question. It has taken this form. It is intended that a settlement shall be executed by Colonel Guy Pilkington, who is one of the brothers of the testator, and who is the grandfather of the child mentioned in the notice of appeal, to whom I will hereafter allude as "Penelope." The trustees of this settlement are, in fact, the same persons as are the trustees of the testator's will, and it recites that the settlor is desirous of making provision for the benefit of Penelope. Penelope was born on December 29, 1956, so that on the date when this document was exhibited to the affidavit in support of the summons, she was somewhat less than 2½ years of age. The terms of the settlement proposed to be made (which was incidentally of the sum of £10 in cash) were

[2] L.R. 12 Eq. 167, 170.

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that the trust money and any other moneys which the trustees might receive should be invested in the usual way, and should then be held upon trust so that, until Penelope was 21, the income should be available for her maintenance, education and the like. From the age of 21 to 30 she should be entitled to receive the income, and then, on her attaining 30 years of age, she was to be entitled to the capital, and there followed provisions so that if she were to die under 30 leaving children, those children would take the capital, and if she did not leave children, then there were trusts over. Clause 9 of this document reads: "The "power of advancement contained in section 32 of the Trustee "Act, 1925, shall apply." I do not intend to attempt any kind of definition by way of limitation or otherwise of the vital language which I have already read from the first subsection of section 32 of the Trustee Act. But, to my mind, the power which is conferred by that section contemplates something being done for the advancement or benefit (and I accept entirely what Jessel M.R. said, that the benefit should be construed in the widest sense) of the particular person in question, according as that course may seem to be called for by the circumstances at the time, that is at the time when the advancement or benefit is conferred. I would observe from the subsection that it is intended to deal with capital of the trust fund, and to deal with the case of a person who is entitled to some share in the capital of the trust fund which, for one reason or another, he or she cannot at the time touch, either because it is liable to be divested or because his or her interest is contingent, or because it is subject to some prior interest. In those circumstances, the subsection contemplates that, subject to the limitation as to amount in the first proviso, and to such other limitations as there are, the trustees are entitled to take part of the capital out of the trust fund, to liberate it from the trusts which prevent the person concerned receiving it or enjoying it, and then to make it available or apply it for the benefit of the person concerned; but, as I have indicated and as I construe it, in the light of the circumstances affecting that person as they then exist.

What I have said has, at any rate, the support of the language, which I will not cite, of Pickford L.J. in *In re Joicey*.[3] When I look at this settlement it seems to me that it does not, as a matter of common sense, fulfil that qualification. As Lord Maugham observed in *In re Mewburn*,[4] these are matters which may strike one mind one way and one mind another. I have very high regard, if I may say so, in a matter such as this for the view of the judge from whom this appeal comes; but it has seemed to me, looking at it as I have tried to do against the background which I have tried to state, that what is proposed does not fall within the contemplation of the statutory power. I cannot escape the conclusion that it is in truth a resettlement,

[3] [1915] 2 Ch. 115, 122.

[4] [1934] Ch. 112.

an addition of supplementary trusts to those which you find in the original will, which I am fully prepared to assume the trustees quite properly think is for the benefit of the various persons concerned, including Penelope; though I cannot persuade myself that it really relates to Penelope and her benefit in the sense which I think the section contemplates. There has been some discussion of the question of the avoiding, for the benefit of those concerned, of liability to taxation, and quite properly doing so. *In re Collard's Will Trusts*,[5] to which our attention was called by Sir Milner, is an example of what is now accepted, that, if you can prevent the diminution of the trust estate by the impost of taxation, that is a perfectly legitimate thing to do, and is clearly a benefit to those who are interested in the fund. It is quite true also, as Mr. Bathurst pointed out, that you can enumerate advantages which will result to Penelope. She will have an income available and immediately available for her maintenance. She will have that without having to suffer herself, unless she has other funds I know not of, the imposition of surtax. Her capital, the capital here in question, cannot be divested by any exercise of the power of appointment by her father, the testator's nephew, and if her father should live, as seems reasonable to hope since he is only 42, for five years, then the sum which is proposed to be transferred to the trustees of the intended settlement will not bear estate duty which otherwise might be imposed. The last of Mr. Bathurst's advantages is reflected in something in the affidavit of Mr. Winder supporting the summons, that, although she will be entitled to the income at 21, she will not get the capital until she is 30, and so she "would be protected "from the risk that she might at the age of 21 or on her earlier "marriage be able to dissipate the capital of the amount so "applied." This child is now four and upwards, and who can tell what, in the twentieth century, her interests will be, and for what her talents may fit her? She might become a member of a great profession, she might become an artist, a musician, a politician or an explorer. She might, on the other hand, follow the example of domesticity which was more common in past centuries. But can it be said, and ought it to be said now, that she should be in the position when she cannot "dissipate," and I would qualify that by saying, "or alternatively use," capital at 21, or only do so if the trustees then think it would be for her benefit? It seems to me that it cannot be in contemplation in a statutory power of this sort as applied to a will that you should assume all these things about a child aged two or three and not, as I think the clause intends, deal with the problem when really in some sensible form it arises for determination. The advantages which Mr. Bathurst enumerated are, to my mind, of an impersonal kind when related to Penelope, whereas, according to my understanding of the section, the advancement or benefit intended

[5] [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821.

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should be personal to the person concerned in the sense of being related to his or her own real or personal needs. All the many cases to which our attention was properly drawn, as it seems to me, were cases where, for one reason or another, it was desirable that a fund should be made available to meet a particular circumstance affecting a particular person, though it does not follow (and there are instances which show it) that all you can do or ought to do is to hand over a capital sum. I have said that because I, for my part, am not prepared to accept and make a general rule of certain of the propositions by which Mr. Foster supported the case for the Crown. I prefer strictly to confine myself to the facts of this case, and the impression which my mind has formed upon this transaction, and to give in regard to it the answer which I think is in accordance with the contemplation of the statutory language. Thus, I am not saying anything which might cast any doubt on transactions which might involve the making of some settlement in some form or another, doing the kind of thing that was done, for example, in *In re Halsted*,[6] decided by Farwell J., or by Maugham J. in *Mewburn's* case.[7] And I also bear in mind again what Buckley J. said in *Collard's* case,[8] on which I most certainly do not desire to cast any doubt, namely, that if what is to be achieved can quite properly be achieved by two documents, it is no necessary objection that you happen to do it by one.

I will add a word or two about the grounds on which Mr. Foster, in opening the case, founded his objections. First, I would not like to accept the view that this section only contemplates acceleration as distinct from postponement. That, no doubt, is a form of words, but it is, if Mr. Foster will forgive me for saying so, merely a form of words, and I do not think you can improve upon the matter, certainly not try to qualify or expound the fairly clear words of this statute, by introducing some such formula: no postponement, only acceleration. Similarly, I would not accept that anything which appeared to involve, or might be said at first sight to involve, an infringement of the rule delegatus non potest delegare is of itself necessarily fatal to what is done. Again, I think it depends on the circumstances and the form of the transaction. And instances have been cited from the cases which show that if, in other respects, what is done is fairly within what I take to be the intendment of the statute, it is no objection that, as ancillary to what is done, you would confer powers, including powers of advancement, which might, if you looked at it otherwise and with great strictness, be thought at first blush to involve some encroachment on that principle. Nor, as a somewhat similar ground, would I condemn this transaction, so far as this matter is concerned, by saying there are persons who would be entitled to benefit who are not objects of the benefaction under the original will, namely, issue of Penelope. Again, the

[6] [1937] 2 All E.R. 570.
[7] [1934] Ch. 112.
[8] [1960] 2 W.L.R. 415.

cases which I have cited show that if what is done is being done as an exercise of what I think the section contemplates, it may not be an objection that there are added to it provisions which will, or might, result in persons taking a benefit who were not themselves objects of the original settlement or will. I also cannot attach so narrow a significance as Mr. Foster would suggest, I think, with all respect to him, to the words "pay or "apply." I think as a matter of English, if you have a fund available, you can be said to apply it for the benefit of some person in any manner you like by quite an elaborate transaction.

Of those grounds put forward, however, I have, I confess, felt more force in the problem raised by reference to the rule against perpetuities. In the circumstances of this case I would prefer myself not to express any concluded view. It is plain that if the transaction to be entered into in purported exercise of the power of advancement postpones final distribution of the funds to a date that would not have been legitimate in the original will and settlement, then there may be difficulty over the rule against perpetuities. Unless you can say that the fund, the sum of money which is made the subject of the new settlement in the exercise of the power, has been altogether severed from the original settlement so that it makes, so to speak, a new start, it involves considering whether the trusts of the new document ought to be treated in some sense as read into, and by way of qualification or expansion of, the trusts of the original document. Put in other and familiar phraseology, it might depend on whether you thought that the power of advancement as exercised was in the nature of a special power.

In the present case it is to be noted that the trustees have not merely declared of part of the funds in their hands as trustees of Mr. Pilkington's will new trusts. What they have done or what they propose to do is in effect this: They say: It so happens that there is another settlement made by someone else and what we are going to do is to take part of the testator's capital and transfer it to the trustees of this other convenient settlement, which is a settlement for the benefit of Penelope, and therefore there is a complete break and you avoid the problem of perpetuities. By perhaps a parity, if not an inversion, of the reasoning which appealed to Buckley J. in *Collard's* case,[8] I find it a little difficult to think that the transaction can be looked at quite so disjunctively. And there is the difficulty that, unless that be so, then at what point can the sum become the subject-matter of the new settlement—become, so to speak, free of any subsisting trusts? For the trustees themselves would have no power to make a settlement in this form for the benefit of Penelope and her issue. On the other hand, it might be that if the other settlement, to the trustees of which the transfer is to be made, had a wholly independent existence, then other things being equal the trustees might in consideration of the circumstances of the day as they affected a particular beneficiary, say:

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"The best thing we can do for this person now is to take part "of the capital of the trust fund and hand it over to this other "subsisting trust," and if that were done, you might avoid any question of perpetuity and you might in other respects, as I have indicated, be within the scope and intendment of the section. For myself, therefore, I prefer to express no view upon the perpetuity question.

I come back in the end, therefore, to the simple point which is one—and I repeat Lord Maugham's language—which might appeal to different minds in different ways. I do not attempt any further definition of the language of section 32. I venture to suggest that it means what it says, but I do not forget, as Mr. Foster pointed out, that it is, after all, contained in a group of sections which bears the statutory cross-heading: "Maintenance, "advancement and protective trusts," and that cross-heading, at least to my mind, emphasises the point, which has in the end influenced my mind, that the exercise of the power, if truly within the section, must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section whose circumstances call for that to be done which the trustees think fit to do. Unless this be so, I see no limitation to the scope of the power. I hope that I have not in anything that I have said suggested that the trustees in this case have not been acting in what they properly feel to be the best interests of those whom it is their duty to look after. It is no part of the Crown's argument so to suggest, and, indeed, the presence of the Crown, though it has been of great assistance to the court, might in some sense have been an embarrassment to the Crown because they were arguing in a sense an academic case.

But I hope I have not transgressed the limits within which the court has to decide this matter, and without further repetition, I have, in the end, concluded that the first ground stated in the notice of appeal correctly states what the position is, with the result that we should hold in my judgment that what is proposed to be done is not within the intendment of the statutory power of advancement, and so that this appeal should be allowed.

Upjohn L.J. I agree, and in deference to the learned judge from whom we are differing and the arguments that have been presented to us, I propose to add a few words of my own, although I agree with all that has fallen from my Lord. I start with the assumption that the proposed new trusts (if valid) are for the benefit of Penelope: certainly any reasonable body of trustees may properly think so, and I do not myself dissent from that view. The bona fides of the trustees is not in question and they do not surrender their discretion to the court. The sole question, therefore, is whether the proposed transaction of raising and applying the sum of £7,000 to £8,000 out of Penelope's expectant share under her great-uncle's will and transferring it to new trustees

upon the trusts of another settlement is within the powers of the trustees. That question depends entirely on whether they are so empowered by virtue of section 32 of the Trustee Act, 1925. Sir Milner Holland has argued that having regard to the very wide construction that has been put on the word "benefit" by Jessel M.R. in *Lowther* v. *Bentinck*[9] and followed by Farwell J. in *In re Halsted*,[10] once the trustees are satisfied that it is for the benefit of Penelope, it must follow that to carry out the transaction must be within the powers of the trustees under section 32. There being no challenge to the propriety of the exercise of their powers, it follows, therefore, that the proposed transaction is necessarily, so it has been argued, a proper one. That is a very attractive argument and makes necessary a close examination of the true scope and ambit of the powers conferred upon trustees by section 32.

As is well known and was pointed out by Maugham J., in *In re Mewburn*,[11] section 32 produced in statutory form the power which had for many years been inserted in all properly drawn instruments, rendering it unnecessary to insert such powers in such documents in future. It must not, however, be overlooked that the power is one which, if the settlor so desires, may be excluded altogether or varied, as indeed was recently done in *In re Collard*.[12] The section, therefore, must be considered in the light of its historical background and of judicial interpretations of similarly expressed powers of advancement in pre-1926 settlements. Furthermore (and in my judgment this is very important) it must never be forgotten that the power of advancement, whether expressed in the settlement or incorporated by virtue of section 32, is essentially a power which is ancillary to the trusts declared by the settlor, and when exercised in favour of the object of the power, operates in derogation of the beneficial trusts declared by the settlor.

With those preliminary observations I propose to mention one or two cases to which we have been referred to illustrate how the power of advancement has been exercised in the past, and I use the words "power of advancement" as including the wide form of words to be found in section 32. The normal and usual exercise of a power of advancement is the raising and application of a sum of money out of the expectant share of the object of the power by paying it directly to him or applying it for his benefit; for example, to buy him a business or to pay his debts or (in the old days) to buy him a commission in the army. In such cases the trustees are merely anticipating his interest in the trust fund, but the exercise of the power is not, however, necessarily confined to that type of advancement. In special circumstances and provided (and this I think is essential) it is for the benefit of the object of the power, the power may be exercised in favour of non-objects; see,

[9] (1874) 19 Eq. 166.
[10] [1937] 2 All E.R. 570.
[11] [1934] Ch. 112.
[12] [1961] 2 W.L.R. 415.

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for example, in *In re Kershaw's Trusts*,[13] where money was raised to purchase a business in England for the husband of the object of the power, the circumstances being that otherwise he would have to leave his wife and children and reside abroad. Then again provided always that it is for the benefit of the object of the power, in special circumstances it may be proper to raise money and hold it upon trusts for his benefit and for others in succession who may be non-objects such as the wife and children of the object of the power and possibly remoter issue: see *Roper-Curzon* v. *Roper-Curzon*,[14] and in *In re Halstead*.[15] The extent of the class of non-objects who may take under such settlements has not yet been judicially defined and probably is incapable of definition, for it must depend on the particular circumstances of each case. No reported case, however, apart from in *In re Ropner*,[16] decided by Harman J. without argument, has gone so far as to authorise trustees to raise money for the benefit of the object of the power merely because the trustees bona fide thought that it was for his benefit but there was no evidence of any circumstances making it desirable to benefit the particular object of the power on that particular occasion.

Like my Lord, I do not think it is possible to lay down any rule as to the ambit of the powers conferred by section 32 except to say that the exercise of the power must have reference to the actual circumstances of the object of the power requiring to be benefited at the time of the exercise of the power

My Lord has referred to *In re Joicey*.[17] I propose to refer to this case in greater detail, making clear, however, that it is only relevant for the contrast drawn by two judges of that court between the exercise of a wide and unlimited power and the exercise of the ordinary power of advancement. The daughter of the settlor had a power of appointment and she exercised that power of appointment, and added this: "provided always that the said "trustees shall (if and so far as I can authorise the same) have "power from time to time or at any time during the said period "of twenty-one years in their absolute discretion to transfer and "make over the share or shares for the time being of the "appointed funds of any son of mine who shall have attained the "age of twenty-one years or any part of such share or shares to "such son for his own use absolutely." That power was held to be far beyond a power of advancement and to be invalid as a delegation of the power of appointment conferred upon the appointor. Pickford L.J., as he then was, referring to this power, said this[18]: "I do not think it is a power of maintenance or "advancement at all. It is not confined in any way to circum-"stances requiring maintenance or advancement and may be "exercised by the trustees irrespective of such considerations."

[13] (1868) L.R. 6 Eq. 322.
[14] (1871) L.R. 11 Eq. 452.
[15] [1937] 2 All E.R. 570.
[16] [1956] 1 W.L.R. 902.
[17] [1915] 2 Ch. 115.
[18] Ibid. 122.

Warrington L.J. said this[19]: "It is not even a mere power of "advancement which might possibly be said to be so common an "incident to such interest as the donee has here created as to be "fairly within the words 'in such matter in all respects'—as to "this I express no opinion. It is, I think, impossible to deny that "under the provision in question the trustees might of their own "mere motion and without reference to the circumstances of the "son or any other consideration convert a contingent interest into "an absolute one and thus completely alter the dispositions made "by the testatrix."

Those observations assist the conclusion which, like my Lord, I reach independently, that the power conferred by section 32 is not to be exercised by the trustees without reference to the particular circumstances of the object of the power requiring to be advanced at the time of its exercise.

As I ventured to point out in *In re Wills' Will Trusts*,[20] the section does not, in my judgment, permit the trustees, under the guise of making an advancement, to create new trusts or to make a resettlement merely because they think that such new trusts or new settlement will be more beneficial to the object of the power than those which the settlor has chosen to declare. There must be some particular circumstance which justifies the exercise of the power in favour of the object of the power at that particular time in the manner then proposed. But the mere creation of new trusts, in my judgment, in this particular case is just what the trustees, acting, of course, perfectly bona fide, are trying to do. On the facts of this case I cannot see that there are any circumstances in reference to this child of under five with a rich father aged 42, well capable of providing for her and her education, which can justify at the present time—and I emphasise those last four words—the invocation of the powers conferred by section 32. I agree with my Lord that paragraph 1 of the notice of appeal gives the true picture of what the trustees are attempting to do, and I think that is beyond their powers.

I desire to add a few words on the application to this case of the rule against perpetuities. In the ordinary conventional case where an advancement is made to an adult who can settle the sum advanced to him, no doubt no question as to reading back a new settlement into the head settlement would arise, but in this case the object of the power, being of tender years, is incapable of making any settlement. Consequently, the trustees can only justify the making of a settlement provided it is within the powers conferred upon them by section 32. That is plainly a special power and, of course, the trusts created by virtue of the exercise of the power must conform to the rule against remoteness. Moreover, being a special power it is clear that the exercise must, for the purpose of the rule, be written into the instrument creating the power: see *In re Fane*,[21] *per* Buckley L.J.

[19] [1915] 2 Ch. 115, 123.
[20] [1959] Ch. 1.
[21] [1913] 1 Ch. 404, 413; 29 T.L.R. 306, C.A.

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To this the answer was made and accepted by the judge that a sum advanced is taken out of the settlement for all purposes and, therefore, in the case of a power of advancement, the new settlement ought not to be read back into the testator's will. No doubt the law has been stated that a sum advanced is taken out of the settlement for all purposes: see *In re Fox*,[22] and the cases there referred to. But examination of that case and of the earlier cases shows that they were all cases where a sum had been advanced to the object of the power out and out, and questions arose as to whether, as in *Lawrie* v. *Bankes*,[23] the purpose having failed, the object of the power ought to repay it to the trustees or might keep it. In *In re Fox*[24] the question was as to whether the sum advanced had to be brought into hotchpot. It was held in those cases that the payment having been made out and out, the sum did not have to be repaid in the one case or accounted for in the other. But none of the cases touch or, indeed, could touch on any question relating to the rule against perpetuities because, being out and out payments, it could not arise. It is a cardinal rule that the observations of judges and the law as stated by them must be read in relation to the issues which they had to try, and their remarks cannot safely be applied to questions which could not have been in the judges' minds at the time. The position seems to me to be this. Section 32 either empowers the trustees to make a settlement or it does not. If the former, they are exercising a special power of advancement conferred by section 32, and exercising that special power, it must be subject to the usual rule for the purposes of the rule against perpetuities. If they have no power to make a settlement, cadit quaestio. The one thing which it seems to me they cannot do in law is to say: Let us make an out and out advancement and then transfer it to the trustees of the existing settlement and that is a new settlement which need not be read back into the will. All they can do is to say: Under the powers conferred by section 32 we are going to create a new settlement containing new trusts. It matters not whether they themselves declare the trusts, or whether they hand it over to the trustees of an existing trust, whose terms are thought to be appropriate to the circumstances. They are still plainly exercising a special power, and it seems to me, therefore, that these new trusts must, for the purposes of the rule against perpetuities, be read into the testator's will.

What then is the consequence of that? I must examine briefly the terms of the new settlement. I am content to assume that the gift of income to Penelope from the time that she shall attain the age of 21 years until she shall attain the age of 30 years is good, but the next direction that the trustees shall hold the capital of the trust fund upon trust for Penelope if she shall attain the age of 30 years absolutely, is prima facie bad. It

[22] [1904] 1 Ch. 480.
[23] (1857) 4 K. & J. 142.
[24] [1904] 1 Ch. 480.

may be—the question has not been argued before us—that section 163 of the Law of Property Act, 1925, saves it. If it does save it, it does so by directing the trustees to hold the capital of the trust fund for Penelope absolutely upon attaining the age of 21 years. The next trust for the children of Penelope, if she shall die under the age of 30 years, is plainly bad on any footing. The effect, therefore, of the rule against perpetuities upon the proposed settlement is basic: it entirely alters the settlement, and that seems to me to be fatal to this case, for the trustees have never been asked to express any opinion as to whether they would think the proposed settlement, modified by reason of the rule against perpetuities in the manner I have mentioned, is for the benefit of Penelope. That is a matter to which they have never expressed their minds, and, therefore, it cannot possibly be justified under section 32, for it has not been shown that the trustees think that the settlement, as so modified, is for the advancement or benefit of Penelope. On that ground too, therefore, I would think that the transfer to the trustees of this new settlement is entirely beyond the powers of the trustees.

I would only add one further matter and that is that I think Danckwerts J. (as he then was) has read more into certain observations which I made in *In re Wills' Will Trusts* [25] than I intended or, with all respect, than is justifiable on reading what I said. In the passage which he quoted [26] I pointed out the general rule that a person upon whom powers are conferred cannot delegate those powers unless he is expressly authorised so to do. That rule applies, as I venture to think I was quite right in saying, not only to a person exercising a power of appointment but to a person exercising a power of advancement.

For those reasons I would allow this appeal.

PEARSON, L.J. I agree, for the reasons which have been given by my Lords, that the proposed transaction would not be a valid exercise of the powers conferred by section 32 of the Trustee Act, 1925. I do not find it necessary to express any opinion with regard to the application to this case of the rule against perpetuities. I agree that the appeal should be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue*; *Alsop, Stevens & Co.*

B. A. B.

[25] [1959] Ch. 1, 12.

[26] [1959] Ch. 699, 706.

[PRIVY COUNCIL.]

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MOHAMED FALIL ABDUL CAFFOOR AND OTHERS, THE TRUSTEES OF THE ABDUL GAFFOOR TRUST . . . APPELLANTS;

AND

COMMISSIONER OF INCOME TAX, COLOMBO . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Charity—Class, gift for limited—Education—Limited primarily to members of donor's family—Whether of public character solely for charitable purposes—Family trust—Ceylon Income Tax Ordinance (No. 2 *of* 1932, *as amended), s.* 7 (1) (*c*).

Estoppel—Per rem judicatam—Revenue—Income tax—Decision granting exemption—Revenue not estopped from challenging exemption in subsequent years—Not "eadem quaestio."

Ceylon—Revenue—Income tax—Exemption—Trust—Whether public charitable or family trust—Decision granting exemption—Revenue not estopped from challenging exemption in subsequent years—Ceylon Income Tax Ordinance (No. 2 *of* 1932, *as amended), s.* 7 (1) (*c*).

By the terms of a trust deed executed in Ceylon in 1942 the trust income after the death of the grantor was to be applied by the board of trustees, the appellants, in their absolute discretion for all or any of a number of purposes which included "(2) . . . "(*b*) the education instruction or training in England or else- "where abroad of deserving youths of the Islamic Faith" in any department of human activity. "The recipients of the benefits ". . . shall be selected by the board from the following classes of "persons and in the following order:—(i) male descendants along "either the male or female line of the grantor or of any of his "brothers or sisters failing whom" youths of the Islamic Faith born of Muslim parents of the Ceylon Moorish Community permanently resident in Colombo or elsewhere in Ceylon.

Assessments to income tax having been made by the respondent, the Commissioner of Income Tax, on the income of the trust for the five years 1950–51 to 1954–55 the appellants, alleging that the trust was an "institution of a public character established solely for "charitable purposes" within the meaning of section 7 (1) (*c*) of the Ceylon Income Tax Ordinance, 1932, as amended, claimed exemption thereunder from liability to tax. The Board of Review, constituted under the Ordinance, had in fact on an appeal by the appellants in respect of the assessment for the previous year 1949–50 decided that the trust income was exempt on the ground that the trust was of a public character established solely for charitable purposes:—

Held, (1) that the respondent was not estopped by the decision of the Board of Review for the year 1949–50 from challenging the appellants' claim to exemption for the subsequent years. A question of liability to tax for one year was always to be treated as inherently a different issue from that of liability for another

* *Present*: LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

year—as not eadem quaestio—even though there might appear to be similarity or identity in the questions of law on which they respectively depended, and the principle of res judicata did not apply. It was not the status of the tribunal itself, judicial or administrative, that formed the determining element for estoppel in cases of this kind but the limited nature of the question that was within the tribunal's jurisdiction (post, p. 803).

Broken Hill Proprietary Co. Ltd. v. *Broken Hill Municipal Council* [1926] A.C. 94, P.C., applied.

Inland Revenue Commissioners v. *Sneath* [1932] 2 K.B. 362; 48 T.L.R. 241, C.A. and *Society of Medical Officers of Health* v. *Hope* [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L. considered.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155; 42 T.L.R. 207, P.C., not followed; that case could not be treated as an authority on the question of estoppels in respect of successive years of tax assessment.

Held, (2) that in view of what was in effect the absolute priority to the benefit of the trust income which was conferred on the grantor's own family by clause (2) (*b*) (i) of the trust deed this was a family trust and not a trust of a public character solely for charitable purposes, and the income thereof was accordingly not entitled to the exemption claimed.

In re Compton. Powell v. *Compton* [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198, C.A., *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L., and *In re Koettgen's Will Trusts* [1954] Ch. 252; [1954] 2 W.L.R. 166; [1954] 1 All E.R. 581 considered.

Judgment of the Supreme Court of Ceylon (1959) 60 N.L.R. 361 affirmed.

APPEAL (No. 53 of 1959) from a judgment and decree of the Supreme Court of Ceylon (H. N. G. Fernando and Sinnetamby JJ.) (November 26, 1958) allowing an appeal by the present respondent, the Commissioner of Income Tax, Colombo, by way of case stated, from a decision (February 19, 1957) of the Board of Review constituted under the Income Tax Ordinance of Ceylon which had allowed an appeal by the present appellants, the trustees of the Abdul Gaffoor Trust, against a determination of the respondent confirming assessments to income tax made on the appellants in respect of the trust income for the years 1950–51 to 1954–55 inclusive.

The trust purposes, as set out in a trust deed of December 24, 1942, executed by the grantor, were as follows:

" (2) . . . (*a*) A sum not exceeding one thousand rupees " (Rs. 1,000/-) a month for the remuneration of the trustees and " the expenses incurred by them in connection with the adminis- " tration of the trust and for the payment of the costs of profes- " sional accountants solicitors counsel or agents or managers or " other persons whomsoever for or relating to any services ren- " dered or other things done in connection with matters relating " to the trusts hereby created or the trust property.

" (*b*) A sum not exceeding in all one thousand rupees (Rs. " 1,000/-) a month for the education instruction or training in " England or elsewhere abroad of deserving youths of the Islamic

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" Faith in such professions vocations occupations industries arts " or crafts trades employments subjects lines or any other depart- " ments of learning or human activity whatsoever as the board " may in its aforesaid discretion decide in the case of each such " deserving youth with a like discretion in the board from time " to time [to] change modify or alter or completely discontinue in " the case of each such youth either the object or objects of instruc- " tion education or training selected for him by the board (from " among the objects enumerated above) or the place or places or " countries whereat such education training or instruction is being " given from time to time. The board may under a like discretion " partially or wholly discontinue any assistance it may have given " or may be giving in the case of any such youths. It shall be law- " ful for the board out of the said sum to pay for or provide the " whole or any part of the cost of any such youth going abroad from " or in returning to Ceylon once or oftener as the board may under " such discretion aforesaid from time to time decide. The recipi- " ents of the benefits provided for in this clause shall be selected " by the board from the following classes of persons and in the " following order:

" (i) male descendants along either the male or female line of " the grantor or of any of his brothers or sisters failing whom

" (ii) youths of the Islamic Faith not being male descendants " as aforesaid of the grantor or of his brothers or sisters born " of Muslim parents of the Ceylon Moorish Community perma- " nently resident in the City of Colombo (wherever such youths " may have been or be resident from time to time) failing whom

" (iii) youths of the Islamic Faith not being male descendants " as aforesaid of the grantor or of his brothers or sisters born of " Muslim parents of the Ceylon Moorish Community permanently " resident anywhere else in the said Island of Ceylon other than " in Colombo (wherever such youths may have been or be resident " from time to time).

" (*c*) A sum not exceeding two hundred and fifty rupees (Rs. " 250/-) a month for the education of deserving youths of the " Islamic Faith born of Muslim parents of the Ceylon Moorish " Community permanently resident in Ceylon at either the Uni- " versity of Ceylon or any institution associated with or affiliated " to it or the Ceylon Law College or any other scholastic or voca- " tional or professional or agricultural or industrial or other " technical institution public or private in Ceylon.

" (*d*) A sum not exceeding two hundred and fifty rupees (Rs. " 250/-) a month for providing dowries for poor girls of the Islamic " Faith wherever resident born of Muslim parents of the Ceylon " Moorish Community permanently resident in the City of " Colombo.

" (*e*) A sum not exceeding two hundred and fifty rupees (Rs. " 250/-) a month for supplementing the income of the Ghaf- " fooriyah Arabic School at Maharagama in the said Island

" founded [by] the grantor in the event of the funds already " provided for the said school under the relative trusts proving " insufficient.

" (*f*) A sum not exceeding one thousand rupees (Rs. 1,000/-) " a month to be accumulated from month to month and distri- " buted for charity once a year during the month of Ramadan.

" (*g*) any surplus or any sums not expended on any of the " above objects shall be credited to a reserve fund to be used in " such proportions to such extents at such time or times and from " time to time in such manner as the board may in its absolute " and uncontrolled discretion decide (1) for the purpose of meet- " ing any unforeseen expenditure or contingency in connection " with the trust property (2) in furtherance of all or any one or " more of the various objects of the trust (3) for educating in a " secondary school or secondary schools in Ceylon poor deserving " boys of the Islamic Faith born of Muslim parents permanently " resident in Ceylon (wherever such boys may have been or be " resident from time to time) and (4) for the relief of poverty " distress or sickness amongst members of the Islamic Faith in " Ceylon."

The main questions raised in this appeal were: (1) Whether the decision of the Board of Review on appeal against an assessment made on the trustees for the year 1949–50 operated as res judicata in respect of subsequent years now in question. (2) Whether, during the years covered by the present assessments, the trust was a trust " of a public character established solely for " charitable purposes " and exempt from tax by virtue of section 7 (1) (*c*) of the Income Tax Ordinance.

The Supreme Court of Ceylon held (1) that the decision of the Board of Review on an appeal from a previous assessment did not operate as res judicata; and (2) that the income of the trust was not exempt from tax.

1961. March 1, 2, 7, 8. *E. F. N. Gratiaen Q.C.*, Ceylon, *Michael Nolan*, *Sammuganatham* and *Basnayake* for the appellants.

Sir John Senter Q.C. and *Walter Jayawardena* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Inland Revenue Commissioners* v. *Brooks* [1]; *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* [2]; *Federal Commissioner of Taxation* v. *Munro* [3]; *Badar Bee* v. *Habib Merican Noordin* [4]; *Sankaralinga* v. *Commissioner of Income Tax* [5]; *In re Cox, Baker* v.

[1] [1915] A.C. 478; 31 T.L.R. 89, H.L.
[2] (1925) 35 C.L.R. 422.
[3] (1926) 38 C.L.R. 153.
[4] [1909] A.C. 615, P.C.
[5] A.I.R. (1930) Mad. 209.

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National Trust Co. Ltd.[6]; *Rex* v. *Income Tax Special Commissioners, Ex parte Elmhirst*[7]; *Hoystead* v. *Federal Commissioner of Taxation*[8]; *Edwards (Inspector of Taxes)* v. *Bairstow*[9]; *Income Tax Commissioner* v. *Aga Abbas Ali Shiraji*[10]; *Morice* v. *Bishop of Durham.*[11]

April 17. The judgment of their Lordships was delivered by LORD RADCLIFFE: This appeal from a judgment of the Supreme Court of Ceylon concerns five assessments to income tax for the revenue years 1950–51 to 1954–55 which have been made upon the income of a trust, styled the Abdul Gaffoor Trust, of which the appellants are the trustees. The appellants' case is that these assessments ought to be discharged because the trust is an "institution or trust of a public character established solely for "charitable purposes" within the meaning of section 7 (1) (*c*) of the Ceylon Income Tax Ordinance, 1932 (No. 2 of 1932, as subsequently amended), and its income is accordingly exempt from liability to the tax. For the moment it is sufficient to note that by virtue of the interpretation section of the Ordinance, section 2, "charitable purpose" is to be held to include "relief of the poor, "education and medical relief."

The trust in question was set up by a deed dated December 24, 1942, executed by one Noor Deen Hadjiar Abdul Caffoor, the grantor, of the one part and certain persons of the other part who were to act as the intended trustees. The trust property was stated to be of the value of Rs. 2,050,000, lawful money of Ceylon, at the date of the deed. The overriding trust in the deed was that during the life of the grantor the trustees were to apply the whole of the income for such purposes and in such manner as the grantor himself should in his absolute direction direct, whether or not such purposes should fall within those directed by the deed to be operative after the grantor's death. It is plain, therefore, that until his death, which took place on November 1, 1948, the current trust income was not in any sense devoted to charitable purposes. Accordingly, it can be argued that for this reason alone the Abdul Gaffoor Trust is not capable of being described as "established solely for charitable purposes." This argument was placed before the Supreme Court by the respondent and was there rejected on the ground that the word "established" had no essential connection with the date of the founding trust deed, and that the critical test for the purposes of the exemption of income from tax was the nature of the trusts that were operative in the year to which the claimed exemption related. The respondent's submission was repeated to their Lordships on the ground that it was desired to keep the point open.

[6] [1955] A.C. 627; [1955] 3 W.L.R. 42; [1955] 2 All E.R. 550, P.C.

[7] [1936] 1 K.B. 487; 52 T.L.R. 143, C.A.

[8] (1921) 29 C.L.R. 537.

[9] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.

[10] (1944) I.L.R.(Mad.) 837.

[11] (1804) 9 Ves. 399.

The point was not fully developed in argument and, for reasons which will shortly appear, their Lordships find it unnecessary to express any opinion upon it.

Once the grantor was dead his overriding trust came to an end. The trust income thereafter was to be held by the trustees upon trust, after reserving a sum of Rs. 1,000 a month for upkeep and maintenance of the trust property, for all or any of a number of enumerated purposes which were set out in subheads (*a*) to (*g*) inclusive of paragraph 2 of the trust deed. The application of the income for or among these purposes was left to the absolute and uncontrolled discretion of a board, to be set up under the trust, consisting of the trustees and certain other named persons.

It is more convenient to set out these trust purposes in full as expressed in the deed than to try to reduce the expression of them by abridgement. [His Lordship stated the relevant terms of the trust deed as set out above and continued:]

If one accepts, as their Lordships do, the Supreme Court's reading of the words "for charity" in subhead (*f*) as meaning no more than "for the relief of the poor," it appears that in any year after the grantor's death the whole of the trust income, after allowing for administrative expenses, was destined to be applied for purposes that can broadly be described as serving education or the relief of poverty or of sickness or distress. Prima facie, these would qualify as charitable purposes.

The first main point taken on behalf of the appellants is that as between themselves and the respondent the question of exemption has been conclusively decided in their favour by a decision of the Board of Review, constituted under the Income Tax Ordinance, which decision was given on December 22, 1954, upon an appeal made by them to that board against assessment for the revenue year 1949–50. It is not in dispute that this decision was given or that the ground upon which exemption was allowed was that the income was that of a trust of a public character established solely for charitable purposes.

The appellants, therefore, are seeking to treat the decision of the Board of Review as setting up an estoppel per rem judicatam on the question of the trust income's right to be exempted from tax. This plea has not hitherto prevailed in the various hearings in Ceylon, it has been rejected in turn by the Commissioner of Income Tax, acting under section 69 of the Ordinance, by the Board of Review, acting under section 73, and by the Supreme Court, under section 74. For the reasons which will appear their Lordships are also of opinion that it cannot succeed.

The grounds for rejecting the estoppel in the courts of Ceylon have been stated either as "the previous decision of the Board of "Review which relates to an assessment for a year previous to "the years of assessment which are now before us is not binding "on us" (Decision of the Board of Review, paragraph 2) or as depending upon the question whether the Board of Review performs judicial and not merely administrative functions or, to

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put it in yet another way, upon the question whether the board was intended to function as a court of competent jurisdiction to decide litigation between the subject and the Crown (judgment of the Supreme Court). These different ways of approaching the issue reflect differences of formulation which are to be found in judgments in this country on similar or analogous issues. It is to be observed, however, that such differences could well lead to different conclusions in certain circumstances; for, if the fundamental reason why there is no estoppel is based upon the idea that the Board of Review does not possess adequate status as a judicial court of competent jurisdiction, it might seem to follow that a decision of the Supreme Court on the other hand when given on a case stated to it would set up an estoppel per rem judicatam in respect of tax for other years; whereas if the essence of the matter is that a question of liability to tax for one year is always to be treated as inherently a different issue from that of liability for another year, even though there may appear to be similarity or identity in the questions of law on which they respectively depend, it would seem to be the consequence on the contrary that a Supreme Court decision would be no more capable of setting up an estoppel than would one made by the Board of Review, whatever its precise status as a judicial tribunal.

In their Lordships' opinion the question of estoppel cannot be decided merely by inquiring to what extent the Board of Review exercises judicial functions. The critical test is not the bare issue whether or not such a board exercises judicial power, an issue which can indeed arise in other contexts, such as the constitutional question decided in *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation.*[1] What is important here is that the Board of Review is a tribunal set up under the Income Tax Ordinance for the purpose of deciding income tax appeals at a certain stage of their prosecution, and that decisions given with regard to such appeals are effective only within the limited jurisdiction that the Ordinance creates for all tribunals that deal with the matter of an appeal. All such appeals remain in one sense a part of the process of assessment since all the tribunals, including the Supreme Court, have independent power to increase or reduce the assessment under appeal. While, therefore, it is unexceptionable to say that the Board of Review when exercising its powers under section 73 is acting in a sense judicially, that the dispute which it has to determine is at any rate somewhat analogous to a lis inter partes and that the assessor who made the assessment or some other representative of the Commissioner (section 73 (3)) resembles a party hostile to the appellant, these considerations are not those that are critical to the issue of estoppel. The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the

[1] [1931] A.C. 275; 47 T.L.R. 115, P.C.

amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it (see section 75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning upon the construction of the Ordinance or of other statutes or upon the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination (cf. *Reg.* v. *Hutchings* [2]).

It is in this sense that in matters of a recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with "eadem quaestio" as that which arises in respect of an assessment for another year and, consequently, not to set up an estoppel. It is precisely that point that was raised and accepted by this Board in 1926 in *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council*,[3] where it is said: "The "decision of the High Court related to a valuation and a liabi-"lity to a tax in a previous year, and no doubt as regards that "year the decision could not be disputed. The present case "relates to a new question—namely, the valuation for a different "year and the liability for that year. It is not eadem quaestio, "and therefore the principle of res judicata cannot apply."

The *Broken Hill* decision [4] is in itself a striking application of the principle involved, since the earlier judgment which it was sought to set up as an estoppel was one given by the High Court of Australia on a rating assessment referred to it by way of appeal under the tax procedure. It underlines the point that it is not the status of the tribunal itself, judicial or administrative, that forms the determining element for estoppel in cases of this kind but the limited nature of the question that is within the tribunal's jurisdiction. The judgment of the High Court that had been given in the earlier year was explicitly directed to the construction of a particular section of the rating Act and to the correct measurement of the liability in the light of that construction. Precisely the same point arose in the later year and was ultimately decided by this Board in a sense contrary to that which had previously been adopted.

So, on the present appeal, the earlier decision of the Board of Review governing the 1949–50 assessment was based upon a construction of section 7 (1) (*c*) of the Income Tax Ordinance as applied to the income of the Abdul Gaffoor Trust; and the same point of construction now arises again but in respect of assessments of that income for other and later years. In their Lordships' opinion it is not possible to distinguish the principle of the *Broken Hill* decision [4] from that which should prevail in the

[2] (1881) 6 Q.B.D. 300, C.A.
[3] [1926] A.C. 94, 100, P.C.
[4] Ibid.

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present case on any such ground as that here the earlier decision related to the taxpayer's "status" as an exempt person while in the *Broken Hill* case[4] the decision "merely" related to the correct amount of the assessment; for in truth, as has been explained, in all these cases which arise under income tax or rating appeal procedure the decision is essentially as to the correct amount (if any) of the assessment, and in the one case as much as in the other the decision was based upon a question of law, the proper interpretation of one of the provisions of the taxing Act.

To apply the principle of the *Broken Hill* decision[4] to the case now before their Lordships is to bring it into line with what seems to be by now the regular course of authority with regard to appeals in successive years against income tax or rating assessments—see *Inland Revenue Commissioners* v. *Sneath*[5]; *Patuck* v. *Lloyd*[6]; *Reg.* v. *Hutchings*[7]; *Society of Medical Officers of Health* v. *Hope*.[8] It may be that the principles applied in these cases form a somewhat anomalous branch of the general law of estoppel per rem judicatam and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered; but in their Lordships' opinion they are well established in their own field, and it is not by any means to be assumed that the result is one that should be regretted in the public interest.

The decision of this Board in *Hoystead* v. *Commissioner of Taxation*[9] is not consistent with this line of authority, and the appellants naturally relied upon it in their argument. What happened in that case was that an assessment to federal land tax in Australia for the year 1918–19 had been the subject of appeal, and a case was stated for the opinion of the High Court on a point of law that determined the assessment, the correct interpretation of the taxing statute with regard to joint interests in land taken by the assessees under their father's will.

There was a later appeal in respect of the assessment for the year 1920–21; and the question that was brought to this Board was whether the Commissioner of Taxation was estopped in the matter of that assessment by the judgment that had been delivered by the High Court in the earlier proceedings. The Board decided that he was. Unfortunately, however, the argument that the determination of an assessment for one year could not set up an estoppel upon an assessment for another year, an argument that was accepted by the Board at almost the same time in the *Broken Hill* case,[10] does not appear either to have been presented to the Board or to have been noticed or adjudicated upon in the opinion which was delivered by Lord Shaw.

[4] [1926] A.C. 94, 100, P.C.
[5] [1932] 2 K.B. 362; 48 T.L.R. 241, C.A.
[6] (1944) 171 L.T. 340, C.A.
[7] 6 Q.B.D. 300.
[8] [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.
[9] [1926] A.C. 155; 42 T.L.R. 207, P.C.
[10] [1926] A.C. 94.

It is not possible to explain why the matter was dealt with in this way; and it is fair to note that in the majority judgment of the High Court, which was reversed on the appeal, there is a reference, though a passing one, to the point of "eadem "quaestio." In the result, however, the attention of the Board in delivering its opinion was wholly occupied with a discussion of what is quite a different issue in connection with estoppel, whether there can in law be estoppel per rem judicatam in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Their Lordships are of opinion that it is impossible for them to treat *Hoystead's* case [11] as constituting a legal authority on the question of estoppels in respect of successive years of tax assessment. So to treat it would bring it into direct conflict with the contemporaneous decision in the *Broken Hill* case [12]; and to follow it would involve preferring a decision in which the particular point was either assumed without argument or not noticed to a decision, in itself consistent with much other authority, in which the point was explicitly raised and explicitly determined.

For these reasons their Lordships are satisfied that the respondent is not estopped by the 1954 decision of the Board of Review from challenging the appellants' claim that the income of the Abdul Gaffoor Trust is exempt from tax under section 7 of the Income Tax Ordinance.

It is necessary now to turn to the question of exemption. To qualify at all there must be income of an "established" trust. Having regard to the nature of the Abdul Gaffoor Trust it cannot be validly established unless it falls within the definition of "charitable trust" which is contained in section 99 (1) of the Trusts Ordinance, 1918. This definition includes any trust "for "the benefit of the public or any section of the public" falling within any one of a number of categories which extend to such purposes as the relief of poverty and the advancement of education or knowledge. To satisfy the definition contained in the Income Tax Ordinance, therefore, the Abdul Gaffoor Trust must be a charitable trust "of a public character"; to be a subsisting charitable trust at all it must be a trust for the benefit of the public or some section of it.

In order to determine this question their Lordships think that the following principles may safely be applied in the interpretation of the Ceylon Ordinance. First, the general principles that govern the English law as to the validity of charitable trusts can be invoked. It seems plain that both the conception of a trust itself and the conception of what constitutes a charitable trust have been much influenced by English law. Secondly, there is no necessity to include in those general principles rules of the English law that appear to be specially associated with English local conditions or English history, or which appear to be now accepted

[11] [1926] A.C. 155. [12] [1926] A.C. 94.

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as anomalous incidents of the general law. Thirdly, there is no significant difference between the meaning of "of a public "character" and the meaning of "for the benefit of the public "or any section of it." The two phrases are often used interchangeably in English decisions and textbooks—see, e.g., the quotation from Tudor on Charities, 5th ed., p. 11, employed by Lord Greene M.R. in *In re Compton* [13]—"a universal rule that "the law recognises no purpose as charitable unless it is of a "public character. That is to say, a purpose must . . . be "directed to the benefit of the community or a section of the "community." Charitable trusts must be "trusts of a public "nature" (see Lord Macnaghten in *Income Tax Special Purposes Commissioners* v. *Pemsel* [14]). Fourthly, although educational purposes are themselves charitable purposes, no trust under which the beneficiaries are defined by reference to a purely personal relationship with a named propositus can be a valid charitable gift. If, therefore, persons for whose benefit an educational trust is created, derive their title to their benefits by proving their qualifications in this way, whether as descendants of a named person or as employees of a named company, the trust must be regarded merely as a family trust and not as one for the benefit of a section of the community (see *In re Compton* [15]; *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [16]).

Their Lordships do not think that it would be consistent with these principles to apply to the law of Ceylon any doctrine that had as its foundation the ancient English institution of educational provision for "Founders Kin" in certain schools and colleges, or old English decisions about charitable relief for poor relations of a testator. The former provisions were commonly accepted as validly instituted, though there seems to be virtually no direct authority as to the principle upon which they rested, and they should probably be regarded as belonging more to history than to doctrine: the latter are today treated as no more than an anomaly in the general law.

Is, then, the Abdul Gaffoor Trust a charitable trust? It was not disputed that to determine this it is necessary to treat the whole trust income as if it were appropriated for the purposes specified in clause 2 (*b*). This is so because the form in which the various trust sub-heads are expressed is such that no definite sum of money is dedicated to anyone, and the power given by sub-head (*g*) makes it possible for the whole of the income to be carried to a reserve fund which could then be expended as from time to time the Board thought proper in the exclusive implementation of the purposes of sub-head (*b*). To test whether any particular trust is a charitable one what must be asked is whether the income is bound with certainty to be applied to charitable

[13] [1945] Ch. 123, 128; 61 T.L.R. 167; [1945] 1 All E.R. 198, C.A.

[14] [1891] A.C. 531, 580; 7 T.L.R. 657, H.L.

[15] [1945] Ch. 123.

[16] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L.

purposes, not whether it may be so applied. Unless, therefore, sub-head (*b*) itself declares a valid charitable purpose, no part of the trust comes within the exempting provision of the Ordinance.

There are several material constituents in this particular purpose. The money is to be used for "education, instruction or "training" in any department of human activity. Their Lordships will assume, without deciding, that this could be called an educational purpose. The recipients of the benefit are "deserving "youths of the Islamic Faith." So long, however, as there are male descendants in either the male or female line of the grantor, or any of his brothers or sister for whose eduction the board are prepared to provide or reserve money on the ground that they qualify as deserving youths of the Islamic Faith, no other youth of that Faith can obtain any benefit under the trust purpose. They can only come in "failing" the line of the descendants.

It was argued with plausibility for the appellants that what this trust amounted to was a trust whose general purpose was the education of deserving young people of the Islamic Faith, and that its required public character was not destroyed by the circumstance that a preference in the selection of deserving recipients was directed to be given to members of the grantor's own family. Their Lordships go with the argument so far as to say that they do not think that a trust which provides for the education of a section of the public necessarily loses its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection. They part with the argument, however, because they do not consider that the trust which is now before them comes within the range of any such qualified exception. Considering what is in effect the absolute priority to the benefit of the trust income which is conferred on the grantor's own family by clause (i) of sub-head (*b*), the only fair way to describe this trust is as a family trust under which the income is made available to provide for the education or training of relatives of the propositus, in this case the grantor himself, provided only that they are young, deserving and of the required Faith. These conditions do not make it the less a family trust. Such a trust is not a trust of a public character solely for charitable purposes.

In the Supreme Court judgment much consideration was given to the English decision *In re Koettgen's Will Trusts*,[17] the facts of which have much in common with those of the present case. The trust there created was expressed to be for the promotion and furtherance of commercial education; the persons eligible were British-born subjects without sufficient means to obtain at their own expense an education for a higher commercial career; and in selecting beneficiaries the trustees were directed to give preference to employees or members of the families of employees of a

[17] [1954] Ch. 252; [1954] 2 W.L.R. 166; [1954] 1 All E.R. 581.

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named company. It is evident that the court's decision, which upheld the trust as a valid trust for charitable purposes, turned on the exact construction which was given to the words of the will. It was argued that the trust was one "primarily for "the benefit of the employees . . . and their families, and that "it was only if there were insufficient employees or members of "their families that the public could come in as beneficiaries "under the trust." The judge says in his judgment that he did not accept that as the true construction of the clause in question; if he had accepted it, it is evident that he would have rejected the trust as a charitable bequest. The construction that he adopted as correct was that the primary class of beneficiaries consisted of persons without sufficient means to obtain commercial education at their own expense, and that the preference given merely amounted to a duty in the trustees to select employees or members of their families, if available, out of this primary class.

It is not necessary for their Lordships to say whether they would have put the same construction on the will there in question as the judge did, or whether they regard the distinction which he made as ultimately maintainable. The decision edges very near to being inconsistent with *Oppenheim's* case,[18] but it is sufficient to say that the construction of the gift which was there adopted does not tally with the construction which their Lordships are bound to place upon the trust which is now before them. Here the effect of the wording of clause 2 (*b*) (i) is to create a primary disposition of the trust income in favour of the family of the grantor.

For the reasons which have been set out above their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

Solicitors: *Smiles & Co.; T. L. Wilson & Co.*

C. C.

[18] [1951] A.C. 297.

[QUEEN'S BENCH DIVISION.]

Feb. 14, 15.
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Lord Parker C.J., Winn and Widgery JJ.

SOUTHEND-ON-SEA CORPORATION *v.* HODGSON (WICKFORD) LTD.

Town Planning — Enforcement notice — Estoppel — Representation by local planning authority's officer that land had existing user right—Land bought and used by purchasers on faith of representation—Resilement by authority from representation—Enforcement notice requiring cesser of user—Whether authority estopped from adducing evidence contrary to representation—Whether statutory discretion

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

exercisable for the benefit of the public—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23.

Estoppel—Conduct, by—Statutory discretion—Prevention or hindrance of exercise—Local planning authority—Representation by authority's officer that land had existing user right—Land bought and used by purchasers on faith of representation—Whether authority estopped from establishing validity of enforcement notice—Town and Country Planning Act, 1947, *s.* 23.

A company wished to establish a builders' yard and found suitable premises. They wrote to the borough engineer, a chief official employed by the local planning authority, saying that they understood that the premises had been used for this purpose for about 20 years, and that they would be pleased if the borough engineer could let them know whether the premises could still be so used. He replied that the premises had an existing user right as a builders' yard and that no planning permission was, therefore, necessary. Relying on the borough engineer's letter, the company bought the premises and started to use them as a builders' yard. They would not have done so if, as a consequence of the letter, they had not thought that no further planning permission was required. Later, the local planning authority notified the company that a considerable amount of evidence had been presented to them showing that the premises had not been used as a builders' yard and had no existing use as such; that they had decided that the premises could not be so used without planning permission; that such use did not appear to be in keeping with the surrounding development; and that the authority required the company to cease using the premises as a builders' yard. The company continued to use the premises for this purpose and the local authority served an enforcement notice on them pursuant to section 23 of the Town and Country Planning Act, 1947,[1] requiring them to cease the use. The company appealed against the enforcement notice to the justices. At the hearing of their complaint the company proved the facts set out above. The authority then proposed to adduce evidence to contradict the statements in the borough engineer's letter. The justices held, inter alia, that the authority was estopped by the letter from contending that planning permission was required and that, accordingly, the evidence sought to be tendered was inadmissible. On appeal by the authority:—

Held, that, assuming that the statement that the premises had an existing user right as a builders' yard was a pure representation of fact, estoppel could not operate to hinder or prevent the exercise

[1] Town and Country Planning Act, 1947, s. 23: "(1) If it appears to the "local planning authority that any "development of land has been carried out after the appointed day "without the grant of permission "required in that behalf . . . the "local planning authority may within "four years of such development "being carried out, if they consider it "expedient so to do having regard to "the provisions of the development "plan and to any other material considerations, serve on the owner and "occupier of the land [an enforcement] notice . . . (4) If any person "on whom an enforcement notice is "served under this section is aggrieved by the notice, he may, at "any time within the period [preceding the taking effect of the "enforcement notice], appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated; and on any such appeal "the court—(*a*) if satisfied that permission was granted under this Part "of this Act for the development to "which the notice relates, or that no "such permission was required in "respect thereof . . . shall quash the "notice to which the appeal relates ". . ."

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by the local planning authority of their statutory discretion under section 23 of the Act of 1947 in deciding whether to serve an enforcement notice, since this discretion was intended to be exercised for the benefit of the public or a section thereof, and that, accordingly, the appeal must be allowed and the evidence admitted.

Maritime Electric Co. Ltd. v. *General Dairies Ltd.* [1937] A.C. 610; 53 T.L.R. 391; [1937] 1 All E.R. 748, P.C. applied.

Per curiam. There is no logical distinction quoad estoppel between the prevention or hindrance of a positive statutory duty and the prevention or hindrance of the exercise of a statutory discretion.

Case stated by Southend-on-Sea borough justices.

On April 29, 1960, a complaint was preferred by the respondents, Hodgson (Wickford) Ltd., against the appellants, the Southend-on-Sea Corporation, the local planning authority, by way of appeal under section 23 (4) of the Town and Country Planning Act, 1947 (hereinafter called "the Act"), against an enforcement notice dated April 19, 1960.

The justices heard the complaint on June 13, 1960, when the following facts were proved by the respondents: The respondents had wished to establish a builders' yard in Southend and eventually discovered suitable premises at No. 37, Eastwood Road North, Leigh-on-Sea. Before purchasing the land at No. 37, Eastwood Road North, the respondents wrote the following letter dated February 6, 1959, to the borough engineer: "Dear Sir, "We have been looking for a builders' yard for some time, and "we now have the opportunity to purchase one, at 37, Eastwood "Road North, which we understand has been a builders' yard "for about 20 years, until the death of the owner. Although we "hope there will be no objection to our continuing this type of "business, we would be very pleased if you could let us know "if this can still be used for a builders' yard. We are enclosing "a rough site plan for your information. Yours faithfully, Hodg-"son (Wickford) Ltd. F. Hodgson, Director."

By letter dated February 12, 1959, the borough engineer, a chief official employed by the appellants, replied: "Dear Sirs, "Proposed builders' yard, 37, Eastwood Road North, Leigh-on-"Sea. In reply to your letter dated February 6, the land you "have shown on the plan accompanying your letter has an exist-"ing user right as a builders' yard and no planning permission "is therefore necessary. Yours faithfully, T. B. Hill, Borough "Engineer."

Relying on the letter of February 12, the respondents purchased the land, moved a quantity of builders' equipment and materials onto it and used it as a builders' yard; the respondents would not have bought the land if, as a consequence of the letter of February 12, they had not thought that no further planning permission was required.

On July 17, 1959, the appellants' town clerk wrote a letter to the respondents containing the following passages: "I am

" . . . given to understand that you have had correspondence " with the Borough Engineer in which it was suggested that the " land had an existing use as a builders' yard. However, the " Southend-on-Sea Corporation has received many complaints " about the use of this land, as a result of which a considerable " amount of evidence has been presented to the Corporation " showing that the land has not been used as a builders' yard " and has no existing use as such.

" I am writing, therefore, to inform you that the Corporation " has decided that the land cannot be used as a builders' yard " without planning permission and, furthermore, that such use " does not appear to them to be in keeping with the surrounding " development.

" I have been instructed, therefore, to write and inform you " that the Corporation require you to cease using the land as a " builders' yard."

The respondents replied, saying that they felt that they had been unfairly treated. On April 20, 1960, the appellants served on the respondents an enforcement notice dated April 19, 1960 (the subject of the complaint), reciting, inter alia, that the use of the land as a builders' yard had commenced within four years of the date of service of the notice. The notice required the respondents, within 14 days of May 19, 1960, to cease the use of the land for this purpose.

At the date of the hearing before the justices the land was still being used by the respondents as a builders' yard.

At the close of the respondents' case the appellants proposed to call evidence; the respondents submitted that any such evidence was inadmissible. They contended that no planning permission was required for the development to which the notice related; that the appellants were estopped from calling evidence to contradict the statements contained in the letter of February 12, 1959; that the letter of February 6, 1959, was a valid application under section 17 of the Act for determination by the appellants of the question whether the operations and use proposed by the respondents on the land would constitute or involve development and, if so, whether an application for planning permission was required; and that the letter of February 12, 1959, was a valid determination of the question or was reasonably accepted as such by the respondents.

It was contended by the appellants that they were entitled to call evidence to contradict the statements contained in the letter of February 12; that the letter of February 6 was not and did not purport to be an application under section 17, nor the letter of February 12 a notice of determination of such an application; that such an application could in any event only be validly determined by the duly authorised committee of the appellants and that no such committee (as could be established by evidence) had considered the letter of February 6 or authorised the reply

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of February 12, and that, accordingly, the appellants could not be bound thereby as a valid determination under section 17; that the appellants could not be prevented by an estoppel from performing their statutory functions for the public benefit with respect to the control of development under Part III of the Act; and that in any event the appellants should not be prevented from calling evidence to show that the statement relied upon as giving rise to the estoppel had been made by reason of mistake and/or misrepresentation.

The justices were of opinion that the respondents, in their letter of February 6, fulfilled all the requirements of article 5 (4) and (5) of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (hereinafter called "the Regulations"), to ascertain whether planning permission was required pursuant to section 17; that the appellants did not comply with the statutory requirements of article 5 (6) of the Regulations; that the respondents were entitled to assume that the borough engineer had consulted any other departments or committees which it was deemed necessary to consult before the letter of February 12 was written to the respondents; that the letter of February 12 was quite clear and explicit and on the face of it was an authoritative statement intended to be acted upon, and the fact that the respondents purchased the land and used it as a builders' yard was sufficient to make the letter binding; that as the borough engineer was the appropriate person to consult to ascertain whether planning permission was required, he was the only person who could inform the respondents that planning permission was or was not required, and therefore his action could not be ultra vires and must be binding upon the appellants; and that the appellants were therefore estopped from declaring that planning permission was required.

The justices, accordingly, held the evidence proposed to be tendered by the appellants to be inadmissible and quashed the enforcement notice. The appellants appealed.

Nigel Bridge for the appellants.
Hugh Forbes for the respondents.

The following cases, which are not referred to in the judgment, were cited in argument: *Sunderland Corporation* v. *Priestman*[2]; *Robertson* v. *Minister of Pensions*[3]; *Howell* v. *Falmouth Boat Construction Co. Ltd.*[4]; *Attorney-General* v. *Smith*[5]; *In re 56, Denton Road, Twickenham.*[6]

[2] [1927] 2 Ch. 107.
[3] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.
[4] [1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278, H.L.
[5] [1958] 2 Q.B. 173; [1958] 3 W.L.R. 81; [1958] 2 All E.R. 557.
[6] [1953] Ch. 51; [1952] 2 T.L.R. 676; [1952] 2 All E.R. 799.

LORD PARKER C.J. stated the facts and continued: I confess that I have strained throughout to support the decision of the justices, which clearly sounds common sense, particularly when the respondents have only acted as they have done as the result of the letter from the borough engineer. It is said, nevertheless, that the action taken by the appellants is justified in law and that no estoppel can be raised against them based on that letter.

The broad submission made by Mr. Bridge on behalf of the appellants is that estoppel cannot operate to prevent or hinder the performance of a statutory duty or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public. It is further said that the discretion of a local planning authority to serve an enforcement notice under section 23 in respect of development in fact carried out without permission is a statutory discretion of a public character. It is perfectly clear that that proposition is sound, at any rate to this extent, that estoppel cannot operate to prevent or hinder the performance of a positive statutory duty. That, indeed, is admitted by Mr. Forbes on behalf of the respondents, but he maintains that it is limited to that and that it does not extend to an estoppel which might prevent or hinder the exercise of a statutory discretion. I can see no logical distinction between the two. In *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*[1] the appellants, who were a public utility company, were under the relevant statute[2] to be under this duty: "No "public utility shall charge, demand, collect or receive a greater "or less compensation for any service, than is prescribed in such "schedules as are at the time established, or demand, collect "or receive any rates, tolls or charges not specified in such "schedules." Over a considerable period sums less than the statutory charges were obtained from the respondents on representations that only so much electricity had been consumed. In fact the meter that was read only recorded one-tenth of the charge, and by mistake in rendering their accounts the appellants had failed to multiply the amount shown on the meter by 10. An estoppel was sought to be raised against them, and Lord Maugham said[3]: "In such a case—and their Lordships do not "propose to express any opinion as to statutes which are not "within this category—where, as here, the statute imposes a "duty of a positive kind, not avoidable by the performance of "any formality, for the doing of the very act which the plaintiff "seeks to do, it is not open to the defendant to set up an "estoppel to prevent it. This conclusion must follow from the "circumstance that an estoppel is only a rule of evidence which "under certain special circumstances can be invoked by a party "to an action; it cannot therefore avail in such a case to release "the plaintiff from an obligation to obey such a statute, nor can

[1] [1937] A.C. 610; 53 T.L.R. 391; [1937] 1 All E.R. 748, P.C.

[2] Public Utilities Act, R.S. of New Brunswick, 1927, s. 16.

[3] [1937] A.C. 610. 620.

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"it enable the defendant to escape from a statutory obligation of "such a kind on his part. It is immaterial whether the obliga-"tion is onerous or otherwise to the party suing. The duty of "each party is to obey the law."

As I have said, I can see no logical distinction between a case such as that of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion. There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion. Similarly, as it seems to me, an estoppel cannot be raised to prevent or hinder the exercise of the discretion.

Having said that, it seems to me that this matter comes down to a very narrow point on the construction of the letters to which I have referred. Based on that principle, it is conceded that in so far as the letter from the borough engineer was saying that no permission was necessary, that could not be raised as an estoppel. What is said, however, is that that letter contains a representation of a fact which can operate as an estoppel against the appellants just as it could between private parties, namely, the representation that the land has an existing user right as a builders' yard. It is said that that is a pure representation of fact which does not prevent or hinder the exercise of the discretion which the local planning authority has under section 23 in regard to the service of enforcement notices. I am by no means certain that that letter, read as a whole, can be looked upon as a pure representation of fact, but assuming that it can be read in that sense, the question arises whether it does not, even so, limit or hinder the free exercise by the planning authority of their discretion under section 23.

Section 23, so far as it is material, by subsection (1) provides: "If it appears to the local planning authority that any develop-"ment of land has been carried out after the appointed day "without the grant of permission required in that behalf . . . the "local planning authority may . . . if they consider it expedient "so to do having regard to the provisions of the development "plan and to any other material considerations, serve on the "owner and occupier of the land a notice under this section," that is, an enforcement notice.

It seems to me, therefore, that if the appellants are not allowed in this case to adduce evidence as to what the true position was in regard to existing user, they must be prevented from exercising their free discretion under the section. It is true that it can be said, as in this case, that they have exercised their discretion. They have said that it appears to them that the development of land has been carried out without permission,

and therefore to that extent the exercise of the discretion has not been hampered; but it seems to me quite idle to say that a local authority has in fact been able to exercise its discretion and issue an enforcement notice if by reason of estoppel it is prevented from proving and showing that it is a valid enforcement notice in that amongst other things planning permission was required. I have reluctantly come to the conclusion, accordingly, that the argument for the appellants is right, and that this appeal should succeed.

I would only add this, that apparently a point was taken before the justices that the two letters of February 6 and February 12 were, respectively, an application under section 17 of the Act to determine whether planning permission was necessary and a determination by the local planning authority that no permission was necessary. Before this court, however, that point, though not actually abandoned, has not been argued and I am quite satisfied that on the reading of those letters it cannot be said either that there was a valid application under section 17 or a proper determination thereunder.

WINN J. I agree.

WIDGERY J. I also agree.

Appeal allowed with costs.
Leave to appeal.

Solicitors: *Sharpe, Pritchard & Co. for Town Clerk, Southend-on-Sea; Drysdale, Lamb & Jackson.*

[PRIVY COUNCIL.]

MANGALESWARI . . . . . APPELLANT;

AND

VELUPILLAI SELVADURAI AND OTHERS . RESPONDENTS.

J. C.*
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April 26.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Tesawalamai — Land — Pre-emption — Two equal co-owners of land—Sale by one of his half-share to stranger—No prior notice to co-owner—Action to enforce right of pre-emption—Time of accrual—Date of knowledge of sale—Pre-emptor not required to prove financial ability and intention to purchase at date of sale—Whether knowledge of natural guardian imputed to minor.
Roman-Dutch Law—Retraction or naesting—Extent of right—Ceylon.
Mohammedan Law—Pre-emption, right of—Extent of right—Ceylon.

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* *Present*: LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD DENNING, LORD MORRIS OF BORTH-Y-GEST, the RT. HON. L. M. D. DE SILVA.

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Under the law of Tesawalamai—a body of customary law, subsequently given statutory force, obtaining among the inhabitants of the Northern Province of Ceylon—where the requisite notice has not been given by one of two co-owners of land in equal shares to the other before a sale of his own undivided half-share to a stranger a cause of action accrues to the other co-owner to enforce his right of pre-emption on his gaining knowledge of the sale and to have it set aside and the half-share transferred to him on the same terms as those on which the sale had taken place. He has not to "establish by positive proof that, had he in fact "received the requisite notice, he would and could have purchased "the property himself . . . rather than permit it to be sold to a "stranger."

Velupillai v. *Pulendra* (1951) 53 N.L.R. 472 overruled.

There is nothing in the statutory provisions of the Tesawalamai or in previous decisions of the Supreme Court of Ceylon to support the principle in *Velupillai* v. *Pulendra* (supra) that the pre-emptor must show that had he received notice he could and would have purchased the property. Further, there is nothing in Roman-Dutch law, which "where the Tesawalamai is silent is applicable" (*Sabapathypillai* v. *Sinnatamby* (1948) 50 N.L.R. 367), which supports that principle; nor is there anything in the Muslim law relating to pre-emption directly or indirectly to support it. The principle does not form part of the law of Ceylon.

Kathiresu v. *Kasinather* (1923) 25 N.L.R. 331, at 332; *Mailvaganam* v. *Kandiah* (1930) 32 N.L.R. 211, at 213 and *Karthigesu* v. *Parupathy* (1945) 46 N.L.R. 162 considered.

The appellant and her father, the first respondent, inherited in 1935 certain land as co-owners in equal shares. In 1937 the first respondent sold his half-share to the second respondent. The appellant, who did not become aware of the sale until January, 1950, shortly thereafter, and while still a minor, brought an action to enforce a right of pre-emption under the law of Tesawalamai, which was applicable to the rights of the parties, in respect of the undivided half-share sold by her father, and asked that the conveyance to the second respondent should be set aside and her father ordered to execute a deed of transfer in her favour on her bringing into court a sum equal to the consideration paid by the second respondent:—

Held, that notice to, or knowledge of, a natural guardian as interested as her father could not be imputed to the minor appellant; that her cause of action arose at the time when she came to know of the sale; that she had not to show that had she received the requisite notice she would and could have purchased the property; and that she was entitled to the relief claimed on depositing the amount of the consideration in court.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 10 of 1958) from a judgment and decree of the Supreme Court of Ceylon (June 25 and 26, 1952, respectively) allowing an appeal from a judgment and decree of the District Court of Chavakachcheri (November 28, 1950) whereby it had been held, inter alia, that the appellant was entitled to pre-empt an undivided half-share in certain land sold by the first respondent.

The following facts are taken from the judgment of the Judicial Committee: The appellant, a minor at the time but now a major, instituted this action through her duly appointed next friend in

the District Court of Chavakachcheri on August 30, 1950, to enforce a right of pre-emption under the law of Tesawalamai in respect of an undivided half-share of a certain land. It was agreed that the law of Tesawalamai was applicable to the rights of parties in this case. She prayed that a deed of conveyance executed by the first respondent in favour of the second respondent be set aside and that the first respondent be ordered to execute a deed of transfer in her favour on her bringing into court a sum of Rs. 1,500, which was the consideration paid by the second respondent to the first on the deed, or other sum as the court might fix.

The district judge entered judgment in her favour on November 28, 1950, giving her time till December 18, 1950, to deposit a sum of Rs. 1,500 in court. She had deposited in court the said sum of Rs. 1,500 and a further sum of Rs. 1,500 determined by the district judge to be payable as compensation for improvements.

The Supreme Court (Gunasekera J., with whom Gratiaen J. agreed) set aside the said judgment and dismissed the action. The present appeal was from that order.

The appellant (born in 1930) and her father, the first respondent, inherited as co-owners in equal shares the property in question under the last will of her mother, who died in 1935. In September, 1937, the first respondent sold his half-share of it to the second respondent who, in turn, had sold the property to the third and fourth respondents. The appellant as a co-owner fell into the category of persons entitled to pre-empt under the Tesawalamai. The second and third and fourth respondents did not fall into that category. It had been stated by the appellant in evidence, and found by the district judge, that she did not become aware of the sale till after the institution of a certain partition action (the details of which were not material to this case) on January 10, 1950. That finding was not challenged on this appeal or elsewhere.

1961. Feb. 27, 28. *Stephen Chapman Q.C.* and *John Stephenson Q.C.* for the appellant.

Gilbert Dold and *J. B. Baker* for the second respondent (now deceased and represented by his widow) and for the fifth, sixth, seventh and eighth respondents (substituted together with the third and fourth respondents in place of the deceased second respondent).

The first respondent did not appear and was not represented.

The tenth and eleventh respondents were substituted for the ninth respondent, a defendant in the action, since deceased. They were not represented on this appeal.

The following cases, in addition to those referred to in the

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judgment, were cited in argument: *Puthatampy* v. *Mailvakanam* [1]; *Seelachchy* v. *Visuvanathan Chetty* [2]; *Tillainathan* v. *Ramasamy Chetty* [3]; *Suppiah* v. *Thambiah* [4]; *Silva* v. *Mohamadu* [5]; *In re David Payne & Co. Ltd.* [6]; *Stool of Abinabina* v. *Chief Kojo Enyimadu* [7]; *Connecticut Fire Insurance Co.* v. *Kavanagh* [8]; *Basant Singh* v. *Mahabir Pershad* [9]; *Chinnappa* v. *Kanakar* [10]; *Iya Mattayer* v. *Kanapathipillai* [11]; *Thangammah* v. *Kanagasabai* [12]; *Annapillai* v. *Eswaralingam* [13]

April 26. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA, who stated the facts set out above and continued: The Tesawalamai is a body of customary law obtaining among the inhabitants of the Northern Province of Ceylon. Its origin has been the subject of some controversy. It was collected and put into writing at the instance of the Dutch Governor Simons in 1706 and, after the British occupation, given the force of law by Regulation 18 of 1806 which, as amended by Ordinance No. 5 of 1869, is now Chapter 51 of the Legislative Enactments of Ceylon (Vol. II, p. 49). Part VII relates to pre-emption. There have been subsequent amendments but these were subsequent to the date of the sale mentioned above, and have not been invoked by the parties in the courts in Ceylon.

Under the Tesawalamai any of several persons (among them co-owners as stated above) falling into a defined category had on any proposed sale of a land to a person outside the category the right to demand that the property be sold to him on the same terms and conditions as on the proposed sale. Notice had to be given to all persons in the category or else the sale was liable to be defeated by any one of them. The position was correctly stated in the judgment of the Supreme Court in *Kathiresu* v. *Kasinather* thus *: "The Tesawalamai itself declared the form of "notice to be given where a co-owner has the right of pre-"emption. But by Ordinance No. 4 of 1895, so much of the "Tesawalamai as requires publication and schedules [these were "prescribed formalities] of intended sales of immovable property "was repealed. But this court held in *Suppiah* v. *Thambiah*,† "that notwithstanding the abolition of publication and schedules "of intended sales, the liability of a co-owner desiring to sell his "share of a land to give reasonable notice to his other co-owners "of the intended sale still survived."

It was further held in *Kathiresu* v. *Kasinather* ‡ and approved in *Mailvaganam* v. *Kandiah* § "that a person who has knowledge

[1] (1897) 3 N.L.R. 42.
[2] (1922) 23 N.L.R. 97.
[3] (1900) 4 N.L.R. 328.
[4] (1904) 7 N.L.R. 151.
[5] (1916) 19 N.L.R. 426.
[6] [1904] 2 Ch. 608; 20 T.L.R. 590, C.A.
[7] [1953] A.C. 207, P.C.
[8] [1892] A.C. 473; 8 T.L.R. 752, P.C.
[9] (1913) L.R. 40 I.A. 86.
[10] (1910) 13 N.L.R. 157.
[11] (1928) 29 N.L.R. 301.
[12] (1949) 51 N.L.R. 500.
[13] (1960) 62 N.L.R. 224.
* (1923) 25 N.L.R. 331, 332.
† (1904) 7 N.L.R. 157.
‡ 25 N.L.R. 331.
§ (1930) 32 N.L.R. 211, 213.

"of an intended sale by a co-owner of his share and does not offer "to exercise his right of pre-emption cannot thereafter bring an "action for pre-emption and that the burden of proof is on the "defendant to prove that he either gave formal notice or that "the plaintiff had knowledge of the intended sale."

Their Lordships are of opinion, consistently with views expressed by the Supreme Court of Ceylon in various decisions, that where no notice has been given before the sale a cause of action accrues to a pre-emptor on his gaining knowledge of the sale to have it set aside and the property transferred to him on the same terms as those on which the sale had taken place. This principle, while it stood, created no doubt a serious difficulty in making sure that a proposed transfer of land would be sound. Amending legislation has been passed in 1947 to meet this and other difficulties arising from the Tesawalamai in dealing with land.

The Supreme Court allowed the appeal of the respondents and dismissed the action on the basis of the case of *Velupillai* v. *Pulendra*,[5] decided two years earlier by the same judges, in which it was held "it is fundamental to the cause of action such as is "alleged to have arisen in this case that the pre-emptor should "establish by positive proof that, had he in fact received the "requisite notice, he would and could have purchased the pro-"perty himself within a reasonable time rather than permit it to "be sold to a stranger." On an examination of the evidence in the present case they came to the conclusion that the appellant's estate was insufficient for the purpose (of a purchase) at the time of the sale by the first respondent to the second in 1937. For these reasons they dismissed the action.

It is necessary now to examine whether the view expressed in *Velupillai* v. *Pulendra*[6] is sound. It has been urged by counsel for the appellants, and not challenged by counsel for the respondent, that there is nothing in the statutory provisions of the Tesawalamai or in previous decisions of the Supreme Court which supports the view mentioned. In such circumstances the courts in Ceylon have derived assistance sometimes from the Roman-Dutch law and sometimes from the Muslim law relating to pre-emption. There has been a difference of opinion as to which system should be resorted to. It was held by the Supreme Court in *Karthigesu* v. *Parupathy*[7]: "pre-emption as it "prevails in British India owes its origin entirely to Mahome-"dan Law and the provisions in the Tesawalamai (Legis-"lative Enactments, Volume 2, Chapter 51, Part 7) may be due "to the early occupation of North Ceylon for a time by Mahome-"dans or the later occupation by the Malabars who had them-"selves come under Mahomedan influence in India. The "decisions of the Indian courts on questions of pre-emption may,

[5] (1951) 53 N.L.R. 472, 474.
[6] Ibid.
[7] (1945) 46 N.L.R. 162, 163.

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"therefore, be taken as guides so far as such decisions are not "affected by statutes or the personal law governing persons of "Islamic faith."

But it was held in *Sabapathypillai* v. *Sinnatamby* [8] that "where the Tesawalamai is silent the Roman-Dutch law is "applicable." This view has also been expressed in other cases

Counsel for the appellant argues, correctly in their Lordships' opinion, that there is nothing in either system which supports the view expressed in *Velupillai* v. *Pulendra* [9] and that, on the contrary, there is a certain amount which appears to be inconsistent with it.

It appears to their Lordships that neither the Roman-Dutch law nor the Muslim can be regarded as part of the law of Tesawalamai, but that it is permissible to look at the law obtaining in those systems, to ascertain the reasoning which underlies the principle of pre-emption as it is to be found in them in dealing with various problems; and, when not in conflict with the principles of Tesawalamai as established in Ceylon and otherwise appropriate, to borrow such rules and concepts as seem best suited to the situation in Ceylon.

Grotius, Book III, Chapter XVI, section 10 (Lee's Translation of the Jurisprudence of Holland by Hugo Grotius, p. 379) says: "10. The right of recall must be instituted within a year of the "sale or, at all events, within a year of its coming to the know-"ledge of the person asserting the right, as to which he may be "put to this oath." He does not say that the pre-emptor must show he was able to produce the money necessary for pre-emption at the time of the sale, or at the time it comes to his knowledge.

Voet in his commentary on the Pandects (Berwick's Translation, p. 61), founding himself upon Tiraquellus, says: "A renun-"ciation of the right of retractus is indeed not to be inferred "merely from one having refused to purchase the thing when "offered to him by a cognate; for many circumstances might "dissuade him from an immediate purchase, for example, less "astuteness on the part of the cognate [vendor] than on that of "the extraneous purchaser, which might make it more to the "advantage of the latter to avail himself of the right of retractus "after it has been already purchased than to be himself the first "purchaser; want of ready money which however he might be "able to procure within the year allowed for the exercise of the "right; and many others. Tiraquellus *De retractu gentilit*, § 1, "*gloss.* 9, *n.* 145. Nor is renunciation to be inferred from the "circumstance of his having been present at the sale and "remaining silent; for such silence is rather to be attributed to "his knowledge that his right would last for the term of a whole "year or other period defined by statute."

Retraction (or naesting) was the name given in Roman-Dutch law to pre-emption. It will be seen that under the

[8] (1948) 50 N.L.R. 367. [9] 53 N.L.R. 472.

Roman-Dutch law a pre-emptor was in a position much more privileged than under the law of Ceylon. There is nothing in the Roman-Dutch law which directly or indirectly supports the view on which the judgment of the Supreme Court rests.

Their Lordships have been referred to various passages in the works of Mulla, Wilson and Tyabji which satisfy them of the negative proposition that there is nothing in the Muslim law which supports directly or indirectly the view of the Supreme Court. They will make reference to a passage which appears in Wilson's Anglo-Muhammadan Law (6th ed., p. 415, art. 387): "It is not "necessary according to Muhammadan Law, but it is sometimes "required by the local wajib-ul-arz, [local board of rights, p. 66 "ib] that the owner of property should give notice to the persons "having the right of pre-emption before selling to a stranger. "Under the Muhammadan Law the right cannot be lost by delay "in making the demand until the existence of a binding contract "has actually come to the knowledge of the pre-emptor; where "notice is required by the wajib-ul-arz the right is lost unless the "pre-emptor replies to the notice within a reasonable time after "receiving it, offering to purchase at the price asked, or at a price "to be settled in accordance with the provisions of the wajib-ul-"arz."

There is no indication in this passage or elsewhere that if the property is sold without notice the pre-emptor asserting his right to pre-emption in an action must "establish by positive proof "that had he in fact received the requisite notice, he would and "could have purchased the property himself rather than permit "it to be sold to a stranger," and no indication of anything which resembles what has just been said in any way.

It appears from what has been said that there is nothing in the Roman-Dutch law or the Muslim law which can be said to support the principle upon which the judgment of the Supreme Court rests. The passages quoted tend on the whole to be opposed to such a principle. As already stated, there is nothing in the statute law or in the decisions of the Ceylon courts which has a bearing on it. Their Lordships are of opinion that it must be held that the principle does not form part of the law in Ceylon. The Supreme Court in laying down the principle observed [10]: "A "would-be pre-emptor cannot claim to be in a better position "by not receiving notice of the intended sale than he would have "been if he had received such notice." On the other hand, it has to be noted that the point of time at which the cause of action arises in the case of a sale without notice is, as already stated, the time at which the person deprived of his rights as a pre-emptor comes to know of the sale. This may be a considerable time after the sale and still further from the time at which he should have received notice. Had he received notice and did not possess the necessary money at the time he might have raised

[10] 53 N.L.R. 472, 474.

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it. It would not be just to insist that he should establish facts which might well have existed some considerable time before the action, but of which it might at the time of action be difficult to obtain evidence in a convincing form; for instance, a person who might at the relevant time have assisted the pre-emptor with money might be dead or, if alive, his evidence could be criticised on the ground that he is saying he would have done something which he was never called upon to do in the past and would not be called upon to do in the future.

It was argued that the vendor, being the father of the minor, was her natural guardian, and that his knowledge of the sale should be imputed to her. The Supreme Court did not decide this question as the view discussed above taken by it was sufficient to dispose of the case. Their Lordships do not find it necessary to consider the general question as to the circumstances, if any, under which notice to a natural guardian can under the law of Ceylon be said to be notice to a minor sufficient to bind him (or her). They are of opinion that notice to, or the knowledge of, a natural guardian as interested as the first respondent could not be imputed to the appellant.

The Muslim law, while recognising the doctrine of pre-emption, does not look upon it with favour. Thus Tyabji (Muhammadan Law, 3rd ed.) says at p. 725: "Pre-emption is not favoured by "the law," and further: "The right of shufa [pre-emption] is but "a feeble right, as it is a disseising another of his property, merely "in order to prevent apprehended inconveniences." In Ceylon it was said rightly by the Supreme Court in 1923 in the case of *Kathiresu* v. *Kasinather* [11]: "The right of pre-emption imposes "a serious fetter on an owner's right of free disposition of pro-"perty, and the facts have to be carefully scrutinised before a "co-owner is allowed to set aside a sale on such a ground." In the case of *Velupillai* v. *Pulendra* [12] the Supreme Court was no doubt quite rightly scrutinising the circumstances closely, but with all respect their Lordships cannot find sufficient material upon which the view expressed by it can be sustained.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal should be allowed, the decree of the Supreme Court set aside and the decree of the District Court restored. The costs in the Supreme Court and on this appeal must be paid by the second to eleventh respondents. The first respondent filed no answer and raised no opposition at any stage of the case.

Solicitors: *Lee & Pembertons; A. L. Bryden & Williams.*

C. C.

[11] 25 N.L.R. 331, 332–333. [12] 53 N.L.R. 472.

[CHANCERY DIVISION.]

In re HOWARD'S WILL TRUSTS. LEVIN AND OTHERS *v.* BRADLEY AND OTHERS.

1961
March 21, 22, 23, 29.

Wilberforce J.

[1960 H. No. 3503.]

Name and Arms Clause—Condition subsequent—Public policy—Uncertainty—Direction to "take use and bear" surname "upon all "occasions"—Forfeiture on refusal or neglect, or if person entitled should "discontinue" to use name—Direction applying to married women and their husbands—Whether void for uncertainty—Whether contrary to public policy.

Will—Construction—Acceleration—Forfeiture clause—Time of application—Life interest released to remainderman—"Under the limita- "tions" herein—Name and arms clause.

Severability of Documents—Name and arms clause—Public policy—Partly contrary to public policy (post, p. 834).

Judicial Precdeent—Public policy—Decision at first instance—Stare decisis.

By his will, dated February 19, 1930, a testator devised three freehold estates to his trustees on trust for his wife for life, and after her death for his daughter, his only child, for her life, with remainders over among his grandchildren. By clause 8 of his will the testator directed that every person other than his daughter who became entitled "under the limitations hereinbefore contained" as tenant for life or tenant in tail male or tail general to the possession or receipt of the rents and profits of the settled estates, and who did not at that time use and bear the surname and arms of Howard "shall within one year after becoming so entitled or (being an "infant) within one year after attaining the age of 21 years and "also every person . . . being the husband of a woman becoming so "entitled shall within one year after his marriage or within one "year after his wife becomes so entitled . . . take use and bear "and every other person becoming so entitled who already uses the "name of Howard shall continue to use and bear in all deeds and "writings which he or she shall sign and upon all occasions the "surname of Howard and . . . shall apply for and endeavour to "obtain the royal licence or take such other steps as may be "required to authorise the user and bearing of the said surname and "arms and further that in case any person or the husband of "any person becoming so entitled . . . should refuse or neglect "within the time aforesaid to take use and bear the same . . . "or . . . should discontinue to use and bear the same (except in "the case of a woman upon marriage) then . . . immediately after "the expiration of the said . . . year or immediately after such "discontinuance . . . the estate for life . . .[or] . . . the estate in "tail male or in tail general of that person shall absolutely deter- "mine" and the settled estates should devolve as though the person concerned being a tenant for life were dead, or being a tenant in tail were dead and without heirs.

The testator died on April 22, 1934, and his wife in 1941. His daughter died on January 5, 1960, at which date, in the events which had happened, the persons beneficially interested under the separate limitations of each estate in the will were respectively a man (the testator's grandson), a widow and a married woman (the testator's granddaughters). Between 1950 and 1958 the testator's

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daughter released part of her interest in two of the settled estates to the widow and the married woman, thus accelerating their interests. By January 5, 1961, none of those persons had taken any steps to comply with the direction in clause 8 of the will.

On a summons to determine whether clause 8 of the will was valid and binding, or whether it was void for uncertainty or as being contrary to public policy, and if it were binding, whether the term of one year after refusing or neglecting to assume the surname and arms began, as regarded the testator's granddaughters, on January 5, 1960, on the death of his daughter, or on the dates of the releases by her:—

Held, (1) that adopting the principle of reasonable construction, the clear meaning of the injunction to "take use and bear" the surname of Howard "on all occasions" was that the surname should be used on all occasions on which a surname would be used, and of "discontinue" that failure to use the surname on one such occasion would be a breach of the injunction occasioning a forfeiture, and that, accordingly, the clause was not void for uncertainty (post, p. 830).

In re Neeld [1960] Ch. 455; [1960] 2 W.L.R. 730; [1960] 2 All E.R. 33; *In re Drax* (1906) 22 T.L.R. 343 followed.

In re Wood's Will Trusts [1952] Ch. 406; [1951] 1 T.L.R. 670; [1952] 1 All E.R. 740; *In re Kersey* [1952] W.N. 541 distinguished.

(2) That in so far as it applied to women married at the date of its operation or their husbands, the clause was void as being contrary to public policy; but that otherwise it was not contrary to public policy and was binding (post, p. 834).

In re Neeld (supra) followed.

(3) That, as regards the testator's granddaughters, the term of one year did not begin until the death of the testator's daughter on January 5, 1960, for it was not until that date that they became "entitled under the limitations hereinbefore contained" (post, p. 835).

In re Petre [1910] 1 Ch. 290 applied.

(4) That since the testator's widowed granddaughter and his grandson, had known of the existence of the clause, and had not complied with it within one year of the death of his daughter, they had neglected to act under it and that, accordingly, their interests were forfeited.

ADJOURNED SUMMONS.

By his will, dated February 19, 1930, the testator, Philip John Canning Howard, devised three freehold estates, the Corby estate, the Foxcote estate and the Middleton estate, the "settled estates," to his trustees on trust, subject to certain charges relating to the estate as a whole which ceased to be payable, for his wife for life, and after her death for his daughter, Lady Ursula Mary Lawson, the wife of Sir Henry Joseph Lawson, for life, with remainders over. Clause 8 of the will read: "I declare that every person (other "than Lady Lawson or a peer or peeress) who under the limita- "tions hereinbefore contained becomes entitled as tenant for life "or as tenant in tail male or in tail general by purchase to the "possession or to the receipt of the rents and profits of my settled "estates or any part thereof and does not at the time of becoming "so entitled use and bear the surname and arms of Howard shall "within one year after becoming so entitled or (being an infant)

"within one year after attaining the age of 21 years and also "every person (other than the said Sir Henry Joseph Lawson or "a peer) being the husband of a woman becoming so entitled "shall within one year after his marriage or within one year after "his wife becomes so entitled or if he be an infant then within "one year after attaining the age of 21 years (whichever of the "three last mentioned events last happens) unless in any case pre-"vented by death take use and bear and every other person "becoming so entitled who already uses the name of Howard "shall continue to use and bear in all deeds and writings which "he or she shall sign and upon all occasions the surname of "Howard and every such person who shall also for the time "being be entitled to the possession or receipt of the rents and "profits of the Lawson family estates in the county of York and "elsewhere or upon whom the baronetcy held and enjoyed by the "said Sir Henry Joseph Lawson shall devolve in conjunction "with the surname of Lawson and so that the surname of "Howard shall immediately precede the surname of Lawson and "as to every other such person without any other surname "and shall also use the arms of Howard As to every such per-"son who shall also for the time being be entitled to the "possession or the receipt of the rents and profits of the Lawson "family estates aforesaid or upon whom the said baronetcy held "and enjoyed by the said Sir Henry Joseph Lawson shall "devolve quartered with the Lawson family arms and as to every "other such person without any other arms and every such "person if not having already borne and used the surname and "arms of Howard shall apply for and endeavour to obtain the "royal licence or take such other steps as may be requisite to "authorise the user and bearing of the said surname and arms "and further that in case any person or the husband of any "person becoming so entitled (other than Lady Lawson and the "said Sir Henry Joseph Lawson and not being a peer or peeress) "and not having already taken or used and borne such sur-"name and arms should refuse or neglect within the time afore-"said to take use and bear the same respectively or to take such "steps as aforesaid or if any person or the husband of any person "so entitled and using or bearing such surname and arms should "discontinue to use and bear the same (except in the case of a "woman upon marriage) then and in every such case immediately "after the expiration of the said term of one year or imme-"diately after such discontinuance as aforesaid as the case may "be if the person who or whose husband shall so refuse or "neglect or discontinue as aforesaid shall be tenant for life the "estate for life of that person shall absolutely determine and if "the person who or whose husband shall so refuse neglect or "discontinue as aforesaid shall be tenant in tail male or in tail "general then the estate in tail male or in tail general of that "person shall absolutely determine and my settled estates shall

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"immediately go to the person next in remainder under the "limitations hereinbefore contained in the same manner as if in "the case of a person whose estate for life is so made to determine that person were dead or in the case of a person whose "estate in tail male or in tail general is so made to determine "that person were dead and there were a general failure of issue "of that person inheritable to that estate which is so made to "determine."

The testator died on April 22, 1934, and his will was proved on October 24, 1934. His widow died on May 22, 1941, and his daughter, who after the death of Sir Henry Joseph Lawson married one Hugh Levin, died on January 5, 1960. At the date of her death, in the events which had happened, the settled estates were held on the following trusts: The Corby estate was held on trust for William Howard Lawson, the younger son of Mrs. Levin, for life, with remainder to his son, John Philip Lawson, for life, with remainder (subject to defeasance in the event of issue being born to John Philip Lawson) to Hugh William Lawson, the second son of William Howard Lawson, in tail male. The Foxcote estate was held on trust for Mrs. Mary Catherine Bradley, the elder daughter of Mrs. Levin, who at the date of the testator's death was married to Geoffrey Bradley, who died on March 16, 1945, and, she having had no children, with remainder to Denis Gerard Waterkeyn, the son of Mrs. Aurea Clare Waterkeyn, the younger daughter of Mrs. Levin and who was also married at the date of the testator's death, for life, with remainder to his infant son, Francis Howard Waterkeyn, in tail male with remainder to him in tail general, with remainder to his infant sister, Catherine Anne Waterkeyn, in tail male with remainder over. By a deed of release and surrender dated November 1, 1960, Mrs. Aurea Clare Waterkeyn had released her contingent reversionary life interest in the Foxcote estate to the intent that the estate should devolve on the death of Mrs. Bradley as though she had predeceased Mrs. Bradley. The Middleton estate was held on trust for Mrs. Aurea Clare Waterkeyn for life with remainder to Denis Gerard Waterkeyn for life with remainder to Francis Howard Waterkeyn in tail male with remainders over.

In 1950 and 1952 Mrs. Levin had released parts of her interest in the Middleton estate, thus accelerating the interest of Mrs. Aurea Clare Waterkeyn, and in 1953 she had released part, and in 1958 a further part, of her interest in the Foxcote estate, thus accelerating the interest of Mrs. Bradley.

By a deed of family arrangement dated July 23, 1953, and made between Mrs. Levin, her elder son, Sir Ralph Henry Lawson, William Howard Lawson, Mrs. Aurea Clare Waterkeyn, her daughter, Mrs. Cecilia Rambaut, Denis Gerard Waterkeyn and Mrs. Bradley (all the adults then beneficially interested in any part of the settled estates), of the first part, and the trustees of the will of the second part, which recited that it was apprehended

that clause 8 of the will was invalid, it was agreed that the will should be read and construed in all respects as if that clause were omitted therefrom.

Following the death of Mrs. Levin on January 5, 1960, none of the parties of the first part to the deed of family arrangement were anxious to change their names, nor were John Philip Lawson and Hugh William Lawson anxious to change their names or to take advantage of any forfeiture that their father might incur or might have incurred by refusing or neglecting to change his name. The husband of Mrs. Aurea Clare Waterkeyn, who had lived apart from his wife since 1932, had stated in about 1934 his unwillingness to change his name, and their son, Denis Gerard Waterkeyn, was also not anxious to change his name or to take advantage of any forfeiture that Mrs. Aurea Clare Waterkeyn or Mrs. Bradley might incur or which might have been incurred by his father or Mrs. Bradley refusing or neglecting to change their names.

On December 14, 1960, the trustees of the will took out a summons to determine whether clause 8 of the will was valid and binding on the defendants, Mrs. Bradley, Mrs. Aurea Clare Waterkeyn, William Howard Lawson, Denis Gerard Waterkeyn, John Philip Lawson, Hugh William Lawson, Catherine Anne Waterkeyn and Francis Howard Waterkeyn, or whether it was void for uncertainty or as being contrary to public policy; and if it were valid and binding, whether the term of one year after refusing or neglecting to assume the surname and arms commenced as regarded Mrs. Bradley and Mrs. Aurea Clare Waterkeyn (a) on the death of Mrs. Levin, or (b) as respected each part of the settled estate in which Mrs. Levin released her life interest, on the date of the releases.

D. C. Potter for the trustees of the will.

R. S. Lazarus Q.C. and *T. A. C. Burgess* for the adult defendants, the first to sixth defendants.

Mark Nesbitt for the infant defendants, the seventh and eighth defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Brown* v. *Burdett* [1]; *In re Hughes* [2]; *In re Watson* [3]; *In re Quintin Dick.* [4]

Cur. adv. vult.

March 29. WILBERFORCE J. read the following judgment: The name and arms clause whose validity is in question in this case is contained in the will of Philip John Canning Howard, who died on April 22, 1934.

[1] (1882) Ch.D. 667.
[2] [1943] Ch. 296; 59 T.L.R. 375; [1943] 2 All E.R. 269.
[3] [1930] 2 Ch. 344.
[4] [1926] Ch. 992; 42 T.L.R. 681.

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The greater part of that will was directed to dispositions of certain landed property which was collectively referred to as "the "settled estates." [His Lordship stated the dispositions, as set out above, and continued:] These separate dispositions having been made of the three estates, clause 8 of the will contained a name and arms clause applicable to the settled estates generally requiring, briefly, any person (other than the testator's daughter) who should become entitled as tenant for life or tenant in tail to the settled estates, or any part thereof, and the husband of any woman so becoming entitled, to assume the name and arms of Howard, and to use and bear the same upon all occasions, with a provision that upon any discontinuance so to do the estate of the person concerned should immediately determine.

It is, of course, well known that the name Howard is one of considerable antiquity and repute in English history, and the same is true of the Howard arms. It was the absence of any male issue to inherit the name that, no doubt, prompted the testator's disposition.

The name and arms clause did not apply to the testator's daughter, and the first occasion for its operation arose on January 5, 1960, when she died. If the clause is valid and effective (and subject to a subsidiary point to be noticed later) a forfeiture occurred on January 5, 1961, of the interests of those persons who took the first life interests, namely, William Howard Lawson, Mary Catherine Bradley and Aurea Clare Waterkeyn.

There are two other matters of fact to be stated at this point. First, there were certain partial releases of the life interest of the testator's daughter in the Middleton and the Foxcote (but not the Corby) estates, so that, pro tanto, the interests of Mrs. Bradley and Mrs. Waterkeyn were accelerated. This gives rise to the subsidiary point, which is whether these releases brought the name and arms clause into immediate operation. Secondly, there was executed on July 23, 1953, between all the parties interested in the settled estates who were at that date adults, a deed of family arrangement in which, after reciting that it was apprehended that the name and arms clause was invalid, it was agreed that the will should be read as if the name and arms clause were omitted therefrom. In other words, the adult beneficiaries agreed among themselves not to take advantage of any forfeiture which might have occurred. Consequently (and perhaps also for other reasons) no step has been taken by any of the relevant persons, subsequently to January 5, 1960, to comply with the clause, and as regards some of them it is already too late for them to do so.

There are some general observations I should like to make before examining the clause in detail. Name and arms clauses have been in use, and examples of them can be found in books of conveyancing precedents, for a century at least, and, so far as reported cases go, no general objection was raised to them until

after the World War of 1939–45, although, undoubtedly, opportunities for such objection arose. From 1945 onwards a wind of change of increasing force developed against them. Vaisey J. held such a clause void in 1945 (*In re Fry* [1]) on grounds, inter alia, of public policy, and followed this with two further decisions in 1951 (*In re Lewis' Will Trust* [2]) and 1952 (*In re Bouverie* [3]), the latter followed immediately by a decision of Wynn-Parry J. (*In re Wood's Will Trusts* [4]), in which the invalidity was based on uncertainty. Later in 1952 Danckwerts J. held (*In re Kersey* [5]) that a clause almost identical with that with which I am concerned was void for uncertainty, and also as being contrary to public policy, and described it as out of date and inconsistent with the spirit of the time. It is not surprising that the editors of Key and Elphinstone's Precedents in Conveyancing, 15th ed. (1953), vol. 2, p. 784, should, with some degree of defeatism, have recommended to their readers to abandon the attempt to construct a binding clause and to limit themselves to a provision having only precatory force.

So far the tide flows strongly in one direction, but in 1960 Cross J., again on a clause very similar to the present, held (*In re Neeld* [6]) that it was not void for uncertainty. and, although expressing his willingness to follow Danckwerts J. on the issue of public policy in similar circumstances, found that the particular clause in that case, being almost exclusively directed towards male persons, was not contrary to public policy. Finally, in the course of this year, Plowman J. followed Danckwerts J. in holding a shorter clause contrary to public policy, but stated that he would not have rejected it on grounds of uncertainty alone (*In re Harris' Will Trusts* [7]).

To this brief summary of the cases I should add that in 1955, after Upjohn J. had upheld a clause not unlike the present (*In re Murray* [8]), the Court of Appeal [9] rejected it on account of certain special difficulties inherent in its drafting, but did not express or indicate favour or disfavour of the trend of decisions given at first instance.

In this labyrinth it is obvious that it is not easy for a judge of first instance to find his way.

I will now consider the criticisms which have been made of the clause. It is attacked, first, on grounds of uncertainty. As to this line of objection I make two observations: first, it is apparent that the clause—as, indeed, the whole of this will—is drafted, not only professionally but by a skilled draftsman

[1] [1945] Ch. 348; 61 T.L.R. 449; [1945] 2 All E.R. 205.

[2] [1951] W.N. 591; [1951] 2 T.L.R. 1032.

[3] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[4] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

[5] [1952] W.N. 541.

[6] [1960] Ch. 455; [1960] 2 W.L.R. 730; [1960] 2 All E.R. 33.

[7] The Times, March 1, 1961.

[8] Unreported.

[9] [1955] Ch. 69; [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129, C.A.

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with knowledge of the precedents and of the decided cases. It differs little from the precedent given in Davidson's Precedents and Forms in Conveyancing, 2nd. ed. (1864), vol. 4, p. 334, and I bear in mind the words of Lord Simonds in *Bromley* v. *Tryon* [10] on the attitude of the courts towards well-tried and established conveyancing precedents.

Secondly, I bear in mind that I am concerned with a condition subsequent, which may have the effect of shifting or divesting a vested estate, and that, for the condition to be effective, it must be expressed with sufficient precision and distinctness to enable the court and (accepting Lord Romer's addition in *Sifton* v. *Sifton* [11]) the parties, to see from the beginning what it is that must be done to avoid or to bring about a termination of the relevant interest. It is right to look at the clause carefully and even critically, but I do not accept any suggestion that it should be examined with hostility, and I am inclined to think that sometimes an excessive degree of ingenuity has been deployed in attacking similar clauses. I accept the principle of reasonable construction adopted by Cross J. in *In re Neeld* [12] with a view to seeing whether some real, not fanciful, objection through lack of precision or distinctness exists. I think that the same approach, also involving a refusal to be intimidated by possible difficulties of application, was adopted by both the Court of Appeal [13] and the House of Lords [14] in *Bromley* v. *Tryon.*

Turning now to detail, the main criticism was directed against the word "discontinue." It was said that this word indicates the cessation of a habit, or of a settled course of action, and that it is impossible to say what degree of cessation, or for how long, is necessary to terminate the interest. Apart from authority, I should not be willing to accept this argument. The forfeiture provision follows, and would normally represent the counterpart of, the preceding portion of the clause which contains the positive injunction to take and use the name and arms. The two should, if possible, be construed together. The positive injunction is "take use and bear," and, in the case of a person who already uses the name of Howard, to "continue to use and bear "in all deeds and writings which he or she shall sign and upon all "occasions the surname of Howard."

The meaning of this injunction appears to me to be clear and stringent. The name is to be used on all occasions, and one case of failure to use would be a breach of it. To this the forfeiture clause provides a corresponding sequel; the words used are "in case any person . . . should discontinue to use and bear the "same," and these words, in my judgment, naturally and aptly mean that one case of failure brings a forfeiture about—a person

[10] [1952] A.C. 265, 274–275; [1951] 2 T.L.R. 1119; [1951] 2 All E.R. 1058, H.L.

[11] [1938] A.C. 656, 675; 54 T.L.R. 969; [1938] 3 All E.R 435, P.C.

[12] [1960] Ch. 455, 468.

[13] [1950] W.N. 507; [1950] 2 All E.R. 955, C.A.

[14] [1952] A.C. 265.

who fails to use on one occasion evidently does not continue to use on all occasions. The words do not naturally or aptly suggest that before a forfeiture occurs there must be a period of cessation. The conception of a single, once-for-all breach, is, to my mind, strengthened by the following words "then and in every such "case immediately after the expiration of the said term of one "year, or immediately after such discontinuance as aforesaid" the estate shall absolutely determine. I find, then, that the word "discontinue" is, in its context, certain and clear.

But attack was also made upon the very words to which I have already referred as being, to my mind, significant, namely, "upon all occasions." It was said that these words are themselves uncertain, because there must be occasions when the surname is not used or required to be used, such as when writing to a member of the family, and these latter occasions being incapable of definition, the compulsory occasions must equally be uncertain. I do not find this argument impressive. The words, to me, appear, clearly enough, to refer to all occasions—and only those occasions on which a surname is used—to all "surname "occasions" and not to "Christian name occasions" or "nick-"name occasions," or, one might add, "pseudonym occasions": so to interpret the words appears to me to fall well within the limits of careful and critical interpretation which the law requires, and so interpreted the words present no difficulty. On this approach to the clause I therefore find it lacking in destructive uncertainty.

But there are authorities to be considered. In *In re Lewis' Will Trust* [15] the word was "disuse," and Vaisey J. read this as referable, not so much to an identifiable act performed at one moment, as to a continuous process, the beginning of which might be very difficult to identify. He added [16]: "This word "does not appear to me to have the same meaning as 'discon-"'tinue the use of,' a phrase which seems to indicate an overt "act, the happening of which can be identified."

In *In re Bouverie* [17] the word was again "disuse," but Vaisey J. expressed second thoughts about the words "to discon-"tinue," saying [18]: "Although . . . the word 'discontinue' is "probably in not much better case, I thought at one time that "it was more descriptive of a single act than the word 'disuse.' "I am, however, not at all certain that the word 'discontinue' is "not open to the same objection as the word 'disuse,' but I am "not going to say anything about that, because that is not the "word which is in question here."

These second thoughts were made the basis of the decision in *In re Wood's Will Trusts*,[19] where the positive injunction was to assume and use the surname and arms either alone or together with his or her own surname and arms, and Wynn-Parry J. then

[15] [1951] W.N. 591.
[16] [1951] W.N. 591, 592.
[17] [1952] Ch. 400.
[18] Ibid. 405.
[19] [1952] Ch. 406.

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held[19] "that the clause was void for uncertainty, as the phrase "'discontinue to bear and use' was indistinguishable from the "word 'disuse' . . ."

The word "discontinue" again figures in *In re Kersey*,[20] and though the report is not a full one, it is clear that Danckwerts J. had cited to him, and relied on, *In re Wood's Will Trusts*.[21]

In *In re Neeld*[22] there were two names and arms clauses, one relating to the name Inigo-Jones and one relating to the name Neeld. The Neeld clause had in it the word "discontinue," and also, in the positive injunction, the words "upon all occasions." Cross J. treated the addition of these words as decisive: he held that "discontinue to use" obviously referred back to the earlier phrase and meant "discontinue to use on all occasions." Not only was this his opinion, but he found support for it in *In re Drax*,[23] where Swinfen Eady J. held that "upon all other "occasions" referred to all occasions when a surname is ordinarily used.

I would only add to these modern decisions *In re Cornwallis*,[24] where the word "discontinue" was used followed by the words "for six calendar months," thus clearly, by the context, indicating a cessation of a habit.

In these circumstances, it is clear that I have ample support—without myself importing any unduly fine distinctions based on the different wordings used—for the interpretation which, prima facie, appeals to me, and for holding that the word "discontinue" may bear a different meaning in different contexts. I propose to align myself on this point with Cross J.[25] and Swinfen Eady J.,[26] whose reasoning seems to me entirely relevant to this clause, and to hold that the clause is not void for uncertainty.

I now pass to the issue of public policy, and here I think it convenient, first, to consider the state of the authorities directly bearing on name and arms clauses. In the first place, in spite of the long history of these clauses, it was never, so far as I know, suggested, still less decided, that they were contrary to public policy until the decision of Vaisey J. in *In re Fry*[27] in 1945, where he had occasion to consider a clause which applied to all persons becoming entitled, not to a life interest or an estate tail, but to an absolute interest, and whether they were male or female. It did not apply to the husbands of married women. The clause was fatally defective in other respects, but Vaisey J. also held it was void as being against public policy. After stating that he did so with hesitation, and that there might be cases in which it could be applied to a woman with "absolute propriety," he held that[28] "the use of different surnames by a man and "his wife cannot fail to be productive of many embarrassments

[19] [1952] Ch. 406.
[20] [1952] W.N. 541.
[21] [1952] Ch. 406.
[22] [1960] Ch. 455, 466–467.
[23] (1906) 22 T.L.R. 343.
[24] (1886) 32 Ch.D. 388.
[25] [1960] Ch. 455.
[26] 22 T.L.R. 343.
[27] [1945] Ch. 348.
[28] Ibid. 354.

"and inconveniences, not only to themselves, their children and "relatives, but to their friends and acquaintances, and indeed to "society generally." He referred to the clause as operating "by "the coercive and quasi-punitive method of a defeasance," and then said: "The precedent books show that the right form of a "name-clause where the beneficiary is or may become a married "woman is to place the obligation not upon her alone but upon "her husband as well."

From these citations it is obvious that the decision in *In re Fry*,[29] so far from supporting a contention adverse to the present clause, goes some distance the other way, in view of the description of Vaisey J.[30] of a clause like the present as "the right "form of a name clause." The objection which he felt in that case, at any rate, was based on a degree of embarrassment extending beyond the persons immediately affected by the condition and reaching the public at large. In *In re Lewis' Will Trust*[31] Vaisey J. followed this decision in a case where the person immediately concerned was an unmarried woman, but said that he did so "not without hesitation."

There followed the decision of Danckwerts J. in *In re Kersey*[32] in 1952, which involved a clause identical (I think) with the present. In particular it sought (as Vaisey J. said that it properly should) to impose the obligation on the husband of a married woman. The case is only briefly reported in the Weekly Notes, and there Danckwerts J. is reported as saying it was very undesirable that a wife should have to bring pressure upon her husband to change his name in order that she might not be deprived of an estate to which she had succeeded, and that he could not conceive anything more likely to cause differences between husband and wife than a clause containing a provision of this character. It illustrated the fatuity of trying to impose obligations of this sort which were out of date and inconsistent with the spirit of the times.

From this passage I understand the sole ground upon which the clause was held to be contrary to public policy to have been that differences would be caused between husband and wife. The reference to the clause being out of date and inconvenient with the spirit of the times was not, as I read it, to provide an additional basis of invalidity. It has never been the function of the judges on grounds of public policy to excise anachronistic practices from conveyancing (or surely they would long before their statuory abolition have rid the law of the restraint on anticipation), and I take the words of Danckwerts J. as of a descriptive character, corresponding to the adjective used by Lord Mansfield C.J. in *Gulliver* v. *Ashby*.[33]

In re Kersey[32] was adverted to in *In re Neeld*,[34] when Cross

[29] [1945] Ch. 348.
[30] Ibid. 354.
[31] [1951] W.N. 591.
[32] [1952] W.N. 541.
[33] (1766) 4 Burr. 1930, 1941.
[34] [1960] Ch. 455, 467.

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J. said that he would have followed the decision had it been applicable; in fact, he distinguished it and it has recently been followed by Plowman J. in *In re Harris' Will Trusts.*[35]

The current of authority, then, is not inconsiderable and is all one way, and I have to consider whether I am justified in resisting it. I say "resisting" advisedly, because before me the whole issue of public policy was fully argued on its merits, and, speaking for myself, forceful and lucid though Mr. Lazarus's argument was, I found it, though possibly compelling, to carry less than perfect conviction. To hold such a clause as, from the public point of view, comparatively innocuous may well, I recognise depend, just as much as a finding against it, upon the idiosyncratic inferences of one judicial mind (I adapt from Lord Atkin's famous opinion in *Fender* v. *St. John Mildmay*[36]). But, nevertheless, search as I may, I cannot find either that the act required to be done (the assumption of the name and arms of Howard) is a harmful act, or that the condition may have harmful tendencies. I apply the test suggested by Lord Atkin[37] (and in passing I should say that the relevance of the tests, which are applied to contracts, to conditions is established by *Egerton* v. *Brownlow*[38] and the use of that case in *Fender's* case[39]): would the condition "in a majority of cases, or at any rate in a considerable number of cases" expose the parties "to a real temptation" such that it is likely that they will yield to it: is there likely to be a general tendency to do wrong?

To answer these questions in the affirmative involves two steps, either of which I would be reluctant to take. The first involves assuming that in a decision on matters which, after all, involve the interests of both spouses (since both are interested in the wife succeeding to the estate, and both are concerned with a change of name) the normal give-and-take of married life is unable, in a significant number of cases, adequately to arrive at an agreement. The second involves assuming that, if a difference of opinion, or even a disagreement, between the spouses is caused, that is likely to assume the dimensions of an evil which it is the public policy of the law to prevent. If such a doctrine to this effect were to prevail, it is difficult to see where it would stop: would a condition as to residence or religion (attached to a gift of property) be similarly treated? If not, how can the court compare a man's attachment to his name with his attachment to his house or to his religion? I even seem to detect some inconsistency between, on the one hand, the proposition that a testator's wish to continue his name is silly and anachronistic and ought to be rejected, and, on the other hand, the argument that a husband's reluctance to change his name for his wife's fortune is normal and ought to be respected. Be that as it may, just as

[35] The Times, March 1, 1961.

[36] [1938] A.C. 1, 12; 53 T.L.R. 885; [1937] 3 All E.R. 402, H.L.

[37] [1938] A.C. 1, 13.

[38] (1853) 1 H.L.C. 1, H.L.

[39] [1938] A.C. 1, 13.

pacta sunt servanda, so is the preservation of liberty, and in England liberty has always, happily, included eccentricity, of testamentary disposition, an important objective of public policy, and I have not been persuaded that I could find here a contrary objective of equal or comparable weight.

In this, however, I am, as the recent cases show, speaking for myself, and it is evidently undesirable that on a subject so much a matter of appreciation different judges of the same Division should speak with different voices. (The risk of their doing so is, of course, one of the main arguments against applying considerations of public policy to any but the clearest cases.) There is a series of decisions one way and none, apart from two dicta of Vaisey J. in *In re Fry*,[40] the other way. These decisions may well have been acted upon—I have already noted the warning of the editors of Key and Elphinstone—and they have been acted upon by the beneficiaries in the present case as the recital in the deed of family arrangement, executed shortly after *In re Kersey*[41] shows. The principle stare decisis seems to me to apply in full force in such a situation, and all the more since the clause here is identical with the clause in *In re Kersey*[42]; and I have come to the conclusion that I ought to follow the precedents.

How far, then, do the decisions go? In my judgment they go no further than to declare the clause void in so far as it affects married women. *In re Fry*,[43] *In re Kersey*[44] and *In re Harris's Will Trusts*[45] were all concerned with married women, and the ratio decidendi of *In re Kersey*[46] is applicable to married women alone. I see no reason to apply it to single women or to men.

The only cited case in which the principle has been applied to unmarried women is *In re Lewis' Will Trust*,[47] where, as I have said, Vaisey J. followed his own decision in *In re Fry*,[48] not without hesitation, but gave no additional reasons for applying that case to unmarried women.

It has been argued (on the analogy of covenants in restraint of trade) that I cannot sever the condition; that it is either wholly good or wholly bad. But I do not think that the analogy is a true one. In covenants in restraint of trade the court is faced, ex hypothesi, with a single covenant in consideration of which some other promise has been made. To sever the covenant would be to change the consideration and to alter the parties' bargain. In this will, the testator has attempted to apply the condition to men, single women and to married women, and I see no reason why, because it is void for a special reason as to married women, it should be void as to the others—any more than if a testator sought to apply a restraint on anticipation to every person, male or female, married or unmarried, interested under his will. In

[40] [1945] Ch. 348.
[41] [1952] W.N. 541.
[42] The Times, March 1, 1961.
[43] [1945] Ch. 348.
[44] [1952] W.N. 541.
[45] The Times, March 1, 1961.
[46] [1952] W.N. 541.
[47] [1951] W.N. 591.
[48] [1945] Ch. 348.

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this case, moreover, the three separate estates were separately limited, the tenant for life at the relevant date being respectively a man, a widow and a married woman, and it seems to me that clause 8 should be separately and individually applied to each case. I am much assisted in reaching this conclusion by the fact that a similar approach was adopted by Cross J. in *In re Neeld*,[49] where, distinguishing *In re Kersey*,[50] he said[51]: "here the bene-"ficiary who is immediately affected is the first defendant, Ralph "Christopher Inigo-Jones, and it is only in very improbable and "remote contingencies that any female can possibly be affected "at all. I do not think that the fact that a clause may be "invalid so far as it applies to married women and their husbands "is any sufficient reason for holding it totally void even as "applied to males or spinsters." With respect, I adopt this passage, and I would add widows to the latter class.

I must now deal with the subsidiary point which arose from the circumstances that the testator's daughter released her life interest in parts of the Middleton and Foxcote estates before her death. The question is whether, as regards the portion included in the releases, the name and arms clause operated immediately on the release, or whether it only operated when the life tenant died. This depends upon the true construction of clause 8.

That clause commences in this way: "I declare that every "person (other than Lady Lawson or a peer or peeress) who under "the limitations hereinbefore contained becomes entitled as "tenant for life or as tenant in tail male or in tail general by "purchase to the possession or to the receipt of the rents and "profits of my settled estates or any part thereof and does not "at the time of becoming so entitled use and bear the surname "and arms of Howard . . ."

The first argument was directed to the words "under the "limitations hereinbefore contained," and it was said that the granddaughters did not become so entitled; they became entitled under the releases. A similar point arose in *In re Petre's Settlement Trusts*,[52] where the reverse situation occurred, the reversioner assigned to the tenant for life in possession. Joyce J., however, considered both cases and said[53] that the words "entitled to the actual possession . . . under the limitations of "the . . . settlement" meant "entitled to such possession, "looking to the terms of the settlement, and not regarding any-"thing else." The word "actual" does not appear in this present will, but that seems to me immaterial, and otherwise the decision is relevant and helpful.

It was followed in *In re Duncombe*,[54] where the phrase was "in the actual possession or (construed as 'that is to say')

[49] [1960] Ch. 455, 467.
[50] [1952] W.N. 541.
[51] [1960] Ch. 455, 467.
[52] [1910] 1 Ch. 290.
[53] Ibid. 296.
[54] [1932] 1 Ch. 622. C.A.

" entitled to the receipt of rents and profits of . . . " Romer L.J. relied [55] on the absence of some words as " under the limitations " of " or " under or by virtue of " the settlement to distinguish *In re Petre* [56] (which on the facts he appeared to accept), and to show that " actual possession," not " entitlement," was intended.

In my judgment the words in clause 8, " under the limitations " hereinbefore contained," bring the case under the principle stated in *In re Petre*,[56] with the result that release, total or partial, by way of acceleration does not bring the clause into operation. I should add that the words " or any part thereof " appear to me to relate to the three separate estates which are compendiously dealt with in this clause and do not contemplate a case of partial release. Accordingly, I hold that the name and arms clause did not begin to operate until the death of the testator's daughter on January 5, 1960.

One other point should be mentioned. It was suggested that the forfeiture provision had never operated, because no beneficiary had " refused or neglected " to assume the name and arms. " Neglect," it was said, presupposes knowledge, actual or constructive, of a duty, and the parties did not know, at any rate until after the judgment of Cross J. in *In re Neeld*,[57] that they had a duty to comply with the clause. I do not accept this. The beneficiaries were clearly aware of the existence of the clause, and, acting advisedly, they did not comply with it. Such mistake as they made was purely a mistake of law, and they have clearly neglected to act under the clause.

I therefore decide: (1) That the clause is not void for uncertainty; (2) that the clause is void as contrary to public policy in so far as it purports to affect married women or their husbands, but no further; (3) that the effective date on which clause 8 began to operate was the death of the testator's daughter on January 5, 1960, and declarations will be made accordingly.

Declarations accordingly.
Costs to be paid out of the settled estates in proportion to their value.

Solicitors: *Blount Petre & Co.*

M. G. T.

[55] [1932] 1 Ch. 622, 641.
[56] [1910] 1 Ch. 290.
[57] [1960] Ch. 455.

[QUEEN'S BENCH DIVISION.]

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[1960 C. No. 3052.]

Agriculture—Agricultural holding—Notice to quit—Death of tenant—Tenancy assigned before death—Whether original tenant or assignee "tenant with whom the contract of tenancy was made"—"Tenant"—Meaning—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (2) (*g*).

On April 12, 1950, the tenant of certain agricultural land under a yearly tenancy from March 25, 1948, with the consent of the landlord, executed an assignment assigning to her son, the defendant, for a consideration of £5, all the premises comprised in the original tenancy agreement and the benefit of the tenancy thereby subsisting to be held by him but subject to the stipulations of the original tenancy agreement. By a further document under seal executed between the landlord and the defendant, the landlord consented to the assignment to the defendant with benefit of the tenancy created by the original agreement, and gave permission to assign or underlet, a covenant not included in the original tenancy agreement. Thereafter the defendant occupied the land for agricultural purposes. On February 15, 1959, the defendant's mother died and on March 19 the landlord served on the defendant a notice to quit the premises on March 25, 1960. The notice stated that it was given by reason of the death of the tenant with whom the contract of tenancy had been made within three months before the date of the giving of the notice to quit and on the ground of such death (in accordance with section 24 (2) (*g*) of the Agricultural Holdings Act, 1948 [1]) and that accordingly section 24 (1) of the Act did not apply. On April 2, 1959, the defendant's solicitors served a counter-notice, expressing the opinion that in view of the deed of assignment the defendant was the tenant and the death of his mother did not affect his tenancy. Shortly after March 25, 1960, the defendant removed most of his stock from the land but returned it on May 23 and thereafter asserted his full right to occupation of the land.

In an action by the landlord for possession, damages and an injunction to restrain the defendant from trespassing on the land:—

Held, (1) that the two documents executed in 1950 were entirely consistent with the defendant becoming the tenant under the old tenancy and being regulated by its terms, and accordingly the contract of tenancy within the context of section 24 (2) (*g*) was the

[1] Agricultural Holdings Act, 1948, s. 24 (1): "Where notice to quit an "agricultural holding . . . is given to "the tenant thereof, and not later than "one month from the giving of the "notice to quit the tenant serves on "the landlord a counter-notice in "writing requiring that this sub-"section shall apply to the notice to "quit, then, subject to the provisions "of the next following subsection, "the notice to quit shall not have "effect unless the Minister * consents "to the operation thereof. (2) The "foregoing subsection shall not apply "where— . . . (*g*) the tenant with "whom the contract of tenancy was "made had died within three months "before the date of the giving of the "notice to quit, and it is stated in "the notice that it is given by reason "of the matter aforesaid."

* The Agriculture Act, 1958, s. 3 (1), transferred the functions conferred on the Minister to the Agricultural Lands Tribunal.

original contract of letting to the defendant's mother, who was the individual with whom that contract was made.

(2) That the clear meaning of the words of section 24 (2) (*g*) was that the landlord might serve notice to quit if the individual who was the tenant with whom the contract of tenancy was made had died within the previous three months, the "tenant" referred to therein being someone who was not now the tenant because he or she was dead, but someone who had been the tenant on a former occasion, and there was no reason to confine the words of paragraph (*g*) so as to require that the tenant referred to should still have been the holder of the estate at the date of his death. Accordingly, the notice to quit was valid and the tenancy had been determined on March 25, 1960.

ACTION.

The following statement of facts is summarised from the judgment.

The plaintiff, John Eric Clarke, was the owner of certain agricultural land known as "Tanyard Land" in the parish of Frittenden in the county of Kent, which he bought in 1948, together with certain other land in the vicinity. At the time the defendant, William Howard Hall, was the tenant of Tanyard Land. The plaintiff was anxious to recover part of the premises then let to the defendant, and eventually the parties reached agreement as to the part of the land the defendant was to give up, and it was agreed that the terms of the new agreement should be contained in a new agreement of tenancy. The plaintiff was a solicitor and, although not acting as solicitor for the defendant at any material time, it was agreed that he should prepare the tenancy agreement without charge to the defendant, save that they would bear the stamp duty equally between them. The defendant then requested that the tenancy should be granted to his mother, Edith Elsie Hall, instead of to him, and, as the plaintiff agreed the tenancy agreement was prepared and executed by the plaintiff and the defendant's mother. The tenancy was a normal agricultural yearly tenancy from March 25, 1948, at a rent for the 50 or so acres comprised in the letting of £70 per annum. There was no covenant or condition against assigning or subletting by the tenant. In 1950 the defendant informed the plaintiff that he would like the tenancy of the land to be in his own name. The plaintiff agreed that that could be done but said that a licence to assign from him to the defendant would be necessary. It was not suggested that the plaintiff had an intention to mislead but, in fact, no such licence was necessary. The plaintiff accordingly prepared two documents for execution by the parties. One, dated April 12, 1950, was an assignment whereby the defendant's mother assigned to the defendant for a consideration of £5 all the premises comprised in the original tenancy agreement, and the benefit of the tenancy thereby subsisting, to hold unto the defendant subject to the terms, conditions and stipulations of the original tenancy agreement (which was recited), and henceforth on the part of the defendant

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to be so observed and performed. The other document which was under seal between the plaintiff and the defendant read as follows: "In the matter of an agreement dated July 20, 1948, "and made between John Eric Clarke and Edith Elsie Hall being "a tenancy from year to year from March 25, 1948, of Tanyard "Land, I, John Eric Clarke of Cranbrook in the County of Kent "solicitor being the present landlord of the property comprised "in the said agreement hereby consent to the said Edith Elsie Hall "assigning Tanyard Land comprised in the said agreement to "William Howard Hall of Biddenden in the County of Kent "farmer with the benefit of the tenancy created by the said "agreement. I, William Howard Hall hereby covenant with the "said John Eric Clarke not to assign charge underlet or part with "the premises known as Tanyard Land or any part thereof or the "benefit of the said agreement." Nothing was provided in that agreement which would make the proviso for re-entry in the original tenancy agreement exercisable in the event of a breach by the defendant of his covenant not to assign, which was contained in the licence.

Following the execution of those documents the defendant occupied the land for agricultural purposes, mainly pasturage. On February 15, 1959, Mrs. Hall died, and on March 19, 1959, the plaintiff served upon the defendant a notice to quit the premises on March 25, 1960. The notice to quit stated that it was given by reason of the death of Edith Elsie Hall (the tenant with whom the contract of tenancy was made) within three months before the date of the giving of the notice to quit and on the ground of such death and, accordingly, section 24 (1) of the Agricultural Holdings Act, 1949, did not apply. It was common ground that that notice was properly served and had no technical defect.

On April 2, 1959, the plaintiff's solicitors wrote to the plaintiff enclosing a counter-notice under section 24 (1) of the Act of 1948, and expressing the opinion that in view of the deed of assignment executed in April, 1950, the defendant was the tenant and the death of his mother did not affect the tenancy. After correspondence between the parties on February 1, 1960, at the request of the defendant, one Major Leslie Chalk, a friend of the defendant's and an experienced land agent, met the plaintiff to try to persuade him that the notice to quit was invalid (the view which he himself held), and, if not, to see whether some other modus vivendi might be arrived at to enable the defendant amicably to retain the use of the land or some part of it, but the plaintiff maintained his position.

Shortly before February 25, 1960, the plaintiff gave notice to the defendant that he was proposing to make a claim for compensation under section 58 of the Agricultural Holdings Act, 1948, in respect of depreciation of the holding, a notice which, under the Act, had to be given at that time, assuming that the tenancy was coming to an end on March 25. The defendant, whilst not

giving up hope of being able to retain possession, thought it wise to allow the machinery of claim and counter-claim in relation to section 58 to take its course, in case the tenancy was proved in fact to have been validly determined on March 25. Accordingly, Major Chalk, on behalf of the defendant, wrote to the plaintiff, referring to the notice, and setting out the defendant's claim upon quitting, namely, for tenant's pasture, unexhausted manurial values of fertilisers applied, and feeding-stuffs fed and for one field gate.

On March 25, 1960 (the date when the tenancy would determine if the notice was valid), the defendant had upon the land a substantial number of ewes, some hay and some items of dead stock comprising five or six new sheep troughs, a new sheep rack, a hay-loader and trailer, but on March 28 he removed from the land to his farm some miles away the great bulk of his flock, leaving behind two ewes and two lambs and the hay and dead stock. According to evidence given at the trial of the action it was his normal practice during lambing to take the ewes back to his farm, and the removal of the bulk of the flock on March 28 was only an example of that well-established practice and was not either intended to be, or in contemplation of, a delivery up of possession in accordance with the notice. The two ewes left behind were removed by the defendant to his farm some three weeks later. In the meantime the plaintiff, without seeking the permission of the defendant, put a pony and four heifers on the land some time in April, erected some simple jumps for his children to use when exercising the pony, and made some survey of the land to see what its condition was but took no further action with regard to the land. However, on May 16, 1960, he followed up his original claim under section 58 by serving upon the defendant a notice under section 70 of the Act of 1948 requiring arbitration to determine the amount of the claim for compensation which disclosed to the defendant for the first time that he was claiming some £700, a figure which the defendant and his adviser, Major Chalk, thought excessive.

Shortly after the receipt of that notice the defendant consulted new solicitors. In the meantime, Major Chalk's firm (in his absence) had written to the plaintiff's agents on May 18, 1960, with reference to the notice under section 70 protesting at the amount of the claim and stating that from March to May if left dormant is just the time when a difference in appearance can be made. Two days later the plaintiff struck a bargain with another farmer whereby the latter was to take the hay and aftermath of one of the fields, but on May 23 he was informed by the defendant's new solicitors that they had advised the defendant that the notice to quit was not valid, and requiring the plaintiff to remove from the land the stock he had put upon it. On the same day the defendant brought back on the land a substantial quantity of sheep and thereafter asserted his full right to the occupation of the land.

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On August 26, 1960, the plaintiff issued a writ claiming possession of the land, damages, mesne profits and an injunction to restrain the defendant, his servants or agents, from trespassing on the land. He claimed that by virtue of the tenancy agreement of July 20, 1948, the lands were let by the plaintiff to Mrs. Edith Elsie Hall, who thereby became the tenant with whom the contract of tenancy was made within the meaning of section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, for a term commencing on March 25, 1948, from year to year; that on April 12, 1960, Edith Elsie Hall assigned the benefit of the tenancy to the defendant whereafter the defendant paid the rent due by virtue of the agreement; that Edith Elsie Hall having died on February 16, 1959, the plaintiff on March 19, 1959, within three months of her death, served notice to quit the holding upon the defendant; that the notice had expired on March 24, 1960, and that, notwithstanding the expiration of the notice, the defendant had wrongfully entered thereafter on the plaintiff's land and claimed to retain possession thereof, whereby he had trespassed upon the plaintiff's land.

By his defence the defendant denied the validity of the notice to quit and claimed that he was lawfully in possession of the land as tenant. He contended that the notice to quit was served after the assignment of the term to the defendant and that, on the date of her death, Edith Elsie Hall was no longer the tenant, alternatively that by virtue of the agreement of July 20, 1948, between the plaintiff and the deceased Edith Elsie Hall, and the agreement in writing between the plaintiff and the defendant in April, 1950, and of the assignment of April 12, 1950, he (the defendant) became and still was the tenant with whom the contract of tenancy was made within the meaning of section 24 (2) (*g*) of the Act of 1948; that he had at all material times retained possession of the land and had never either left or re-entered the same or trespassed thereon as alleged or at all. By his reply the plaintiff contended, inter alia, that the defendant was estopped from alleging that he was the tenant by virtue of any tenancy prior to 1948, alternatively that any tenancy prior to 1948 was surrendered by operation of law; further, that the defendant quitted the land in March, 1960, alternatively that he removed his stock from the land and instructed a valuer to act for him to submit a claim upon quitting the holding which was notified to the plaintiff, thereafter the plaintiff entered into possession of the holding.

Adrian Head for the plaintiff.

George Dobry and *Michael Rich* for the defendant.

The following cases (relevant to this report) were cited in argument: *Woodward* v. *Earl of Dudley* [2]; *Costagliola* v. *Bunting*.[3]

[2] [1954] Ch. 283; [1954] 1 All E.R. 559.

[3] [1955] 1 W.L.R. 580; [1958] 1 W.L.R. 476; [1954] 1 All E.R. 846.

WIDGERY J. This is a case in which the plaintiff sues the defendant for an injunction and damages in respect of an alleged trespass by the defendant on the plaintiff's land which is known as Tanyard Land, in the parish of Frittenden, in the county of Kent. Although the action takes that form it is, in fact, a landlord and tenant dispute of a familiar kind, the substance of the matter being that the plaintiff owns the land in question and the defendant is, or was, the tenant of that land. The plaintiff alleges that the defendant's tenancy has been determined. The defendant denies this and has proceeded to exercise certain rights of possession over the land. In those circumstances the plaintiff seeks to adjust the issue by claiming the injunction and damages to which I have referred. [His Lordship stated the facts, read section 24 (1) and (2) (*g*) of the Agricultural Holdings Act, 1948, and continued:] The issues which arise in this case are these: the plaintiff says the defendant's tenancy has been determined. The defendant denies it. The plaintiff bases his submissions really on two limbs. He says, first, that the notice to quit is itself a valid notice, effectively determining the tenancy on March 25, 1960; alternatively, he says that the defendant has determined this tenancy by a surrender; or, possibly, in the second alternative, is estopped from denying that he has determined his tenancy. It would be convenient if I took those two points in that order.

Returning to section 24 (2), paragraph (*g*), of the Act of 1948, the first question which I must decide in considering whether this paragraph gives the plaintiff the relief which he claims is: what, on the facts of this case, is the contract of tenancy to which paragraph (*g*) refers? It is urged upon me by Mr. Dobry for the defendant that on the facts a new contract of tenancy came into existence in 1950 when the defendant became tenant of this land. He says, therefore, that, there being a new contract of tenancy made in 1950, the tenant with whom that contract was made is the defendant, and not his mother, and that consequently there is no room for the application of paragraph (*g*).

Mr. Dobry has fought this point most tenaciously but I am bound to say that it seems to me to be virtually unarguable. The assignment, by its very terms, states that what was being passed to the defendant was the existing estate of his mother upon the terms and conditions which she had contracted to observe in the original tenancy agreement, and I cannot accept the argument that the accompanying licence is in any sense a novation, creating a new tenancy agreement. In my judgment these two documents are entirely consistent with the defendant becoming a tenant under the old tenancy and being regulated by the terms of the old tenancy, and I regard the additional covenant against assigning or underletting, which the defendant entered into in the licence, as being a purely collateral personal bargain between himself and the plaintiff. I therefore find against the defendant on that argument, and hold that the contract of tenancy in this case, within

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the context of paragraph (*g*), was the original contract of letting with Mrs. Hall, and that therefore means that Mrs. Hall is the individual with whom that contract was made.

Mr. Dobry then contends that even on that view paragraph (*g*) has no application here, and his argument, in substance and however it is put, really amounts to this: that on the proper construction of paragraph (*g*) the landlord is only entitled to take advantage of the facility to give notice to quit an agricultural property if the tenant who has just died was not only the tenant with whom the contract of tenancy was made but was also at the moment of death the actual tenant of the land, in the sense of being the person in whom the tenant's interest was actually vested. He says, in effect, that paragraph (*g*) on its proper construction can only apply when the person whose death is said to make the giving of the notice to quit possible is both the original tenant and still the tenant at the date of death. Accordingly, he says that once the tenancy has been assigned, as it has been assigned in this case, paragraph (*g*) can have no further effect.

I have been referred to two authorities on the construction of paragraph (*g*) but neither of them is directly helpful on this point, and, indeed, it seems to arise for decision for the first time. Mr. Dobry has referred me to section 94 of the Act, which contains a definition of "tenant" in the following terms: "'tenant' "means the holder of land under a contract of tenancy, and "includes the executors, administrators, assigns, committee of "the estate, or trustee in bankruptcy of a tenant, or other person "deriving title from a tenant." He submits that in the light of that definition paragraph (*g*) should be read as follows, namely: "The holder of land, being the holder with whom the contract of "tenancy was made, had died within three months before the "date of the giving of the notice to quit," and he relies on the fact that by incorporating the word "holder" in that way he incorporates a word which implies the actual holding of the estate and is inconsistent with a reference to someone who formerly held that estate.

In my judgment, looking at the words in paragraph (*g*) without assistance from authority, I think that they are clear, and I think that they mean what, in my view, they say, namely, that the landlord may take this opportunity of serving notice to quit if the individual who was the tenant with whom the contract of tenancy was made has died within the preceding three months. I do not think that the words are ambiguous and that is the meaning which I would give them, and I am unable to accept Mr. Dobry's argument based upon section 94, because I think that it is implicit in that argument that a reference to "tenant" in section 24 should not, unless the context otherwise requires, include a former tenant.

That, in my judgment, is really the basis of his argument, and

that it is unsound is apparent to me both from section 24 itself and from section 94, because each of those sections in its own way makes it perfectly clear that the draftsman is using the word "tenant" to include not merely the present holder of the land but also a former holder who was formerly the tenant. Thus, in section 94, there is reference to the executors and administrators of a tenant. That, in itself, as I see it, shows that the word "tenant" is being used to describe a past holder, not a present one, and, as Mr. Head has pointed out, the same considerations apply to section 24 itself. Under section 24 (1) notice to quit is given to the tenant of the land, in certain circumstances, where paragraph (*g*) of subsection (2) is applied, when there has been the death of a former holder. Thus the draftsman still, in paragraph (*g*), uses the words "the tenant" to describe that person who by hypothesis is already deceased.

It seems to me, therefore, that it is quite impossible to say that whenever the Act refers to a person as tenant it is necessarily speaking of someone who is a present tenant and necessarily not speaking of someone who was a former tenant, and, in my judgment, the correct interpretation of paragraph (*g*) is that the person referred to as "tenant" is someone who is not now the tenant, because he or she is dead, but someone who was the tenant on a former occasion. That being the case, I see no reason at all to confine the words so as to require that the tenant referred to should still have been the holder of the estate at the date of his or her death.

Consequently, in my judgment, this notice to quit is valid and the tenancy duly determined in accordance with it on March 25, 1960.

That is sufficient, of course, to dispose of this matter, but in case the defendant is minded to have the question considered in another court, I think it would be helpful if I at least made some observations and finding of fact with regard to the other issues which have been argued. On these other issues Mr. Head, on behalf of the plaintiff, has first of all submitted that where a notice to quit is given by a landlord and the tenant's actions, or representations, are indicative of the fact that he is accepting that notice as valid, and will proceed to quit in accordance with it, there may then be set up an estoppel which will prevent the tenant from subsequently denying the validity of the notice. That such an estoppel could, or may, arise is apparent from authority which has been cited to me, and I refer in particular to *Harnham Singh* v. *Jamal Pirbhai*.[1] It is equally apparent, in my judgment, that before such an estoppel can be set up there must be an unequivocal representation made by the defendant to the effect that he is treating the notice as valid and proposes to go.

[His Lordship then referred to the correspondence between

[1] [1951] A.C. 688, P.C.

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the plaintiff and the defendant's solicitors up to the time that the notice to quit expired on March 25, 1960, and said that, in the circumstances of this case, the letter of February 25, 1960, from Major Chalk was not sufficient to create an estoppel against the defendant. Moreover, the removal by the defendant of most of his stock from the land on March 28, 1960, was not an unequivocal action amounting to a representation by the defendant that he was going to go as it was consistent with his past practice in the spring for many years, and was just as consistent with his intention to retain the tenancy as with his intention to give it up. Further, the letter from Major Chalk's firm of May 18, 1960, was quite insufficient to found any representation that the tenancy had come to an end. He could therefore find no ground for saying that the defendant was estopped from denying the validity of the notice to quit, and if the matter turned on that point he would decide the case in favour of the defendant.

[His Lordship then referred to the submission made on behalf of the plaintiff that there had been actual surrender by operation of law, and said that in his judgment the removal of the bulk of the sheep on March 28, 1960, was not a giving up of possession by the defendant. It was a perfectly normal move in good husbandry, and there was no reason to suppose that the sheep were taken away with a view to their being kept permanently on the defendant's farm. On the contrary, all the facts were consistent with their removal having been the normal temporary spring removal which the defendant usually carried out. Although the defendant had carried out no normal farming operations between March 28 and May 23 a tenant did not give up possession of agricultural land merely by not using it. He had left behind two ewes and lambs and a certain amount of dead stock, and on one occasion one of his men was sent back in the latter part of April, 1960, to do some hedging. Even if he was doing that work with a view to reducing the claim against him under section 58 of the Act he had no right to do it after his tenancy had come to an end. That was another factor, however small, pointing to the fact that the defendant had never abandoned possession, if and so far as it was a matter of intention. He found that the defendant was disappointed with the advice he was receiving up to March 25, 1960, as it was suggesting to him that he would have to go and that the notice was valid but, nevertheless, in his Lordship's judgment, the defendant never gave up hope. He was prepared to remain hoping that something would turn up, and if and so far as his intention was a matter of importance, he found that the defendant never intended to give up possession and continued to hope that by some means or other the matter would be resolved in his favour. For those reasons he found that there was no surrender of this tenancy and, again, but for his decision on the notice to quit he would, if that were the only matter, have decided the case in favour of the defendant. His Lordship continued:]

In substance he has been kept out of this land for about 12 months, and it is common ground between the parties that the value of this land is about £200 per annum, whether one thinks in terms of the rent at which it would let or of the profit which the owner-occupier might reasonably expect to make. In my judgment, therefore, the matter of damages will be adequately met by my awarding the plaintiff £200. He is also entitled to the injunction for which he prays.

Judgment for the plaintiff with costs.

Solicitors: *Wrinch & Fisher for Murton, Clarke & Murton-Neale, Cranbrook; Field, Roscoe & Co. for Hallett & Co., Ashford.*

E. M. W.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL OF THE GAMBIA . APPELLANT;

AND

PIERRE SARR N'JIE . . . . . RESPONDENT.

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ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Barrister — Professional misconduct — Diciplinary power of judge — Exercise by deputy—Whether a judicial power—Gambia.

West Africa—Gambia—Legal practitioner—Professional misconduct—Disciplinary power of deputy judge to suspend or strike off—Judicial power—Supreme Court Ordinance (Laws of the Gambia, 1955, *c.* 5), *s.* 7—*Rules of the Supreme Court of the Gambia,* 1928, *Ord. IX, r.* 7.

West Africa—Gambia—Appeal to Privy Council—Competency—Locus standi of Attorney-General—"Person aggrieved"—West African (Appeal to Privy Council) Order in Council, 1949, *s.* 31.

By section 7 of the Supreme Court Ordinance of the Gambia: ". . . it shall be lawful for the Governor to appoint a deputy judge "to represent the judge of the Supreme Court of the Colony of the "Gambia [the Chief Justice] in the exercise of his judicial "powers . . . "; and by Order IX, r. 7, of the Rules of the Supreme Court of the Gambia: "The judge shall have power, for reasonable "cause, to suspend any barrister or solicitor from practising within "the jurisdiction of the court . . . or order his name to be struck "off the Roll of Court."

The name of the respondent, a member of the English Bar who had been admitted to practice as a barrister and solicitor of the Supreme Court of the Gambia, was, after due inquiry into allegations of professional misconduct by a deputy judge appointed under section 7 of the Supreme Court Ordinance, ordered by him to be

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* *Present*: LORD RADCLIFFE, LORD DENNING, LORD GUEST.

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struck off the roll of the Supreme Court of the Gambia. On his appeal, the West African Court of Appeal set aside the deputy judge's order on the ground that he had only jurisdiction to represent the Chief Justice "in the exercise of his judicial powers," and that the power to strike a legal practitioner off the roll was not a judicial power. On appeal by the Attorney-General of the Gambia by special leave:—

Held, that the power of a judge, sitting as a disciplinary authority, to suspend or strike off a legal practitioner was a judicial power of the judge which it was competent for a deputy judge to exercise.

Order IX, r. 7, was simply a restatement of the inherent power of the judge at common law and was intra vires.

In re Justices of Court of Common Pleas of Antigua (1830) 1 Knapp 267, at 268, P.C.; *Har Prasad Singh* v. *Judges of Allahabad High Court* (1931) L.R. 58 I.A. 152 and *Macauley* v. *Judges of the Supreme Court of Sierra Leone* [1928] A.C. 344, P.C. considered.

Held, further, that the Attorney-General, representing the Crown as guardian of the public interest, was a "person "aggrieved"—words of wide import—by the decision of the West African Court of Appeal within the meaning of section 31 of the West African (Appeal to Privy Council) Order in Council, 1949, and accordingly had a locus standi to petition for special leave to appeal.

Ex parte Sidebotham (1880) 14 Ch.D. 458, at 465, C.A. and *Ex parte Official Receiver, In re Reed, Bowen & Co.* (1887) 19 Q.B.D. 174; 3 T.L.R. 640, C.A. considered.

By section 5 of the West African (Appeal to Privy Council) Order in Council, 1949: "Applications to the court for leave to "appeal shall be made by motion or petition within 21 days from "the date of the judgment to be appealed from, and the applicant "shall give the opposite party notice of his intended application."

Held, that while a literal construction of section 5 would appear to require that the application itself must be heard within 21 days, all that was intended was that notice should be lodged in the court within 21 days from the date of the judgment appealed from, and a copy served on the opposite party as soon as possible, and in any case within a reasonable time before the date of the hearing.

Judgment of the West African Court of Appeal reversed.

Appeal (No. 54 of 1959), by special leave.

The following facts are taken from the judgment of the Judicial Committee: Pierre Sarr N'Jie was a member of the English Bar who was admitted a few years ago to practice as a barrister and solicitor of the Supreme Court of the Gambia. On September 22, 1958, the deputy judge (Abbott J.) made an order striking his name off the roll of that court and directing that it be reported to the Masters of the Bench of his Inn. On June 5, 1959, the West African Court of Appeal (Bairamian Actg.P., Hurley Actg.J.A. and Ames Actg.J.A.) set aside the order on the ground that the deputy judge had no jurisdiction in the matter. The Attorney-General of the Gambia sought leave to appeal to Her Majesty in Council but on July 6, 1959, the West African Court of Appeal (Bairamian Actg.P., Benka-Coker J. and Marke J.) refused him leave to appeal on the ground that notice had not been given in due time to Pierre Sarr N'Jie. Thereupon the Attorney-General made a petition to Her Majesty for special leave to appeal from

the judgments of the West African Court of Appeal, both of June 5, 1959, and July 6, 1959. This petition was granted but liberty was expressly reserved to Pierre Sarr N'Jie to raise the preliminary point that no appeal lay at the instance of the Attorney-General. Their Lordships rejected this preliminary point and their reasons appear in their judgment.

The history started with a civil suit tried in 1958 in the Supreme Court of the Gambia before the Chief Justice of the Gambia (Wiseham C.J.). On June 27, 1958, in the course of giving judgment, Wiseham C.J. criticised severely certain conduct of Pierre Sarr N'Jie which had come to his notice during the trial, and he sent a copy of his judgment to the Attorney-General of the Gambia. On July 16, 1958, the Attorney-General served a notice of motion on Pierre Sarr N'Jie asking for an inquiry to be made by the Chief Justice into allegations of professional misconduct against Pierre Sarr N'Jie and for his name to be struck off the roll of court. The allegations were set out in an affidavit and were to the effect that he had received several sums of money on behalf of others, to wit, £350, £150, £50, £203 9s., £1,360, and £200, and had utilised them for his own purposes, and further, that he had, with intent to deceive, been guilty of false representation and concealment.

On July 19, 1958, the motion came on for hearing before Wiseham C.J. Pierre Sarr N'Jie was then represented by his brother, Mr. S. A. N'Jie. He consented to an inquiry being held but asked that it should be held by someone other than Wiseham C.J. The Chief Justice said that, in view of his findings in the civil suit, this was reasonable. He said that he would recommend that someone other than himself should be appointed as a deputy judge to hold the inquiry and to exercise all the powers vested in the Chief Justice. Mr. S. A. N'Jie asked for time until November, but this the Chief Justice refused to grant. A day or two later Pierre Sarr N'Jie left the Gambia for England and on July 25, 1958, he wrote from London to the Attorney-General of the Gambia asking the date of the inquiry. He said: "I should "like it held as early as possible, say, first week of September "next."

Steps were duly taken to appoint a deputy judge to hold the inquiry instead of the Chief Justice. The Governor appointed Abbott J. (at that time a Justice of the Federal Supreme Court of Nigeria) to be a deputy judge of the Gambia. The hearing was fixed for September 15, 1958, at Bathurst in the Gambia. Notice was given to Pierre Sarr N'Jie, who wrote on August 17, 1958: "I have noted that the hearing of the matter before the court will "take place (at Bathurst) on September 15, 1958, and I shall be "present, God being willing."

Notwithstanding the apparent concurrence in the date of September 15, 1958, Pierre Sarr N'Jie afterwards sought by various means to get the hearing adjourned. At one time he

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objected to a hearing during the vacation. At another time he said it was impossible for him to attend. Eventually he said he was ill and that a medical certificate was available, but none ever came. All his objections were overruled: and Abbott J. held the inquiry on September 15, 16, 17 and 18, 1958. The Attorney-General appeared but Pierre Sarr N'Jie did not appear nor was he represented, save for a fleeting moment when his brother, Mr. E. D. N'Jie, asked for an adjournment and, on its being refused, withdrew.

On September 22, 1958, Abbott J. gave his decision. He found that eight out of the nine allegations against Pierre Sarr N'Jie had been established. He summarised his conclusions in these words: "Of the respondent's behaviour as disclosed by the "documentary and oral evidence before me, I find it difficult to "speak with anything approaching moderation. He is un-"doubtedly guilty of the most disgraceful professional miscon-"duct that I have come across in 35 years' legal experience. He "is totally unfitted, in my view, to be entrusted with the interests "and affairs of any member of the public, still less with any "money belonging to anyone else, and he is a disgrace to the "profession to which he belongs."

Abbott J. ordered that his name be struck off the roll of barristers and solicitors of the Supreme Court of the Gambia and directed that the making of the order be reported by the Attorney-General to the Masters of the Bench of the Inn of Court by which he was called to the Bar.

On June 5, 1959, the West African Court of Appeal set aside this order on the ground that a deputy judge had only jurisdiction to represent the Chief Justice "in the exercise of his judicial "powers": and they held that the power to strike a legal practitioner off the roll was not a judicial power. Against that decision the Attorney-General of the Gambia now appealed.

1961. March 15, 16, 20. *J. G. Le Quesne* for the appellant. *E. F. N. Gratiaen Q.C.* Ceylon and *Walter Jayawardena* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Boulter* v. *Kent Justices* [1]; *Regina* v. *Keepers of the Peace and Justices of the County of London* [2]; *Sevenoaks Urban District Council* v. *Twynam* [3]; *Rex* v. *London Quarter Sessions, Ex parte Westminster Corpn.* [4]; *In re Monckton* [5]; *In re Downie and Arrindell* [6]; *In re Taylor* [7];

[1] [1897] A.C. 556; 13 T.L.R. 538, H.L.
[2] (1890) 25 Q.B.D. 357; 6 T.L.R. 389, D.C.
[3] [1929] 2 K.B. 440; 45 T.L.R. 508, D.C.
[4] [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032, D.C.
[5] (1837) 1 Moo.P.C.C. 455, P.C.
[6] (1841) 3 Moo.P.C.C. 414, P.C.
[7] [1912] A.C. 347; 28 T.L.R. 206; 105 L.T. 973, P.C.

Morgan v. *Leech* [8]; *Attorney-General for Ceylon* v. *Perera* [9]; *Reg.* v. *Bertrand* [10]; *In re Lamb, Ex parte Board of Trade* [11]; *Jennings* v. *Kelly* [12]; *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow* [13]; *Rex* v. *Benchers of Gray's Inn* [14]; *Rex* v. *Benchers of Lincoln's Inn* [15]; *Institute of Patent Agents* v. *Lockwood* [16]; *Godfrey* v. *George*.[17]

May 3. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships see no reason to suppose that Abbott J. was wrong in refusing to grant an adjournment. It was a matter for his discretion, and there is no ground for saying that he exercised his discretion improperly. If Pierre Sarr N'Jie had any defence on the merits, he ought to have returned to the Gambia to put it forward: and no good reason was shown for his not doing so.

In order to consider the validity of the decision of the West African Court of Appeal their Lordships must draw attention to the fact that there is only one judge of the Supreme Court of the Gambia: for by section 4 of the Supreme Court Ordinance it is provided that: "The Supreme Court shall consist of and shall be "held by and before a judge to be appointed by the Governor." The single judge is the Chief Justice. There is provision for an acting judge to be appointed to act if the Chief Justice is ill or absent from duty, but that was not the case here. There is also provision for a deputy judge to be appointed, and that is what was done. Abbott J. was appointed a deputy judge under section 7 of the Supreme Court Ordinance, which provides that:

"1 (1). Notwithstanding anything in this Ordinance contained, "it shall be lawful for the Governor to appoint a Deputy Judge "to represent the Judge of the Supreme Court of the Colony of "the Gambia *in the exercise of his judicial powers*, although he "be present in the Colony or the Protectorate.

"(2) Such Deputy Judge *shall exercise all the judicial powers* "of the Judge of the Supreme Court, and all acts done by such "Deputy Judge, in the execution of his powers, shall be as valid "and effectual, to all intents and purposes, as if they had been "done by the Judge of the Supreme Court, and all judgments "orders or decrees made by such Deputy Judge shall be subject "to the same right of appeal in all respects as if they had been "made by the Judge of the Supreme Court.

"(3) The Judge of the Supreme Court may direct at what time "and place such Deputy Judge shall sit, and what causes shall "be heard before him, and generally make such arrangements as

[8] (1841) 3 Moo.P.C.C. 368, P.C.
[9] [1953] A.C. 200; [1953] 2 W.L.R. 238, P.C.
[10] (1867) L.R. 1 P.C. 520, P.C.
[11] [1894] 2 Q.B. 805; 10 T.L.R. 575, C.A.
[12] [1940] A.C. 206; 56 T.L.R. 154; [1939] 4 All E.R. 464, H.L.
[13] [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78, D.C.
[14] (1780) 1 Doug. 353.
[15] (1825) 4 B. & C. 855.
[16] [1894] A.C. 347; 10 T.L.R. 527, H.L.
[17] [1896] 1 Q.B. 48, C.A.

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"to him shall seem proper for the division and despatch of the "business of the Supreme Court."

It is quite apparent from that section that the deputy judge can only represent the Chief Justice in the exercise of his judicial powers. He cannot represent the Chief Justice in the exercise of his administrative powers. Some of the powers of the Chief Justice are clearly judicial powers, as when he sits in court to decide civil or criminal cases. Others are equally clearly administrative powers, as when he directs the times at which the offices of the court shall be open, or appoints notaries public, or makes rules of court. Into which of these categories are we to place the power of the Chief Justice to suspend legal practitioners or to strike them off the roll of court? Is this a judicial power or an administrative power? This necessitates an analysis of the nature of the power.

By the common law of England the judges have the right to determine who shall be admitted to practise as barristers and solicitors: and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court: and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the colonies the judges have retained the power in their own hands, at any rate in those colonies where the profession is "fused." The principle upon which this rests was well stated by Lord Wynford in 1830 in *In re Justices of Court of Common Pleas of Antigua*[1]: "In the colonies there are no Inns of Court, but it is "essential for the due administration of justice that some persons "should have authority to determine, who are fit persons to prac-"tise as advocates and attorneys there. Now advocates and "attorneys have always been admitted in the Colonial Courts by "the judges, and the judges only. The power of suspending from "practice must, we think, be incidental to that of admitting to "practise, as is the case in England with regard to attorneys. In "Antigua the characters of advocates and attorneys are given to "one person; the court therefore that confers both characters "may for just cause take both away." In the Gambia these powers of the judges have been embodied in Rules of the Supreme Court, 1928. Order IX, r. 2, says that the judge (there is only one) may, in his discretion, approve, admit and enrol to practise as a barrister and solicitor of the court (inter alios) any person who is entitled to practise as a barrister in England and who produces testimonials of good character. Order IX, r. 7, says that "the Judge shall have power, for reasonable cause, to "suspend any barrister or solicitor from practising within the "jurisdiction of the Court for any specified period, or order his "name to be struck off the Roll of Court." Their Lordships notice that a majority of the West African Court of Appeal

[1] (1830) 1 Knapp 267, 268.

(Bairamian Actg.P. and Ames Actg.J.A., with Hurley Actg.J.A. dissenting) thought that Order IX, r. 7, was ultra vires. But it seems to their Lordships that it is simply a restatement of the inherent power of the judge at common law and is intra vires. And this was conceded by Mr. Gratiaen before their Lordships.

When the judges exercise this power to suspend or expel, they do not decide a suit between parties. There is no prosecutor as in a criminal case, nor any plaintiff as in a civil suit. The judges usually act on their own initiative, ex mero motu, on information which has come to their notice, or to the notice of one or other of them in the course of their duties; as in *Rex* v. *Southerton*[2] and *Har Prasad Singh* v. *Judges of Allahabad High Court*.[3] But sometimes they have acted on the complaint of the Attorney-General of the colony, as in the *Petition from Antigua*[4] and *Macauley* v. *Judges of the Supreme Court of Sierra Leone*[5] (see the printed book). Or even on the complaint of a third person, as in *Anandalvan* v. *Judges of the High Court of Madras*[6] (see the printed record of the proceedings, pp. 1 and 284). Whoever makes the complaint, the judges, are, of course, under a duty to act judicially: see *Har Prasad Singh* v. *Judges of Allahabad High Court*.[7]

When a legal practitioner is suspended or struck off by the judges of a colony, he has always been at liberty to petition Her Majesty in Council to restore him. But he should give notice of his application to the judges so as to enable them to justify their order: see *Smith* v. *Justices of Sierra Leone*,[8] by Lord Brougham; and in all the cases since 1848 the judges themselves have been made respondents to the appeal, see, for instance, *Har Prasad Singh* v. *Judges of the High Court of Allahabad*[9]: though in one of the cases the Attorney-General was also made a respondent, *Macauley's* case.[10]

This fact—that the judges are themselves always made respondents to the petition to Her Majesty—is an implicit recognition that, when exercising this jurisdiction, they do not sit as a court of law but as a disciplinary authority. And it has been expressly decided in West Africa that the judges in this regard do not sit as a court. In *Macauley's* case[10] the Chief Justice of Sierra Leone struck Macauley off the roll of court. Macauley sought to appeal to the Full Court under a provision which gave an appeal from a decision of the "Supreme Court" to the Full Court. It was held by Petrides and Sawrey-Cookson JJ., with Atkin J. dissenting, that no appeal lay to the Full Court because the order of the Chief Justice striking him off was not a decision of the "Supreme "Court," and that Macauley's only remedy was to go to the Privy Council for special leave. (The judgment is contained in

[2] (1805) 6 East 126, 143.
[3] (1931) L.R. 58 I.A. 152, 154.
[4] 1 Knapp 267.
[5] [1928] A.C. 344, P.C.
[6] (1930) L.R. 58 I.A. 156n.
[7] Ibid. 152.
[8] (1848) 7 Moo.P.C. 174, 175.
[9] L.R. 58 I.A. 152.
[10] [1928] A.C. 344.

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the printed record in *Macauley's* case, pp. 30 to 33 and 44 to 49.) The legislature seems to have had its attention drawn to this decision, for it soon afterwards made special provision for an appeal. When setting up the West African Court of Appeal, it made provision for appeals to it from the decisions of the "Supreme Court" in civil and criminal cases, and then went on by a special section 14 to provide that "An appeal shall lie to "the Court of Appeal from any order of the Judge suspending a "barrister or solicitor of the Supreme Court from practice or "striking his name off the Roll and for the purposes of any such "appeal any such order shall be deemed to be an order of the "Supreme Court." That section is still in force. It was the very section under which Pierre Sarr N'Jie appealed to the Court of Appeal. And it shows clearly enough that the legislature did not regard the decision of the judge in such a case as a decision of the Supreme Court but as a decision of the judge as a disciplinary authority.

It was on this account—that the judge, when exercising disciplinary powers, does not sit as a court—that the West African Court of Appeal concluded that it was not part of his "judicial "powers" within section 7 of the Supreme Court Ordinance, and it was therefore not within the competence of a deputy judge. Bairamian Actg.P. said: "A deputy judge cannot in my opinion "deal with any matter which is not a proceeding in the court": and Ames Actg.J.A. said: "By 'judicial powers' is meant powers "which he exercises when constituting the Supreme Court under "section 4, to the exclusion of any other of his powers." Their Lordships recognise that in some contexts the words "judicial "powers" do signify the powers of a court which sits to decide controversies between parties: as, for instance, in the phrase "The judicial powers of the Commonwealth," see *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation.*[11] But in this Ordinance the phrase is "The judicial powers of the "judge." And it appears to their Lordships that in this context a judge exercises judicial powers, not only when he is deciding suits between parties, but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge. Suppose, for instance, that a judge, finding that a legal practitioner had been guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see *Myers* v. *Elman*[12] *per* Lord Wright). That would be an exercise of the judicial powers of the judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off. And suppose that the judges of a colony do suspend a practitioner or strike him off. It is undoubtedly open to the practitioner to appeal to Her Majesty

[11] [1931] A.C. 275, 295; 47 T.L.R. 115.

[12] [1940] A.C. 282, 318; 56 T.L.R. 177; [1939] 4 All E.R. 484, H.L.

in Council: and this necessarily imports that it is the exercise by the judges of a judicial power. For there is no right of appeal to their Lordships' Board from the exercise of an administrative power.

Their Lordships are therefore of opinion that the power of a judge to suspend or strike off a legal practitioner is a judicial power of the judge which it is competent for a deputy judge to exercise.

Their Lordships will now revert to the preliminary point: for the foregoing discussion is pertinent to it. The preliminary objection raised by Mr. Gratiaen was simply this: The Attorney-General has no locus standi to petition for special leave to appeal, because he is not a "person aggrieved." Section 31 of the West African (Appeal to Privy Council) Order in Council, 1949 (under which the Attorney-General made his petition) says that: "Nothing in this Order contained shall be deemed to interfere "with the right of His Majesty upon the humble petition of *any* "*person aggrieved* by any judgment of the Court to admit his "appeal therefrom upon such conditions as His Majesty in "Council shall think fit to impose."

In support of this preliminary point Mr. Gratiaen referred to the judgment of James L.J. in *Ex parte Sidebotham*,[13] where he said: "A 'person aggrieved' must be a man who has suffered a "legal grievance, a man against whom a decision has been pro-"nounced which has wrongfully deprived him of something, or "wrongfully refused him something, or wrongfully affected his "title to something." If this definition were to be regarded as exhaustive, it would mean that the only person who could be aggrieved would be a person who was a party to a lis, a controversy inter partes, and had had a decision given against him. The Attorney-General does not come within this definition, because, as their Lordships have already pointed out, in these disciplinary proceedings there is no suit between parties, but only action taken by the judge, ex mero motu or at the instance of the Attorney-General or someone else, against a delinquent practitioner.

But the definition of James L.J. is not to be regarded as exhaustive. Lord Esher M.R. pointed that out in *Ex parte Official Receiver, In re Reed Bowen & Co.*[14] The words "person "aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the Attorney-General a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct

[13] (1880) 14 Ch.D. 458, 465, C.A.

[14] (1887) 19 Q.B.D. 174, 178; 3 T.L.R. 640, C.A.

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of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that if the judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the judge finds the practitioner guilty of professional misconduct, and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge, or is otherwise a point in which the public interest is concerned, the Attorney-General is a "person "aggrieved" by the decision and can properly petition Her Majesty for special leave to appeal. It was for these reasons that their Lordships rejected the preliminary objection and held that the Attorney-General was a "person aggrieved" by the decision of the West African Court of Appeal.

There is one last point to consider. It relates to the order made on July 6, 1959, by the West African Court of Appeal when they refused the Attorney-General leave to appeal to Her Majesty in Council. The point arises on section 5 of the West African (Appeal to Privy Council) Order in Council, 1949, which says that: "Applications to the Court for leave to appeal shall be made by "motion or petition within 21 days from the date of the judgment "to be appealed from, and the applicant shall give the opposite "party notice of his intended application." In the present case the decision of the West African Court of Appeal (by which they set aside the order of the deputy judge) was given on June 5, 1959. The Attorney-General sought leave from that court to appeal to Her Majesty in Council. He lodged his notice of motion within 21 days, namely, on June 23, 1959, but he did not serve it on Pierre Sarr N'Jie within 21 days, because N'Jie was not in the Gambia but in England. On July 6, 1959, the West African Court of Appeal refused the Attorney-General's application. They said: "We cannot in face of section 5 of the Order in Council entertain "an application for leave to appeal unless the notice to the "opposite party of the intended application is given before the "21 days have expired." This ruling is of no practical significance in the present case because their Lordships afterwards gave special leave to appeal: but as the ruling is said to affect many colonies with similar Orders in Council, their Lordships gave special leave to appeal from it.

Their Lordships think that, if section 5 is construed literally, it does seem to lead to the result reached by the West African Court of Appeal: for an application remains an "intended "application" until it is heard in court. But this would mean that the application itself would have to be heard within 21 days. That cannot have been intended. No court could bind itself to give a date for the hearing within that time. All that was intended was that notice should be lodged with the court within 21 days: and a copy served on the opposite party as soon as possible and in any case a reasonable time before the date of the hearing. This result is reached by reading the section in this way: "Applications for leave to appeal shall be made by motion

"or petition (notice of which shall be lodged with the court within "21 days from the date of the judgment to be appealed from), "and the applicant shall give the opposite party notice of his "intended application." Their Lordships think the section should be so read.

Their Lordships will humbly advise Her Majesty that the appeals should be allowed and the order of the deputy judge of the Gambia restored. They make no order as to costs.

Solicitors: *Charles Russell & Co.; A. L. Bryden & Williams.*

C. C.

[QUEEN'S BENCH DIVISION.]

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Jan. 25, 26, 27, 30:
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Estoppel—Per rem judicatam—Negligence—High Court action—Plaintiff passenger in car involved in collision—County court action by driver of plaintiff's car—Driver of plaintiff's car found solely to blame—Judgment entered for other driver—Subsequent High Court action—Both drivers found equally to blame—Whether driver of other car entitled to indemnity—Whether same issues raised in both actions—Whether estoppel by record established—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*), (2).

Joint Tortfeasors—Contribution or indemnity—"Entitled to be indem-"nified"—Proceedings for indemnity based on estoppel by record—Law Reform (Married Women and Tortfeasors) Act, 1935, *s.* 6 (1) (*c*), (2).

Evidence — Documentary — Judge's notes in county court — Whether admissible in High Court—Question of estoppel.

On July 19, 1957, the plaintiff was a passenger in a motor-car driven by the first defendant which came into collision with a motor-car owned by the second defendants and driven by the third defendant. Both the plaintiff and the first defendant sustained injuries. The first defendant brought an action in the county court against the second and third defendants, alleging negligence and claiming damages for injuries and loss sustained by him; the second and third defendants denied negligence and alleged that the accident was solely caused, or alternatively contributed to, by the first defendant's negligence. The county court judge held that the first defendant was wholly to blame for the accident and entered judgment for the second and third defendants. Subsequently, the plaintiff brought an action in the High Court alleging negligence against all three defendants and claiming damages for her injuries. The defendants denied liability and blamed each other. Lawton J. found that the first and third defendants were equally to blame for the collision.

In third party proceedings, brought by the second and third defendants against the first defendant for an indemnity on the grounds (1) that they were persons "entitled to be indemnified" by him within the meaning of section 6 (1) (*c*) of the Law Reform

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(Married Women and Tortfeasors) Act, 1935,[1] and (2) that by reason of the county court judgment the first defendant must be deemed to have admitted his sole responsibility for the plaintiff's damage for the purpose of deciding what was "just and reasonable" under section 6 (2) of that Act:—

Held, (1) that the contention that the second and third defendants were persons "entitled to be indemnified" by the first defendant within section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, was an attempt to base a cause of action on an estoppel by record, but that at common law a cause of action could not be so based and section 6 (1) (*c*) did not allow what the common law would not (post, p. 860).

Dictum of Bowen L.J. in *Low* v. *Bouverie* [1891] 3 Ch.D. 82; 7 T.L.R. 582, C.A. applied.

(2) That the defendants' duty to each other and their duty to the plaintiff were separate and distinct duties, so that the precise question at issue in the High Court proceedings was different from that decided in the county court; nor was the extent of their respective responsibilities for the damage suffered by the plaintiff before the county court; and that, therefore, no estoppel by record had been stablished. Accordingly, the defendants were liable in equal proportions for the damages suffered by the plaintiff (post, p. 864).

Jackson v. *Goldsmith* (1950) 81 C.L.R. 446 and *Neenan* v. *Woodside Astoria Transportation Co.* (1932) 256 New York Supp. 38 applied.

Marginson v. *Blackburn Borough Council* [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273, C.A. considered.

Bell v. *Holmes* [1956] 1 W.L.R. 1359; [1956] 3 All E.R. 449 and *Clyne* v. *Yardley* [1959] N.Z.L.R. 617 not followed.

(3) That the county court judge's notes of the evidence were admissible because, in order to discover what was decided in the county court action, recourse could be had to the information contained in a record of the proceedings (post, p. 859).

ACTION.

On July 19, 1957, a collision occurred between a motor-car owned and driven by the first defendant, Desmond Adolph Tuck, in which the plaintiff, Olive Kathleen Randolph, was a passenger, and a motor-vehicle owned by the second defendants, Norfolk Animal Products Ltd., and driven by the third defendant, Robert Davies Steele. Both the plaintiff and the first defendant were injured, the plaintiff seriously. The first defendant brought proceedings in the county court against the second and third

[1] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6: "(1) Where damage is suffered by "any person as the result of a tort ". . . (*c*) Any tortfeasor liable in "respect of that damage may recover "contribution from any other tort-"feasor who is . . . liable in respect "of the same damage, whether as a "joint tortfeasor or otherwise, so, "however, that no person shall be "entitled to recover contribution under "this section from any person entitled "to be indemnified by him in respect "of the liability in respect of which "the contribution is sought. (2) In "any proceedings for contribution "under this section the amount of the "contribution recoverable from any "person shall be such as may be found "by the court to be just and "equitable having regard to the "extent of that person's responsibility "for the damage; and the court shall "have power to exempt any person "from liability to make contribution, "or to direct that the contribution to "be recovered from any person shall "amount to a complete indemnity."

defendants [plaint No. 0899 of 1958] alleging that the collision was caused by the negligence of the third defendant, and claiming damages for personal injuries and damage done to his clothing: the second and third defendants alleged that the collision was caused solely, or alternatively was contributed to, by the negligence of the first defendant. That action was tried in the West London County Court on July 24 and 31, 1958, when Judge Daynes found that the third defendant was in no way to blame, and that the accident was due to the negligence of the first defendant and entered judgment for the second and third defendants.

Subsequently, on October 15, 1959, the plaintiff issued a writ in the High Court alleging negligence against all three defendants, and claiming damages for the injuries and loss sustained by her as a result of the accident. The first defendant denied negligence and alleged that the accident was caused by the negligence of the third defendant; the second and third defendants also denied negligence and alleged that the accident was caused by the first defendant's negligence.

The second and third defendants brought third party proceedings against the first defendant claiming an indemnity against any liability they might be adjudged to have to the plaintiff, on the ground that the issue between them and the first defendant had been joined and tried in the county court action, and that he had been held wholly responsible, their case being based on section 6 (1) (*c*) and (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935. The question raised by the third party proceedings was ordered to be tried at the trial of the plaintiff's action but subsequent thereto.

In the action, Lawton J. assessed the plaintiff's damages at £8,671 10s. 8d. and found the damage suffered by her was caused by the negligence of both the first and third defendants, the responsibility of each being equal. The second defendants accepted vicarious liability for any negligence proved against the third defendant and this report is confined to the issues raised by the third party proceedings.

The facts are more fully stated in the judgment.

E. Ryder Richardson Q.C. and *D. G. A. Lowe* for the plaintiff.

Montague Berryman Q.C. and *Hugh Griffiths* for the first defendant.

Stanley Rees Q.C. and *I. S. Hill* for the second and third defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Feb. 6, 1961. LAWTON J. read the following judgment: Before I delivered judgment in the action by the plaintiff against the defendants, it was agreed by counsel for all the defendants that

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I should decide on the parol evidence given in that action, but without prejudice to any of the issues raised in the third party proceedings, what was the extent of the responsibility of the first and third defendant for the damage suffered by the plaintiff. It was accepted that the second defendants were vicariously responsible for any negligence proved against the third defendant. In the action I adjudged that the damage suffered by the plaintiff was caused by the negligence of both the first defendant and the third defendant in the driving of their respective motor-cars and, on the parol evidence, I assessed the extent of the responsibility of each of them as equal.

The order for third party directions, which was made in these proceedings on October 12, 1960, provided for the delivery of third party pleadings and for the question of the liability of the first defendant to indemnify the other defendants to be tried at the trial of the action but subsequent thereto. Pursuant to that order, the second and third defendants delivered a third party statement of claim against the first defendant, Tuck, in which they claimed to be indemnified by him against such liability as they might be adjudged to have to the plaintiff. Paragraph 4 of that statement of claim was as follows: "The aforesaid issue "[that is, whether the negligence of the defendant Tuck caused "the collision] between these defendants and the third party was "joined and tried in the West London County Court, Plaint No. "0899 of 1958, on the 24th and 31st days of July, 1958, before "His Honour Judge Daynes and upon the said trial it was found "that the third party herein was wholly to blame and judgment "was accordingly entered for these defendants and the said "judgment still remains in full force."

The defendant Tuck delivered a third party defence to this statement of claim in which he admitted that he brought an action against the second and third defendants to recover damages in respect of injuries he received in the accident, and that this action was tried in the West London County Court by His Honour Judge Daynes on July 24 and 31, 1958, judgment being entered for the second and third defendants. He denied that the second and third defendants were entitled to an indemnity or any other relief against him. He did not by his pleading claim any relief against the second and third defendants but at the hearing before me of the third party proceedings, by his counsel, he asked me to make an order for the second and third defendants to contribute to any damages he might have to pay the plaintiff. Counsel for the second and third defendants raised no objection to my making such an order if any findings on the issues raised by the third party pleadings would allow me to do so.

It seems clear from the submissions of counsel, to which I have been greatly indebted, that these issues, or at least ones similar to them, have caused differences of judicial opinion in the Commonwealth. As far as the researches of counsel went—and

I am sure that they went to the limits of what was reasonably possible—the precise point which I have had to decide has never been dealt with in any reported English case. But counsel for the second and third defendants submitted that what was described in argument as the converse of this point was decided by the Court of Appeal in *Marginson* v. *Blackburn Borough Council*,[1] and that the ratio decidendi of that decision applies to these third party proceedings.

The second and third defendants produced in evidence the county court file of the action entitled "*Tuck* v. *Norfolk Animal* "*Products Limited and Steele*, Plaint No. 0899 of 1958," the county court judge's notes of evidence and some notes of the reasons for judgment taken by one of the counsel in that case and by a solicitor's managing clerk. Counsel for the first defendant submitted that I was not entitled to admit in evidence the judge's notes of the evidence. In my judgment, I was so entitled because in order to discover what was decided in the county court proceedings recourse can be had to such information as is to be derived from reading a record of the proceedings—see the judgment of Slesser L.J. in *Marginson* v. *Blackburn Borough Council*.[2]

In this county court action, as appears from the pleadings, the first defendant Tuck claimed against the second and third defendants damages for personal injuries and for damage done to his clothing sustained when his motor-car collided with the third defendant's, Steele's, motor-car. He alleged that this collision had been caused by the third defendant's negligence. The defendant Steele denied negligence and alleged that the collision had been caused solely or alternatively had been contributed to by the defendant Tuck's own negligence.

As appeared from the evidence in the action before me, the plaintiff had been travelling in the defendant Tuck's motor-car when the collision occurred, and his own claim arose out of the circumstances of that same collision. The county court judge, according to the notes of his reasons for judgment taken by the solicitor's managing clerk, made the following finding: "The "defendant [that is, the defendant Steele] not in any way to "blame and that the accident was due to the negligence of the "plaintiff" [that is, the defendant Tuck]. Counsel's note was to the same effect. There was no appeal from this judgment and the time for appealing has long since expired.

It was on these facts and in these circumstances that counsel for the second and third defendants put forward their claim against the defendant Tuck for an indemnity against any damages they might have to pay the plaintiff. That claim was based, and had to be based, upon the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935. Counsel submitted first,

[1] [1939] 2 K.B. 426; 55 T.L.R. 389; [1939] 1 All E.R. 273, C.A.

[2] [1939] 2 K.B. 426, 437.

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that his clients, having obtained judgment in the county court, were persons "entitled to be indemnified" by the defendant Tuck within the meaning of the concluding words of section 6 (1) (*c*) of that Act; and secondly, that, when deciding what was "just "and equitable" within the meaning of section 6 (2), I was bound to proceed on the basis that the defendant Tuck, by reason of the judgment in the county court, must be deemed to have admitted conclusively his own sole responsibility for the damage suffered by the plaintiff.

The second submission amounted to a plea of estoppel by record, or, as it has been termed in Australia, an issue estoppel. Estoppels which, in Lord Coke's words (Coke's Institutes, Vol. 1, Bk. 3, s. 667), "are a curious and excellent kinde of learning" go oddly with a statute which requires the court to do that which is just and equitable, and whose short title begins with the words "Law Reform." But when considering the issues raised I reminded myself of the warning given by that same judge (45 Coke's Institutes, p. 41), namely, "to leave all causes to be "measured by the golden and streight metwand of the law and not "to the uncertain and crooked cord of discretion," and of the comments of Lord Maugham L.C. in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[3] to the effect that "the doctrine of estoppel is one founded on considerations of "justice and good sense." As to the first of counsel's submissions, it seems to me that he was seeking to base a cause of action upon an estoppel by record. At common law this cannot be done: see *Low* v. *Bouverie*,[4] *per* Bowen L.J.[5] In my judgment, section 6 (1) (*c*) does not allow that which the common law would not.

The validity of the second submission depends upon the second and third defendants establishing that, in the county court action, there was put in issue and decided the precise question, the precise fact which arises in these third party proceedings: see *Ord* v. *Ord*,[6] *per* Lush J.[7] What was the precise question, the precise fact which was put in issue and decided in the county court action? In my judgment, it was that the damage suffered by the first defendant was caused, not by any breach of duty owed to him by the third defendant, but by his failure to take proper care for his own safety. In the action before me the question in issue and for decision was whether the damage suffered by the plaintiff had been caused by any breach of duty owed to her by the defendants Tuck and Steele or either of them. The nature and extent of their duty to her may have been similar to the nature and extent of their duty to each other but, if I understand *Bourhill* v. *Young*,[8] they were separate and distinct

[3] [1939] A.C. 1, 19; 55 T.L.R. 260; [1938] 4 All E.R. 747, H.L.

[4] [1891] 3 Ch. 82; 7 T.L.R. 582, C.A.

[5] Ibid.

[6] [1923] 2 K.B. 432; 39 T.L.R. 437, D.C.

[7] Ibid.

[8] [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.

duties, not two aspects of a general duty which, as motorists, they owed to all road users and which the county court judge had decided had not been broken by the first defendant, Steele.

The issue whether these defendants, or either of them, were in breach of their respective duties to the plaintiff was never before the county court. The fact that issues in two actions are similar does not raise an estoppel: see *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council* [9] and *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[10] in which Lord Romer said [11]: "It is no doubt true to say that whenever a "question has in substance been decided, or has in substance "formed the ratio of, or been fundamental to, the decision in an "earlier action between the same parties, each party is estopped "from litigating the same question thereafter. But this is very "different from saying that he may not thereafter litigate, not "the same question, but a question that is substantially similar "to the one that has already been decided."

Now that these defendants have each been adjudged to have been in breach of duty to the plaintiff, a further question arises between them as to the extent of their respective responsibilities for the damage suffered by the plaintiff. This issue was never before the county court and was not substantially the same as that which was. The county court action was concerned with causation, whereas I have had to consider both causation and blameworthiness—and the factor of blameworthiness may have an important bearing on the extent of responsibility: see *Stapley* v. *Gypsum Mines Ltd.*[12] and *Cavanagh* v. *London Transport Executive*.[13] It follows, so it seems to me in principle, and in the absence of any binding authority, that the second and third defendants have not established an estoppel by record. On broadly similar facts the High Court of Australia in *Jackson* v. *Goldsmith* [14] and the Appellate Division of the Supreme Court of the State of New York in *Neenan* v. *Woodside Astoria Transportation* [15] held that no estoppels were raised.

Counsel for the second and third defendants submitted that the ratio decidendi of *Marginson* v. *Blackburn Borough Council* [16] bound me to decide that his clients had established an estoppel. I have found it necessary to examine that case in detail in order to discover what was decided. The facts were that an omnibus owned by the corporation and a motor-car in which Marginson was travelling as a passenger, and which was being driven by his wife as his agent, collided, and the omnibus ran into and damaged some shop premises. Marginson's wife was killed as a result of the accident. The owners of these premises sued both

[9] [1926] A.C. 94, P.C.
[10] [1939] A.C. 1.
[11] Ibid. 43.
[12] [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478, H.L.
[13] (1956) The Times, October 23.
[14] (1950) 81 C.L.R. 446.
[15] (1932) 256 New York Supp. 38.
[16] [1939] 2 K.B. 426, 437.

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the corporation and Marginson in the county court. Both denied liability and each alleged that the accident was solely caused by the negligence of the other. Thereafter they proceeded by third party notice to bring claims against one another for indemnity or, alternatively, for contribution. In addition to such claims, the corporation in their third party notice to Marginson claimed damages in respect of damage done to their omnibus by Marginson's motor-car. The county court judge held both defendants to blame for the damage done to the shop premises, bearing the loss in equal proportion. He then proceeded to deal with the corporation's claim against Marginson, treating that claim as a separate action, and said: "There, I think, I am entitled not to award "any damages. I find they were both to blame for the damage "to the bus."

This judgment was given, of course, before the Law Reform (Contributory Negligence) Act, 1945, was passed. Later, Marginson sued the corporation for the injuries which he had sustained in the accident, and, under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of his wife's death. To those claims the corporation pleaded that Marginson ought not to be permitted to make them by reason of the county court judgment. Lewis J. found for Marginson on this plea. In the Court of Appeal, counsel for the corporation submitted that Marginson was estopped for three reasons: first, because the county court had adjudged that the corporation and Marginson were both to blame for the damage to the shop premises; secondly, because they had been adjudged liable to contribute equally to the amount of the damages; and thirdly, because Marginson had been adjudged not liable to the corporation for damage to the omnibus on the ground that both parties were to blame.

In a reserved judgment of the court, delivered by Slesser L.J., it was adjudged that Marginson's personal claim against the corporation, but not his claim in his representative capacity, was estopped by the county court judgment. Slesser L.J. dealt with the estoppel held to have been established in these terms [16]: "On "this view, and considering what the learned county court judge "was asked to decide, as between the plaintiff and the defendants "in the present action, he has undoubtedly ruled that the plain-"tiff could not be responsible to the defendants, because in the "matter of alleged negligence in the driving of the motor-omnibus "and motor-car, which, as he says, was a separate claim from "that of the owners of the shops, both parties were to blame. "This seems to us to be a clear decision on the same issue "between the same persons litigating in the present case, and "establishes conclusively, albeit in the county court, in a claim "by the defendants against the present plaintiff, that both were "equally to blame."

[16] [1939] 2 K.B. 426, 437.

The claims for personal injuries and damage to the omnibus arose from damage caused by breaches of duty owed by the corporation and Marginson to each other. As I understand this judgment, the estoppel arose because of the county court judge's adjudication upon the breaches of duty; in other words, the Court of Appeal accepted the corporation's third reason for submitting there was an estoppel. Nothing was said about the estoppel being established because the county court judge had decided that the corporation and Marginson had both been in breach of duty to the owners of the shop premises, or that they were responsible in equal proportion for the damage to the shop premises. In these circumstances, I have decided that *Marginson* v. *Blackburn Borough Council* [16] is not an authority which deals with the question before me in these third party proceedings.

Finally, I come to consider the persuasive authority of the judgment of McNair J. in *Bell* v. *Holmes*.[17] The facts were broadly the same as in *Marginson* v. *Blackburn Borough Council*,[18] save that there were no formal third party proceedings in the county court, the judge, at the defendants' request, apportioning the blame at the end of his judgment in the action. There was nothing in the way of a separate claim by one defendant against the other as in *Marginson* v. *Blackburn Borough Council*.[18]

The attention of McNair J. was invited to the fact that the proceedings before him related to different breaches of duty from those considered in the county court. He dealt with this point in these terms [19]: "Those are different legal issues, of course, in a "sense, but I do not feel the fact that they are technically differ-"ent legal issues should prevent them from giving effect to the "plea of estoppel in a case where, having examined the pleadings "in the county court action and comparing them with the "pleadings in the present action, I am satisfied that the issues of "fact, and the evidence to support them in respect of liability, "would be identically the same, . . ."

McNair J. saw only a short citation of the judgment of the High Court of Australia in *Jackson* v. *Goldsmith*,[20] and had no opportunity, as I have had, of considering the judgment in the American case of *Neenan* v. *Woodside Astoria Transportation*.[21] After mentioning *Jackson* v. *Goldsmith*,[22] he said [23]: "It seems "to me that it is difficult to give an opinion on this point in view "of the distinction between that case and this, that in the case in "the Australian courts the judgment which it was sought to set "up as an estoppel was a judgment in an action between two "only of the three motorists who were involved in the collision, "and I can well understand that the introduction of an additional

[16] [1939] 2 K.B. 426, 437.
[17] [1956] 1 W.L.R. 1359; [1956] 2 All E.R. 449.
[18] [1939] 2 K.B. 426.
[19] [1956] 1 W.L.R. 1359, 1366.
[20] (1950) 81 C.L.R. 446.
[21] (1932) 256 N.Y.Supp. 38.
[22] 81 C.L.R. 446.
[23] [1956] 1 W.L.R. 1359, 1367.

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Lawton J.

"party might operate and destroy the conclusiveness of the "judgment given in the other action."

The Supreme Court of New Zealand, in *Clyne* v. *Yardley*,[24] had to consider the same point as I have had to consider, the facts being much the same. That court decided to follow the reasoning of McNair J. in *Bell* v. *Holmes*[25] in the passage to which I have already made reference. With diffidence and regret, I feel unable to do the same. I prefer the persuasive authority of the Australian and American cases which I have mentioned. In these circumstances, I adjudge that the first and third defendant, Tuck and Steele, are responsible in equal proportions for the damage suffered by the plaintiff.

Judgment accordingly.
The first defendant to have the costs of the third party proceedings.

Solicitors: *Edward Thompson & Co.; Berrymans; Stanley & Co.*

J. F. L.

[24] [1959] N.Z.L.R. 617.

[25] [1956] 1 W.L.R. 1359, 1366; [1956] 3 All E.R. 449.

[QUEEN'S BENCH DIVISION.]

SANDERS v. SCOTT.

1961
April 19.

Lord Parker C.J., Gorman and Salmon JJ.

Road Traffic—Notice of intended prosecution—Service of notice—Driver not served—No evidence whether registered owner served—Burden of proof—Road Traffic Act, 1960 (8 & 9 *Eliz.* 2, *c.* 16), *s.* 241 (2), (3).

The defendant was charged with driving a motor-vehicle in a manner dangerous to the public, contrary to section 2 (1) of the Road Traffic Act, 1960. The defendant was the driver of the motor-vehicle concerned at the time of the alleged offence but was not the registered owner thereof. No warning of intended prosecution was given to the defendant at the time, nor was a summons issued within 14 days, nor was notice of intended prosecution under section 241 (2) of the Road Traffic Act, 1960,[1] served on him at any time, although

[1] Road Traffic Act, 1960, s. 241: "(2) Subject to the following provisions of this section, where a person is prosecuted for an offence to which this section applies he shall not be convicted unless either—(*a*) he was warned at the time the offence was committed that the question of prosecuting him for some one or other of the offences to which this section applies would be taken into consideration; or (*b*) within fourteen days of the commission of the offence a summons . . . for the offence was served on him; or (*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed, was—(i) . . . served on or sent by registered post to him or the person, if any, registered as the owner of the vehicle at the time of the commission of the offence . . . (3) The requirement of the last foregoing subsection shall in every case be deemed to have been complied with unless and until the contrary is proved."

his identity and address were known to the prosecution. There was no evidence whether or not such a notice had been served on the registered owner of the motor-vehicle. The justices were of opinion that, as no notice under section 241 was served on the defendant, and there was no evidence that notice had been sent to any other person, the requirements of the section had not been complied with, and they dismissed the information. On appeal:—

Held, that section 241, which provided a technical defence, must be construed strictly, and subsection (3) placed the burden on the defence to show that its requirements had not been complied with; that, under subsection (2) (*c*) there were two clear alternatives and the notice could be served either on the driver or the registered owner of the vehicle, so that as the defendant had not called the registered owner or proved that no notice had been served on him, he had not discharged the burden of proof; and that, therefore, the justices were wrong in dismissing the information.

CASE STATED by Blackpool justices.

On October 11, 1960, an information was preferred against the defendant, Richard Norman Scott, that on July 29, 1960, he drove a motor-vehicle in a manner dangerous to the public, contrary to section 2 (1) of the Road Traffic Act, 1960.

The following were among the facts found by the justices: The events giving rise to the issue of the information occurred on July 29, 1960, and the defendant was the driver of the motor-vehicle concerned at the time of the alleged offence but was not the person registered as the owner thereof at that time. No warning of intended prosecution was given to the defendant at the time of the alleged offence, nor was notice of intended prosecution under section 21 (*c*) of the Road Traffic Act, 1930, now repealed and replaced by section 241 (2) of the Road Traffic Act, 1960, served on him at any time. The prosecutor was aware of the identity and the permanent and usual address of the defendant on August 5, 1960, seven days after the events giving rise to the issue of the summons. No evidence was called by the prosecutor.

It was contended by the prosecutor that although the defendant had proved that the notice of intended prosecution was not served on him, he did not prove nor seek to prove that notice was not served on the person registered as the owner of the motor-vehicle at the time of the alleged offence, and as the requirement as to notice shall in every case be deemed to have been complied with unless and until the contrary is proved under section 21 (ii) of the Road Traffic Act, 1930, as replaced by section 241 (3) of the Road Traffic Act, 1960, the defendant did not discharge the burden cast on him under that subsection.

It was contended by the defendant that the prosecutor was aware of his identity and permanent and usual address on August 5, 1960, and as no warning of intended prosecution was given to him at the time of the offence and no notice of intended prosecution had been served on him the requirements of section 21 (*c*) of the Road Traffic Act, 1930, had not been complied with.

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The justices were of the opinion that as the prosecution were aware on August 5, 1960, of the identity and permanent address of the driver of the vehicle the notice of intended prosecution should have been sent to him in compliance with the section of the Road Traffic Act, and as there was no evidence before them that the required notice had been sent to any other person, they came to the conclusion that the requirements as to notice had not been complied with by the prosecutor in accordance with section 21 (*c*) of the Act of 1930, and, accordingly, they dismissed the information.

The prosecutor appealed.

R. E. Hammerton for the plaintiff.

The defendant did not appear and was not represented.

Rogerson v. *Edwards* [2] was cited in argument.

LORD PARKER C.J. This is an appeal by way of case stated by justices acting in and for the County Borough of Blackpool, before whom an information was preferred by the prosecutor against the defendant that on July 29, 1960, he drove a motor-vehicle in a manner dangerous to the public, contrary to section 2 (1) of the Road Traffic Act, 1960.

The justices dismissed the information, having come to the conclusion that the requirements with regard to notice of intended prosecution of section 21 of the Act of 1930, now section 241 (2) of the Act of 1960, had not been complied with. The defendant was the driver of a motor-vehicle at the time of the alleged offence. No warning of intended prosecution was given to him at the time, nor was a summons issued within 14 days, nor was a notice of intended prosecution served upon him within 14 days or at all. The defendant, having given evidence of that, submitted that the provisions of the section had not been complied with. At that point the police officer dealing with the case did not go into the witness-box and say, as indeed he might have said: "All that is very true, but I did "serve the registered owner," which is an alternative to serving the driver under the subsection. In fact he did not do that, but contended before the justices that, the burden being on the defence to show that the provisions of the section had not been complied with, it had not been shown that a notice of intended prosecution had not been served on the registered owner.

The section, and it is convenient to take section 241 (2) of the Act of 1960, provides: "(2) Subject to the following provisions of "this section, where a person is prosecuted for an offence to which "this section applies he shall not be convicted unless either— ". . . (*c*) within the said fourteen days a notice of the intended "prosecution specifying the nature of the alleged offence and the

[2] [1959] W.N. 101; 49 L.G.R. 358; 95 S.J. 172, D.C.

"time and place where it is alleged to have been committed, "was . . . served on or sent by registered post to him or the "person, if any, registered as the owner of the vehicle at the time "of the commission of the offence." By subsection (3) it is provided: "The requirement of the last foregoing subsection shall "in every case be deemed to have been complied with unless and "until the contrary is proved."

The justices in this case, and I have some sympathy with them, said this to themselves: "The police knew full well the "name and address of the driver, and where to get at him. They "never did serve him. It is most unlikely, therefore, that they "would serve the registered owner. What is more, the police "officer is here, and if the registered owner had been served he "would have told us so." In those circumstances, they said that they were not satisfied that the requirements of section 241 (2) of the Road Traffic Act, 1960, had been complied with, and dismissed the information. I have some sympathy with them, but I think that the section must be looked at strictly. It is laying down a technical defence and it is putting the burden on the defence to show that the provisions of the section have not been complied with. The notice of intended prosecution can be served either on the driver or on the registered owner. It does not say that it can be served on the driver or, if the name and address of the driver are not known, on the registered owner. There are two complete alternatives and, by section 241 (3) the defence must show that neither alternative has been complied with. The proper way of doing that is for the driver to give evidence that no notice was served on him and to call the registered owner in turn to say that equally no notice had been served on him.

In those circumstances, much as I sympathise with the justices, I do not think that the proof required by subsection (3) was forthcoming and, accordingly, there was no ground on which they could dismiss the information, and the case must go back to them with a direction to hear and determine the charge.

GORMAN J. I agree completely. In the case stated before us the justices say: "We were of the opinion that as the prosecu-"tion were aware on August 5, 1960, of the identity and "permanent address of the driver of the vehicle the notice of "intended prosecution should have been sent to him in com-"pliance with the section of the Road Traffic Act." Whether that was the intention behind the framers of this Act or not, I do not know, but there is nothing in the section with which we are concerned to decide in what circumstances the notice shall be served on the driver or, alternatively, on the registered owner. The justices may well have thought that since the prosecution knew the address of the driver, they ought to have served him; but that is not in accordance with the Act. Then they go on further to say: ". . . and as there was no evidence before us "that the required notice had been sent to any other person we

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"came to the conclusion that the requirements as to notice had "not been complied with by the appellant." There again, I feel that the justices are in error because, as my Lord has said, it is provided by section 241 (3), which relates to the sending of notice either to the driver or registered owner that, "The requirement "of the last foregoing subsection shall in every case be deemed "to have been complied with unless and until the contrary is "proved." I agree completely with my Lord that the justices were in error in finding as they did, but it is an error which is quite understandable in the circumstances of this case.

SALMON J. I agree.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co. for A. C. Brewer, Blackpool.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1961
April 20.

Stevenson J.

STOCK *v.* WANSTEAD AND WOODFORD BOROUGH COUNCIL AND ANOTHER.

[1958 S. No. 2866.]

Land Charge—Certificate of search—Conclusive against "person interested"—Meaning of "person interested"—Innaccurate certificate issued by town clerk—Compensation notice not recorded on certificate—Purchase of land completed—Subsequent claim by Minister of Housing for compensation—Payment by purchaser—Claim by purchaser against local authority — Whether Minister "person "interested"—Whether certificate conclusive against Minister—Land Charges Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 22), *s.* 17 (3)—*Town Planning—Development charge—Non-payment—Whether defeating right to develop land—Town and Country Planning Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 72), *ss.* 28, 29 (1), 46.

The plaintiff was negotiating for the purchase of certain land which he intended to develop by building houses thereon. In September, 1957, pursuant to section 17 (1) of the Land Charges Act, 1925,[1] he lodged with the local borough council a requisition

[1] Land Charges Act, 1925, s. 15 (1): "Any charge (. . . 'a local land "'charge') acquired either before or "after the commencement of this Act "by the council . . . shall be regis-"tered in the perscribed manner by "the proper officer of the local autho-"rity . . ."

S. 17: "(1) Where any person "requires search to be made at the "registry . . . he may on payment of "the prescribed fee lodge at the regis-"try a requisition in that behalf.

"(3) In favour of a purchaser or an "intending purchaser, as against per-"sons interested under or in respect "of matters or documents whereof "entries are required . . . the certifi-"cate, according to the tenor thereof, "shall be conclusive, affirmatively or "negatively, as the case may be."

for an official search of the register of local land charges. The town clerk, as the proper officer, issued an official certificate of search which, in Part 3 (c), relating to planning charges registrable under the Town and Country Planning Acts, 1947 to 1954, recorded the word "nil." In fact, in September, 1956, there had been registered under Part 3 (c) of the register a notice, under section 28 (and section 46) of the Town and Country Planning Act, 1954,[2] that compensation had become payable in respect of the land. The plaintiff, in reliance on the certificate and in ignorance of the compensation notice, purchased the land and subsequently obtained outline planning consent for the development he proposed to carry out. In March, 1958, the Ministry of Housing and Local Government claimed payment of £1,612 under section 29 (1) of the Act of 1954, and the plaintiff paid that sum.

In an action by the plaintiff against the council and the town clerk alleging that the sum so paid represented loss resulting from their negligence and/or breach of statutory duty in issuing an inaccurate certificate of search and claiming, inter alia, damages:—

Held, that the registration of the compensation notice placed the Minister within the class of "persons interested under or in respect "of matters or documents whereof entries are required or allowed "to be registered" in section 17 (3) of the Land Charges Act, 1925, and that, by virtue of that subsection, the certificate was conclusive in favour of the plaintiff, so that he was absolved from any liability to meet the demand made by the Minister, and his right to develop the land could not have been defeated by non-payment of the sum claimed; accordingly, the plaintiff was not entitled to recover anything from the council.

ACTION.

The following statement of facts is taken from the judgment of Stevenson J. In September, 1957, the plaintiff, William Charles Stock, was negotiating for the purchase of land in Woodford at the rear of certain premises in Woodford Road which he intended to develop by erecting dwelling-houses thereon. On September 11, 1957, his solicitors lodged with the Wanstead and

[2] Town and Country Planning Act, 1954, s. 28: "(1) Where, on a "claim for compensation under this "Part of this Act in respect of a planning decision, the Minister determines that compensation is payable "and that the amount of the compensation exceeds £20, the Minister "shall . . . apportion the amount of the "compensation between different parts "of the land . . . and shall include "particulars of the apportionment in "the notice of his findings. . . . "(4) Where, on a claim for compensation under this Part of this Act in "respect of a planning decision, "compensation has become payable of "an amount exceeding £20, the "Minister shall cause notice of that "fact, specifying the planning decision "and the land to which the claim for "compensation relates, . . . to be "deposited with the council of the "county borough or county district in "which the land is situated. . . . (5) "Notices deposited under this section "shall be registered in the register "of local land charges, in such manner as may be prescribed by rules ". . . by the proper officer of the "council. . . ."

S. 29 (1): "No person shall carry "out any new development to which "this section applies, on land in "respect of which a notice (in this "section referred to as a 'compensation notice') is registered . . . until "such amount . . . specified in the "notice has been paid or secured to "the satisfaction of the Minister."

S. 46 (4): "The provisions of sections 28 and 29 of this Act . . . "shall have effect in relation to compensation under this Part of this "Act. . . ."

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Woodford Borough Council a requisition for an official search of the Register of Local Charges for subsisting entries against the land, the fee of 16s. being duly paid to the council in respect of the search. On September 20, 1957, the town clerk, Adam McCarlie Findlay, issued an official certificate of search against the land which, in Part 3 (c) relating to planning charges, registrable under the Town and Country Planning Acts, 1947 and 1954, recorded the word "nil." In fact, under Part 3 (c) there was registered a compensation notice pursuant to sections 28 and 46 of the Town and Country Planning Act, 1954, in the following terms: "Notice is hereby given that compensation amounting to "£2,645 12s. 6d. has become payable in respect of land at "Wanstead, Essex," and there followed a precise description of the land. Compensation had become payable by reason of a refusal by the Essex County Council as planning authority of permission for residential development in respect of the land in August, 1953. The plaintiff, in reliance upon the certificate issued by the defendants, and in ignorance of the compensation notice, continued to negotiate for the purchase of the land, and, on December 20, 1957, contracted to purchase it for the sum of £1,750. On December 30, 1957, he submitted an outline application for permission to develop the land, and on January 31, 1958, outline consent to develop was granted. On February 17, 1958, the purchase was completed by a conveyance to the plaintiff of that date.

On March 17, 1958, the Ministry of Housing and Local Government wrote to the plaintiff pointing out, as was the fact, that compensation had been paid by the Minister under Part 5 of the Town and Country Planning Act, 1954, in respect of an area of land of which the land purchased by the plaintiff formed part, and that a notice of such compensation had been registered in the Register of Local Land Charges under section 28 of that Act. The letter drew the plaintiff's attention to the provisions of section 29 (1) of the Act of 1954 which required that the amount specified in the compensation notice should be paid to the Minister or secured before new development was begun on the land to which the notice was registered, and it stated that the amount of the charge had been apportioned in accordance with section 29 (3) (*b*) of the Act of 1954, and the amount applicable to the plaintiff's land was £1,612 11s. After further correspondence with the Ministry and with the council, the plaintiff paid the sum demanded by the Ministry.

The plaintiff alleged that the sum so paid represented loss which resulted from the inaccurate certificate given by the defendants, and on September 8, 1958, he issued a writ against the council and the town clerk, claiming damages for negligence and/or breach by them of their statutory duties under the Land Charges Act, 1925, and the Town and Country Planning Act, 1954, in issuing an inaccurate and incorrect official certificate of

search; alternatively, damages for breach of contract and/or warranty; alternatively for a declaration that the defendants were liable to indemnify him.

The defendants admitted that the certificate did not show the registration of the compensation notice, but they contended, inter alia, that the certificate was conclusive in favour of a person who at the time it was issued was a purchaser or intending purchaser of the land under section 17 (3) of the Land Charges Act, 1925, and that the Minister was the person so interested in respect of the compensation notice, so that the plaintiff was under no liability to pay the sum to the Minister and therefore, they, the defendants, were not liable to him.

Douglas Lowe for the plaintiff.
John Boyle for the defendants.

No cases were cited in argument.

STEVENSON J. In this action the plaintiff seeks to recover damages against the defendants, the Wanstead and Woodford Borough Council, and the second defendant who was at all material times their clerk, in respect of the issue to the plaintiff or to solicitors on his behalf of an inaccurate certificate of search of the Register of Local Land Charges kept by the second defendant as the proper officer charged with the duty of keeping that register under the Land Charges Act, 1925.

The plaintiff's claim is based upon the allegation of a contract between himself and the council or the second defendant constituted by a written requisition in writing for an official search of the Register of Local Land Charges and the payment by the plaintiff of the prescribed fee for such search in respect of which a receipt was issued by the council on December 12, 1957.

Alternatively, the plaintiff founds his claim on an alleged breach by the council of their statutory duty to search the Register of the Local Land Charges and give certificates of the result of such search. As a further alternative, the plaintiff seeks to found his claim on negligence by the defendants.

[His Lordship stated the facts set out above and continued:] The defendants by their defence allege, amongst other matters, that the certificate of search issued to the plaintiff was, and is, conclusive in favour of the plaintiff as a person who at the time that it was issued was a purchaser or intending purchaser of the land in question, as against persons interested under or in respect of matters or documents whereof entries were required to be made in the Register of Local Land Charges, and that the Minister of Housing and Local Government was at all material times, and is, a person so interested in respect of the notice of compensation. The defendants therefore contend that the plaintiff was not under

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any liability to pay the sum of £1,612 11s. demanded by the Minister and cannot therefore recover that or any sum in this action.

This contention is based upon section 17 of the Land Charges Act, 1925, which provides for official certificates of search. Subsection (3) is in these terms: "In favour of a purchaser or an "intending purchaser, as against persons interested under or in "respect of matters or documents whereof entries are required "or allowed as aforesaid, the certificate, according to the tenor "thereof, shall be conclusive, affirmatively or negatively, as the "case may be."

Counsel for the plaintiff argued that the Minister is not a person interested within the meaning of that subsection. It seems to me plain that the notice of compensation registered in September, 1956, places the Minister within the class described as "persons interested under or in respect of matters or docu-"ments whereof entries are required or allowed to be registered," and that the certificate issued to the plaintiff became conclusive negatively in favour of the plaintiff as an intending purchaser of the land which he acquired.

It has been agreed by counsel that notice of the fact that compensation has been paid is one of those matters which is registrable as a local land charge, and is subject to the provisions to which I have referred relating to searches in the Local Land Charges Register.

I am forced to the conclusion that the effect of section 17 (3) of the Land Charges Act, 1925, was to absolve the plaintiff from any liability to meet the demand made by the Minister, and that the right to develop the land in question could not have been defeated by non-payment of this sum under section 29 of the Town and Country Planning Act, 1954.

In these circumstances, it is not necessary for me to decide, and I express no opinion upon, the question whether the issue to the plaintiff of an inaccurate certificate of search amounted to a breach of contract or a breach of a statutory or any other duty owed by the defendants to the plaintiff, and I dismiss this action.

Judgment for the defendants with costs.

Solicitors: *Lees, Smith & Crabb; William Charles Crocker.*

J. F. L.

[COURT OF APPEAL.]

AYLING *v.* WADE.

C. A.

1961
April 14.

Ormerod, Willmer and Danckwerts L.JJ.

[Plaint No. 901034.]

Landlord and Tenant—Sublease—Repairs, covenant for—Covenant to observe covenants in head lease—Repairing covenant in head lease—Whether covenant merely of indemnity—Whether covenant imposes duty to repair—"Observe"—Meaning—"Window"—Meaning.

By a clause in an underlease the landlord covenanted with the tenant "to pay the rent reserved by and to observe the covenants "contained in the lease, under which the landlord holds the demised "premises, and to keep the tenant indemnified against the "same . . ." By the terms of the head lease, under which the landlord held the demised premises, he was required to keep the premises in good and substantial repair.

The plaintiff was the tenant and the defendant the landlord under the underlease of a restaurant, which was part of the premises held by the landlord under the head lease. The tenant covenanted with the landlord to keep the interior of the premises, including all windows, in good and substantial repair. There was no express covenant with regard to exterior repairs.

The glass in the skylight in the flat roof on top of the restaurant had been broken and ineffectively repaired by the landlord. As a result rainwater poured into the restaurant and the tenant was compelled to close it temporarily, during which time the tenant suffered loss of profits amounting to £38 19s. On a claim by the tenant to recover this sum as damages for breach of covenant:—

Held, that the covenant by the landlord to observe the covenants contained in the head lease was not merely a covenant to indemnify the tenant in the event of the superior lessor taking proceedings for forfeiture, but was also a covenant requiring the landlord to perform the repairing obligations imposed on him by the head lease; therefore, the tenant's claim succeeded (post, p. 877).

In re Poole and Clarke's Contract [1904] 2 Ch. 173; 20 T.L.R. 604, C.A.; *Harris* v. *Boots Cash Chemists (Southern) Ltd.* [1904] 2 Ch. 376; 20 T.L.R. 623; and *Reckitt* v. *Cody* [1920] 2 Ch. 452 distinguished.

Per curiam. "Observe" means to comply with an obligation and has a positive as well as a negative meaning.

Quaere. Whether a "window" includes a skylight.

APPEAL from Judge Leslie, sitting at Woolwich County Court.

The following statement of facts is taken substantially from the judgment of Danckwerts L.J. The defendant, William Charles Wade, had acquired the term created by a lease dated June 23, 1877, under which he held the premises situate at and known as 5 Eltham Road, London, S.E.12. The defendant covenanted in the lease with the superior lessor, inter alia, to keep the premises in good and substantial repair. By an underlease dated December 31, 1957, and made between the defendant and John Denys Dennison, who subsequently assigned the term created by the underlease to the plaintiff, George William Ayling, the defendant sublet part of the premises consisting of a lock-up

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shop or restaurant with kitchen and lavatory accommodation on the ground floor to Dennison for a term of seven years from December 25, 1957, at a rent of £182 per annum. Although the actual assignment of the underlease by Dennison to the plaintiff was not completed apparently until August, 1959, the plaintiff went into possession at Easter, 1958. The defendant as the landlord covenanted in the underlease with the plaintiff as the tenant, inter alia, to observe the covenants contained in the head lease, under which the landlord held the premises. The trouble in the present case arose because there was a skylight in the flat roof on top of the restaurant and, owing to the glass in the skylight having been broken previously and a very ineffective repair having been made by the landlord, rainwater poured into the restaurant. The tenant was compelled to close the restaurant temporarily while the skylight was being effectively repaired, during which period the loss of his profits amounted to £38 19s. In an action by the tenant against the landlord for damages for breach of covenant, the plaintiff claimed that the landlord was liable to pay £38 19s. damages for breach of the covenant to observe the covenants contained in the head lease. The judge held that that sum was the proper amount which was recoverable, if the plaintiff's claim was well founded, but he held that under the terms of the underlease there was no breach of covenant by the landlord, and he dismissed the tenant's claim. The tenant appealed.

A. J. Bateson for the tenant.
C. M. G. Butterfield for the landlord.

The following cases were cited in argument, in addition to those referred to in the judgments: *Ebbetts* v. *Conquest* [1]; *Hornby* v. *Cardwell* [2]; *Gott* v. *Gandy*.[3]

Ormerod L.J. I will ask Danckwerts L.J. to deliver the first judgment.

Danckwerts L.J. This appeal turns upon the proper construction to be given to the terms of an underlease dated December 31, 1957. [His Lordship stated the facts set out above and continued:] In the underlease, the tenant's covenants included first, the usual covenant to pay the reserved rent, and, secondly, "to keep the interior of the premises, including all "doors, windows, and landlord's fixtures, in good and substantial "repair and properly painted, limewashed, papered, and var-"nished as from time to time required." Apparently, it is accepted that a window does not include the skylight in the present case, a matter on which I think I should have felt some

[1] [1895] 2 Ch. 377; 11 T.L.R. 454, C.A.; affirmed sub nom. *Conquest* v. *Ebbetts* [1896] A.C. 490; 12 T.L.R. 599, H.L.

[2] (1881) 8 Q.B.D. 329, C.A.

[3] (1853) 2 Ell. & Bl. 845; 118 E.R. 984.

doubt. Then No. 4 of the tenant's covenants was: "To permit "the landlord with workmen and others to enter upon the "premises and repair in accordance with the covenants and "provisions of the lease, under which the landlord holds the "premises, and so far as any defects remedied by the landlord "may be included in the tenant's covenant to repair hereinbefore "contained forthwith to repay the costs of remedying such "defects to the landlord as a liquidated debt." That, of course, is merely a permissive covenant in the first part and to enable the intermediate landlord, the defendant, to comply with the covenants to which he is subject under the head lease; but it does, it is said, indicate that the carrying out of some repairs by the intermediate landlord is contemplated by the terms of this underlease. No. 7 of the tenant's covenants contained the common provision requiring the tenant "to yield up the premises at the "determination of the tenancy in such good and substantial "repair as shall be in accordance with the tenant's covenants "hereinbefore contained and with all locks keys and fastenings "complete." Clause 3 of the underlease deals with covenants by the landlord. The opening words are: "The landlord hereby "covenants with the tenant," and clause 3 (1) is: "To pay the "rent reserved by and to observe the covenants contained in the "lease, under which the landlord holds the demised premises, "and to keep the tenant indemnified against the same and "against all rates, taxes, and outgoings, whatsoever which now "are or hereafter may become payable in respect of the demised "premises." Clause 3 (2) is a covenant for quiet enjoyment: "That the tenant paying the rent hereby reserved and performing "and observing the several covenants on his part herein con-"tained shall peaceably hold and enjoy the demised premises "during the said term without any interruption by the landlord "or any person rightfully claiming under or in trust for him."

The argument has turned principally on the terms of clause 3 (1) of the underlease. On the face of it, it is a definite covenant by the landlord—it is one of his covenants—to pay the rent reserved and to observe the covenants contained in the lease under which he (the landlord) holds the demised premises; and that, of course, it must be remembered, included not only the demised premises but also a larger piece of property. The judge came to the conclusion that this covenant was to be construed merely as a covenant of indemnity, so that apparently no liability would be cast upon the intermediate landlord until steps had been taken against him to forfeit the lease; and it was argued that this was a provision which was merely intended to protect the undertenant against forfeiture of the lease by reason of the fault of his immediate landlord in performing covenants which were binding upon him under the terms of the head lease.

The words on their face seem to me sufficiently plain, but reliance has been placed upon certain cases where, it must be

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admitted, on very similar words the covenant concerned, in the case of assignments, has been held to be no more than a covenant of indemnity, so that an assignor could not sue the assignee in respect of the covenants unless and until the landlord was proceeding against him as being a person liable to the obligations imposed by the covenants in the lease. Those cases are *In re Poole and Clarke's Contract*[1]; *Harris* v. *Boots Cash Chemists (Southern) Ltd.*[2] and, I think, *Reckitt* v. *Cody*.[3] The difference, of course, is that in the case of assignor and assignee, once the assignor has assigned the premises, he is not really interested in the condition of the premises or in anything else except the possibility of being sued by the landlord under his original obligations, because he has no longer any estate or interest in the property, and it is only the assignee who is concerned to see that the tenancy continues without any proceedings by the landlord to determine it under the condition of re-entry.

In the present case, the situation is rather different, because the landlord of the undertenant is still interested in the property and is still a tenant. He is still liable upon the terms of the lease, and he is not only interested in the terms of the head lease by virtue of his position remaining that of tenant, but he is also interested in the condition of the premises because he is the landlord of the undertenant. Consequently, it seems to me that the rather narrow construction which was put upon somewhat similar forms of words in the case of covenants between assignee and assignor is not necessarily that which ought to be applied in an underlease of this kind.

It is said, of course, that if a landlord is to be subject to liability to repair, plain words must be found in the lease in question, because, as is well known, it is normally the tenant who has to perform various obligations, and it is perhaps not so common for the landlord himself to undertake obligations. It is undoubtedly the case that, whether it is the tenant or the landlord, unless there are repairing covenants, generally speaking there are no obligations to carry out repairs, and it may be that nobody is under any obligation to do any repairs at all. That, of course, is subject to the implied obligations which are cast upon a tenant to keep the premises wind and water tight, and that sort of thing, which, however, is a matter which is not material in the present case; but it is undoubtedly true that a landlord is not liable normally to repair the premises, and one must find a covenant which casts that obligation upon him.

It seems to me that there is such a covenant in the present case. The words seem to me to be perfectly plain. The words "to pay the rent reserved" must be an obligation cast upon the landlord to pay the rent which is reserved by the superior

[1] [1904] 2 Ch. 173; 20 T.L.R. 604, C.A.

[2] [1904] 2 Ch. 376; 20 T.L.R. 623.

[3] [1920] 2 Ch. 452.

lease, and I cannot see why the words which follow, "to observe "the covenants contained in the lease under which the landlord "holds the demised premises," are not also a positive obligation cast by the terms of the underlease upon the intermediate landlord to carry out those obligations, and one which is enforceable by the undertenant, because this is definitely a covenant by the intermediate landlord with the undertenant. He has no doubt covenanted also with the superior landlord to perform exactly similar obligations; but it seems to me that the effect of these words is to make a covenant between the underlandlord and the tenant, and, of course, it applies to a matter in which the subtenant is vitally interested. Unless that is the proper construction, it seems hardly necessary to put in these words. It would have been more accurate conveyancing merely to have placed a covenant in the underlease by which the landlord undertook to indemnify the undertenant against any results of non-performance of the covenants in the superior lease. In other words, it seems to me that if one construes this in the present case merely as a covenant of indemnity, one applies one-half of the provision with which we are concerned and does not apply the first part of it which imposes a positive obligation upon the underlandlord.

It is said that this produces odd and unexpected results, and it was suggested that if the original tenant—that is to say, the landlord in the underlease—were to acquire the superior term, the position would be very obscure, and possibly the covenant would then have no subject-matter any longer to which it could refer, because the covenants in question would have ceased to be operative. That may or may not be the result in such a situation, and I do not think it is necessary for me to express a view upon the matter. But we are faced with construing the actual words which are inserted by the landlord, who prepares a lease in cases of this kind, and they must, it seems to me, be given their plain meaning.

There is one other point which it is necessary, I think, to consider. The judge was impressed by the fact that the word "observe" only was used in this connection and not the word "perform." It was pointed out that in the covenant for quiet enjoyment there was a reference to the tenant performing and observing the covenants on his part; but it seems to me that nothing much can be made of that. We were referred to Stroud's Judicial Dictionary (3rd ed., vol. 3 (1953), p. 1948), where there is some discussion of the relative meaning of the words "observe" and "perform" in respect of negative and positive covenants; but it seems to me that that discussion has really no relation to the problem with which we have to deal in this present case. The word "observe" is not a purely negative word. It cannot, I think, mean that the covenantor may simply sit by noticing what is happening and doing nothing. What it means, I think, is "to "comply with the obligation" and, therefore, it has a positive

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and not merely a negative meaning. It plainly must have a positive as well as a negative meaning in the present case because, without that, the indemnity part of the covenant would be useless, and the indemnity part of the covenant refers to the same covenants as those referred to in the earlier part of the clause. Consequently, it seems to me that (wisely or unwisely it is not necessary to say) the landlord in the present case had undertaken to carry out the obligations imposed upon him by the head lease in such a way as to be liable to his tenant, and that those obligations must contain the repairing covenant, which is a full one, an extract in respect of which has been put in evidence in the present case.[4]

Consequently, I have come to the conclusion that the judge reached the wrong result, and the appeal should be allowed.

ORMEROD L.J. I agree that the appeal should be allowed; and, although we are disturbing the decision of the judge, there is nothing I wish to add to the reasons which have already been given by Danckwerts L.J.

WILLMER L.J. I also agree, and I do not think there is anything I can add to what has already been said by Danckwerts L.J.

Appeal allowed with costs.
Judgment for the plaintiff for the sum of £38 19s. with costs in court below on scale 3.

Solicitors: *H. Ragol-Levy; Braund & Fedrick.*

N. P.

[4] The covenant required the landlord to keep the premises in good and substantial repair.

[COURT OF APPEAL.]

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Phillimore J.
C. A.
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Feb. 24.
Holroyd Pearce, Harman and Davies L.JJ.

Husband and Wife—Maintenance—Divorce—Garnishee—Jurisdiction to order.
Practice—Garnishee proceedings—Divorce—Maintenance—Jurisdiction of Divorce Court.

A woman whose former husband was in arrear with maintenance payments issued a summons for an order garnishing the husband's bank account. The husband appeared under protest and submitted to the registrar, who had made ex parte an order nisi, that the Divorce Court had no jurisdiction to make a garnishee order. The registrar adjourned the summons for hearing by a judge, who made the order absolute. On appeal by the husband:—

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

Held, dismissing the appeal, that the Divorce Court had jurisdiction to make a garnishee order.

Decision of Phillimore J. affirmed.

In re Woolgar [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583 doubted.

SUMMONS adjourned into open court.

On November 20, 1959, the former husband was ordered to pay maintenance for the wife, the successful party in a suit for divorce, at the rate of £800 a year, less tax, payable monthly, together with a further sum for the maintenance of the child of the marriage. On July 8, 1960, the husband was committed to prison for failure to comply with this order, the arrears on May 16, 1960, amounting to over £241. On July 29, 1960, the husband was discharged from prison, the arrears remaining unpaid. The wife, learning that Barclays Bank Ltd. were indebted to the husband, instituted garnishee proceedings. She swore an affidavit in support of the summons stating that £223 8s. 9d. was owing in respect of arrears of maintenance for the period to March 29, 1960, and that Barclays Bank Ltd. were indebted to the husband in the sum of £250. On September 28, 1960, the summons came before a registrar ex parte, and the registrar made an order nisi, pending the hearing of the summons on October 10, 1960. On that date, counsel for the husband stated that the husband appeared under protest, and he submitted that the court had no jurisdiction to make a garnishee order. The registrar adjourned the summons for hearing by a judge.

R. J. S. Harvey for the wife.

Joseph Jackson and *J. C. J. Tatham* for the husband.

The cases cited in argument are referred to in the judgment of Phillimore J.

Nov. 30, 1960. PHILLIMORE J., reading his judgment, referred to the circumstances in which the summons came before him, and continued: At the hearing of this summons a solicitor representing the garnishee informed me that his clients, Barclays Bank Ltd., were indebted to the husband, the judgment debtor, in a sum sufficient to meet the amount claimed in the summons, and Mr. Jackson conceded that, subject to the points of law he desired to raise, the order nisi must be made absolute. He then proceeded to make three submissions: (1) That there is no jurisdiction in the Divorce Division to make a garnishee order. (2) That on the assumption that there is such jurisdiction, no order absolute can be made on this summons since the affidavit of the wife, the judgment creditor, sworn on September 27, 1960, had not been served on the husband, the judgment debtor. (3) That, inasmuch as the judgment debtor had already been committed to prison for the arrears in question, the court ought not to allow them to be made the subject of a garnishee order.

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In support of his first submission, Mr. Jackson made it quite plain that he is contending that, although this court has made garnishee orders for many years—in fact, as will appear, for nearly 80 years—it has never had any jurisdiction to do so, and that all these orders have been bad. The jurisdiction, he says, has always been the subject of doubt amongst lawyers. This assertion discloses a discrepancy between the two principal textbooks on divorce. In support of it, Mr. Jackson referred me to the first edition of Rayden on Divorce, published in 1910. At page 148 the author deals with the practice of the court at that time, nearly 50 years ago, in making garnishee orders and there appears at note (c): "these orders *seem*" (counsel emphasised this word) "to be made under the Common Law Procedure Act, 1854 (17 & "18 Vict. c. 125), ss. 61–67; as, although the Statute Law "Revision Act, 1883 (46 & 47 Vict. c. 49), 'repeals' this, "by section 5 (*b*) it saves the jurisdiction thereby conferred." Mr. Jackson points out that this note has survived all subsequent editions and appears at page 428 of the 7th edition, which he himself edited in 1958. It now appears at page 488 in the 8th edition published since I heard the summons and, as he pointed out, has also found its way into the article on Divorce by Karminski J. and Mr. Jackson himself, which is included in the 3rd edition of Halsbury's Laws of England, vol. 12, at p. 475, n. (b).

In the rival work, first published as Brown on Divorce in 1864, it is necessary to go to the 4th edition, published in 1880, to find a similar expression of doubt. In a note at page 561 the author, after reciting the orders applicable to execution under the Judicature Acts, including Order 45, which is the order dealing with garnishee proceedings, goes on: "but as those rules are not applicable to "the Divorce Court, and as the 52nd section of the Matrimonial "Causes Act, 1857, refers to the manner of enforcing decisions "of the High Court of Chancery in practice *at that time*, it seems "the former Rules of Chancery are the ones to be adopted in the "Divorce Court."

Since, as I shall show, the Divorce Court was, at any rate by 1882, making garnishee orders, and since there was certainly no power in the Chancery Division to make such orders in 1857, it is not perhaps surprising that this note should have disappeared from the next edition published in 1889. In the 14th edition of this work, now entitled Latey on Divorce, the editors state in terms at page 985: "Garnishee orders are made in the Divorce "Division and are governed by Rules of the Supreme Court, "Ord. 45."

In this state of editorial disagreement and legalistic rivalry, Mr. Jackson prays in aid an independent witness in Master Wheatcroft's article on Execution in volume 16 of the 3rd edition of Halsbury's Laws of England. In dealing with garnishee proceedings at page 79, the author adds note (c), in which he questions whether the practice in the Divorce Division can be based

on Order 45 of the Rules of the Supreme Court in the light of the wording of the rules themselves and of two decisions which he cites. These decisions, *In re Woolgar*[1] and *In re Bidie*,[2] I must deal with. This note, and the cases to which the master refers, in fact form the basis of Mr. Jackson's resourceful argument. I say "resourceful" because it does scant justice to the statutory provisions which form the basis of the practice of the Divorce Division. It is the sort of argument which counsel presents when he is required to do something for a debtor who is determined not to pay his debts.

Mr. Jackson's main submission was as follows: The practice of the Supreme Court in regard to garnishee proceedings is contained in Order 45 of the Rules of the Supreme Court under the heading "Attachment of Debts." The Matrimonial Causes Rules, 1957, contain no mention of garnishee proceedings, although they do refer to other methods of enforcing the orders of the court. Thus rule 63 deals with attachment and committal of the person and rule 64, which has the side title "Enforcement of orders," deals with the procedure to be followed on the issue of a writ of fieri facias or sequestration. Accordingly, it is argued that since the Matrimonial Causes Rules, whilst providing for the enforcement of orders, make no express provision for garnishee proceedings, you cannot import the provisions of Order 45 of the Rules of the Supreme Court unless you can find some warranty in the Matrimonial Causes Rules for so doing. Rule 82 of the Matrimonial Causes Rules provides: "Subject to the provisions of "these Rules and of any enactment, the Rules of the Supreme "Court shall, notwithstanding the provisions of Order 68 thereof, "apply with the necessary modification to the practice and pro-"cedure in any cause or matter to which these Rules apply." Mr. Jackson does not seek to argue that Order 68 of the Rules of the Supreme Court affords any difficulty in this case. Rule 1 of that order provides: "Subject to the provisions of this Order, "nothing in these Rules, save as expressly provided, shall affect "the procedure or practice in any of the following causes or "matters," and at (*d*), last of the list: "Proceedings for divorce "or other matrimonial causes." Mr. Jackson says that a garnishee summons is not "a proceeding for divorce or other "matrimonial cause," and, accordingly, that Order 68 affords no difficulty. His argument is simply that you can only by virtue of rule 82 of the Matrimonial Causes Rules, 1957, apply the Rules of the Supreme Court "Subject to the provisions of these Rules "and of any enactment." Since these rules expressly provide for the enforcement of orders by rules 63 and 64, the methods provided by these rules, that is committal, attachment, fieri facias or sequestration, are the only methods by which the orders of the court can be enforced, unless sanction for some other

[1] [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583.

[2] [1949] Ch. 121; 65 T.L.R. 25; [1948] 2 All E.R. 995, C.A.

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method can be found in some enactment. Thus, in the absence of any reference in the Matrimonial Causes Rules to procedure by judgment summons, it was necessary, he claims, to make the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932, to enable the court to apply this method of enforcing its orders.

In support of this submission counsel relies on the decision of Simonds J. in *In re Woolgar*.[3] In that case a widow sought to recover arrears of alimony due to her under an order of the Divorce Division by taking out a summons in the Chancery Division for the administration of her deceased husband's estate. At that time, the question whether money due under an order for maintenance made by the Divorce Division could be treated as a debt so as to found an action in the Chancery Division was the subject of conflicting authority. In *In re Stillwell*[4] Sargant J. decided that it could be so treated. In *In re Hedderwick*[5] Luxmoore J. refused to follow that decision. In the latter case, having considered two decisions of the Court of Appeal, *Bailey* v. *Bailey*[6] and *Linton* v. *Linton*,[7] Luxmoore J. held that an order by the Divorce Court for payment of alimony did not create a legal debt at common law, and that the only method available to a wife of enforcing such an order was by way of attachment under section 5 of the Debtors Act, 1869. He also held that inasmuch as alimony is a judicial assessment of the husband's obligation to maintain his wife, and as such is inalienable and unassignable, it cannot be affected by agreement between the parties or by the bankruptcy of the husband, and remains subject always to variation and revision by the court, and does not partake of the nature of a legally enforceable debt.

In *In re Woolgar*[8] Simonds J. preferred to follow the decision of Luxmoore J. in *In re Hedderwick*.[9] He was, however, faced with a subsidiary point as a result of an alteration in the Matrimonial Causes Rules. The rules issued in 1937 contained rule 81, worded as the present rule 82, save that the word "statute" has been replaced by the word "enactment." Counsel for the wife argued that the effect of this rule, as amended, was to import the Rules of the Supreme Court into matters relating to matrimonial causes, and in particular Order 42, r. 24. That rule provides: "Every order of the Court or a Judge in any cause or matter may "be enforced against all persons bound thereby in the same "manner as a judgment to the same effect." Simonds J. dealt with this point as follows[10]: "On the question whether any "difference has been made by the alteration contained in the "Matrimonial Causes Rules, 1937, the suggestion is that, in view "of rule 81, a liability not hitherto provable in the administration "of an estate is now provable. It is said that the result of rule 81

[3] [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583.
[4] [1916] Ch. 365; 32 T.L.R. 285.
[5] [1933] Ch. 669; 49 T.L.R. 381.
[6] (1884) 13 Q.B.D. 855, C.A.
[7] (1885) 15 Q.B.D. 239, C.A.
[8] [1942] Ch. 318.
[9] [1933] Ch. 669.
[10] [1942] Ch. 318, 320.

"is to introduce the provisions of Order 42, r. 24, of the Rules "of the Supreme Court under which an order for alimony made "by the Divorce Court can be enforced, as if it were a judgment "to the same effect and, therefore, by way of proof in the "administration of the estate. But rule 81 begins with these "words: 'Subject to the provisions of these Rules,' and I turn, "therefore, to rule 62, which prescribes the way (and, as I think, "the only way) in which an order of the Divorce Court may be "enforced. That rule would be wholly unnecessary if the result "of rule 81 was to substitute, as a means of enforcing the orders "of the Divorce Court, the provisions of Order 42, r. 24, of the "Rules of the Supreme Court. Accordingly, I have come to "the conclusion that rule 81 has not made any difference in this "respect, and that *In re Hedderwick* [11] must still be regarded as "an authority. The application for administration must, there-"fore, be dismissed."

Mr. Jackson argues that I should follow this decision. Rule 62 referred to by Simonds J. is now rule 64 and, to borrow his words, prescribes the way, and the only way (I emphasise this phrase), in which an order of the Divorce Court may be enforced. Just as Simonds J. held that rule 81 did not import the provisions of Order 42, r. 24, of the Rules of the Supreme Court, so I should hold that it does not import Order 45 of those rules. Moreover, this decision on the effect of the rules was, it is said, approved by the Court of Appeal in *In re Bidie*.[12] That case was heard by Jenkins J.[13] It was a claim by a widow to recover against the estate of her dead husband arrears of maintenance under an order of the justices made pursuant to the Summary Jurisdiction (Married Women) Act, 1895. Jenkins J. held that the wife could not recover, her only remedy being that provided by the Act itself, which remedy did not survive the husband's death. He further held that for this purpose there is no distinction between alimony payable under an order of the Divorce Court and maintenance payable under the order of a court of summary jurisdiction, and followed the decisions of Luxmoore J. in *In re Hedderwick* [14] and of Simonds J. in *In re Woolgar*.[15] It is not surprising that the argument under the Matrimonial Causes Rules advanced in *In re Woolgar* [16] was not apparently advanced in *In re Bidie*,[17] since, of course, those rules could have no application in the case of an order under the Summary Jurisdiction (Married Women) Act, 1895.

In the Court of Appeal, however, junior counsel for the widow, in following, referred to rule 62 of the Matrimonial Causes Rules, 1944, presumably to suggest that since an order for arrears of

[11] [1933] Ch. 669.
[12] [1949] Ch. 121; 65 T.L.R. 25; [1948] 2 All E.R. 995, C.A.
[13] [1948] Ch. 697; 64 T.L.R. 309; [1948] 1 All E.R. 885.
[14] [1933] Ch. 669.
[15] [1942] Ch. 318.
[16] Ibid.
[17] [1948] Ch. 697.

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maintenance can be enforced by writ of fieri facias, it must partake of the nature of a debt.

In his brief judgment Lord Greene M.R. said [18]: "There is only "one point which requires mentioning, and that is the reference to "rule 62 of the Matrimonial Causes Rules, 1944. It was suggested "by Mr. Mulligan that the two cases of *In re Hedderwick* [19] "and *In re Woolgar* [20] were wrongly decided in view of that rule. "It is worth noticing that in neither case was any suggestion "argued that the rule affected the matter at all. In *In re* "*Hedderwick* [21] counsel did not, apparently, think it worth refer-"ring to; and in *In re Woolgar* [22] it was referred to, not as "governing the case, but on the assumption that it did not govern "the case and that its effect had been altered by a later rule, "rule 81. I might also say that those rules do not apply to the "present case, which has nothing to do with the Matrimonial "Causes Rules."

As Lord Greene M.R. pointed out, the Matrimonial Causes Rules had nothing to do with the point before the court. I do not think that his remarks, which were clearly obiter, can be regarded as approving the observations of Simonds J. in dealing with the point under the Matrimonial Causes Rules in *In re Woolgar*.[23]

What then does the argument under the rules amount to? First, doubts have been expressed as to the jurisdiction of this Division to make garnishee orders in the absence of a clear statement as to the origin of the power to do so. However, though the power has been exercised for many years no attempt appears to have been made to dispute the jurisdiction; if there had been a case in which that attempt had been made, I am sure that Mr. Jackson's industry would have produced it. Secondly, the judgment of Simonds J. in *In re Woolgar* [24] is clear. If the wording of rule 81 (now rule 82) of the Matrimonial Causes Rules does not import Order 42 of the Rules of the Supreme Court, it is difficult on the reasoning he adopted to see how it can import Order 45 of the Rules of the Supreme Court. Since rule 82 also refers to powers derived from "any enactment," Mr. Jackson went on to argue that the power to make garnishee orders does not derive from any enactment. Dealing with the reference in note (c) on page 488 of the 8th edition of Rayden on Divorce to the Common Law Procedure Act, 1854, he points out that the effect of section 99, which interprets the terms "court" and "judge," on which the power to make garnishee orders is conferred by sections 61 to 67 is to confer these powers on the judges of the superior courts of common law sitting at Westminster. The Matrimonial Causes Act, 1857, made no reference to the Common Law Procedure Act, 1854, or of the power to garnish. In dealing with the powers of the court it provided by section 22: "In all suits and

[18] [1949] Ch. 121, 125.
[19] [1933] Ch. 669.
[20] [1942] Ch. 318.
[21] [1933] Ch. 669.
[22] [1942] Ch. 318.
[23] Ibid.
[24] Ibid.

"proceedings, other than proceedings to dissolve any marriage, "the said Court shall proceed and act and give relief on prin-"ciples and rules which in the opinion of the said Court shall be "as nearly as may be conformable to the principles and rules on "which the Ecclesiastical Courts have heretofore acted and given "relief, but subject to the provisions herein contained and to "the rules and orders under this Act." Again, by section 52: "All decrees and orders to be made by the Court in any suit, "proceeding, or petition to be instituted under authority of this "Act shall be enforced and put in execution in the same or the "like manner as the judgments, orders, and decrees of the High "Court of Chancery may be now enforced and put in execution." This latter section bears the sidenote: "Enforcement of orders "and decrees."

Crispin v. *Cumano*,[25] shows that in 1869 the Court of Chancery had no power to make a garnishee order, and it follows that the Divorce Court had no such power at that date. How, then, is it said the power was conferred? I am content to accept the able argument put forward by Mr. Harvey in answer. His argument was as follows: The history of the remedy by way of garnishee is conveniently stated by Mr. Cababé, a barrister of the Inner Temple, in his book on "Interpleader and Attachment of Debts," published in 1881, at page 147. He says: "There was no way, "previous to the passing of the Common Law Procedure Act, "1854, by means of which a judgment creditor could obtain pay-"ment of his debt, from parties who were indebted to the "judgment debtor; yet far more than the amount of the judgment "debt might be due to the judgment debtor from such parties: "and they would probably be quite indifferent to whom they "paid the debt, so long as they could get a good discharge for it.

"Such being the state of things, the Common Law Procedure "Act, 1854, in sections 60–67, provided a machinery by means "of which a judgment creditor might ascertain what debts were "due to his judgment debtors from third parties, and then pro-"ceed to attach them, and so ultimately obtain payment of them.

"The practice was further developed by the Common Law "Procedure Act, 1860, ss. 29 and 30; and by these provisions "the practice was regulated at common law till the passing of "the Judicature Act, 1875.

"In Chancery the power to attach debts did not exist. "(*Horsley* v. *Cox*, L.R. 4 Ch.92.)

"Now, however, under Order 45 of the Rules of the Supreme "Court of 1875, the practice of attachment applies to all divi-"sions of the High Court; and the several rules of the Order "deal with the practice in attachment. These rules are, how-"ever, substantially the same as the provisions of the Common "Law Procedure Acts, 1854 and 1860; so that the decisions under "those Acts are applicable to the present practice."

[25] (1869) L.R. 1 P. & D. 622.

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This passage, in referring to all divisions, is stating that the Divorce Division at this date, 1881, had the power to make a garnishee order. It is accordingly interesting to find that Oakley, the chief clerk of the divorce registry, in the 3rd edition of his book on Divorce Practice, published in 1889, devotes five pages (see pp. 171–176) to the procedure by way of garnishee order. Moreover, in 1881, in *Whittaker* v. *Whittaker*[26] the court made the first garnishee order recorded in the reports as having been made in this division. In that case the petitioner, who had obtained a decree of dissolution and an order for costs, sought to attach a debt due to the respondent and also to appoint a receiver of the respondent's property. The report in recording the order of the court granting both types of relief records the authority for the appointment of a receiver but makes no reference to any authority in regard to the garnishee order. It seems safe to assume that the making of garnishee orders was already familiar practice in the division. The case was referred to as a precedent for the making of a garnishee order in a matrimonial suit by Gorell Barnes J. in *Edmunds* v. *Edmunds*.[27] Although the headnote to that decision begins: "The principles involved in "garnishee proceedings arising out of decrees and orders in "matrimonial suits examined and considered," it is to be observed that it was not sought to argue there was no jurisdiction to make a garnishee order in such a suit, the only reference to jurisdiction being to the Common Law Procedure Act, 1854, which, it was said, made a chose in action subject to attachment.

As Mr. Cababé indicated in the passage I have read, the jurisdiction to make a garnishee order which was created by the Common Law Procedure Act, 1854, and extended by the Common Law Procedure Act, 1860, was originally enjoyed only by the superior courts of common law sitting at Westminster. That power was extended to other courts, including the court for divorce and matrimonial causes, by the Supreme Court of Judicature Act, 1873, which set up a supreme court comprising two permanent divisions: Her Majesty's High Court of Justice and Her Majesty's Court of Appeal. Section 5, in stipulating the constitution of Her Majesty's High Court of Justice as including "the "Judge of the Court of Probate and of the Court for Divorce "and Matrimonial Causes" provides: "All the Judges of the "said court shall have in all respects, save as in this Act is "otherwise expressly provided, equal power, authority, and juris-"diction"; section 16 states the jurisdiction of the High Court of Justice as follows:

"The High Court of Justice shall be a superior court of "record, and, subject as in this Act mentioned, there shall be "transferred to and vested in the said High Court of Justice the "jurisdiction which, at the commencement of this Act, was vested "in, or capable of being exercised by, all or any of the courts

[26] (1881) 7 P.D. 15.

[27] [1904] P. 362.

"following; (that is to say,)" and then a list of all the principal courts follows, including the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas at Westminster and the Court for Divorce and Matrimonial Causes. The section continues: "The jurisdiction by this Act transferred to the High "Court of Justice shall include (subject to the exceptions here-"inafter contained) the jurisdiction which, at the commence-"ment of this Act, was vested in, or capable of being exercised "by, all or any one or more of the judges of the said courts, "respectively, sitting in court or chambers, or elsewhere, when "acting as judges or a judge, in pursuance of any statute, law, "or custom, and all powers given to any such court, or to any "such judges or judge, by any statute; and also all ministerial "powers, duties, and authorities, incident to any and every "part of the jurisdictions so transferred." The effect of sections 5 and 16 was to confer upon the judge of the Court for Divorce and Matrimonial Causes all the powers hitherto enjoyed by the superior courts of common law sitting at Westminster, including, of course, the power to make garnishee orders. Section 23 provided for the exercise of the jurisdiction and for the making of rules as follows: "The jurisdiction by this Act transferred to the "said High Court of Justice and the said Court of Appeal "respectively shall be exercised (so far as regards procedure and "practice) in the manner provided by this Act, or by such rules "and orders of court as may be made pursuant to this Act; and "where no special provision is contained in this Act or in any "such rules or orders of court with reference thereto, it shall "be exercised as nearly as may be in the same manner as the "same might have been exercised by the respective courts from "which such jurisdiction shall have been transferred, or by any "of such courts." No court can abrogate a jurisdiction conferred by Parliament either by rule or by failure to make a rule, and it follows that as from November 2, 1874, when the Act came into operation, the Court for Divorce and Matrimonial Causes, in issuing process by garnishee, was either acting under some new rule or pursuant to section 23 "as nearly as may be in the "same manner" as such process was issued prior to that date by the superior courts of common law sitting at Westminster.

In 1875 Parliament passed the Supreme Court of Judicature Act, 1875, which was an Act to amend the Supreme Court of Judicature Act, 1873. Section 16 reads as follows: "The Rules "of Court in the First Schedule to this Act shall come into "operation at the commencement of this Act, and as to all "matters to which they extend shall thenceforth regulate the "proceedings in the High Court of Justice and Court of Appeal. "But such rules of court, and also all such other rules of court "(if any) as may be made after the passing and before the com-"mencement of this Act under the authority of the next section, "may be annulled or altered by the authority by which new "rules of court may be made after the commencement of this

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"Act." Then section 17 went on to provide for the making of rules in future, and section 18 provided: "All rules and orders of "court in force at the time of the commencement of this Act in "the Court of Probate, the Court for Divorce and Matrimonial "Causes, and the Admiralty Court, or in relation to appeals from "the chief judge in bankruptcy, or from the Court of Appeal in "Chancery in bankruptcy matters, except so far as they are "expressly varied by the First Schedule hereto or by rules of "court made by Order in Council before the commencement "of this Act, shall remain and be in force in the High Court of "Justice and in the Court of Appeal respectively until they shall "respectively be altered or annulled by any rules of court made "after the commencement of this Act," and then the exception goes on to preserve the powers of the Court for Divorce and Matrimonial Causes to make rules and regulations. It seems unlikely that the Court for Divorce and Matrimonial Causes had at this date passed any rule dealing with garnishee proceedings. The First Schedule contains Order 45, which describes the procedure to be followed in garnishee proceedings. As Mr. Cababé points out, it is, in effect, a codification of sections 61–67 of the Common Law Procedure Act, 1854, and sections 29 and 30 of the Common Law Procedure Act, 1860. In addition, Order 62 provides for exceptions from the rules as follows: "Nothing in these rules "shall affect the practice or procedure in any of the following "causes or matters." The last in the list of such causes reads "Proceedings for divorce or other matrimonial causes." This is the same stipulation as that now contained in Rules of the Supreme Court, Order 68, to which I referred at the beginning of this judgment when dealing with the terms of rule 82 of the Matrimonial Causes Rules.

What, then, was the position after the Act of 1875 came into force in November of that year? The Act of 1873 had granted the Court for Divorce and Matrimonial Causes jurisdiction to make garnishee orders, its jurisdiction to be exercised either by rule or in the absence of a rule by following "as nearly as may be" the former procedure of the superior courts of common law sitting at Westminster. The Act of 1875 provided a rule in the shape of Order 45, which was in fact a codification of the provisions of the Common Law Procedure Acts on which the common law courts had acted. At the same time Order 62 provided that it was not to affect the practice or procedure in a proceeding for divorce or other matrimonial cause. Dependent on whether garnishee process in the Court for Divorce and Matrimonial Causes was to be termed such a proceeding or cause, that court must either have used Order 45, or the old procedure of the common law courts which it codified. For all practical purposes it comes to the same thing, but this distinction may explain the doubt expressed in the 1st edition of Rayden to which I have referred.

The Statute Law Revision Act, 1883, repealed the Common

Law Procedure Acts, but saved the jurisdiction derived from them, as counsel agree. The Matrimonial Causes Rules, 1924, first contained in rule 97, a rule analogous to the present rule 82. These rules provided as follows: Rules 77 and 78 dealt with attachments and committal in terms similar to those now contained in rule 63. Rule 79 read as follows: "(*a*) In default of "payment to any person of any sum of money at the time "appointed by any order of the court for the payment thereof, a "writ of fieri facias, sequestration, or elegit shall be sealed and "issued as of course in the Registry upon an affidavit of service "of the order and of non-payment," thus covering the field now covered by rule 64. Rule 97 provided: "In any matter of prac-"tice or procedure which is not governed by statute or dealt with "by these Rules the Rules of the Supreme Court in respect of "like matters shall be deemed to apply." The question of whether these rules affected the position depends in fact on whether the reasoning of Simonds J. in *In re Woolgar* [28] was correct.

The Supreme Court of Judicature (Consolidation) Act, 1925, repealed and re-enacted the provisions of the Acts of 1873 and 1875. The relevant sections are sections 4, 18 and 21. Section 4 divided the business of the High Court into three Divisions, the third consisting of the Probate, Divorce and Admiralty Division, provided by subsection (4), which was added by section 6 of the Administration of Justice Act, 1928, "Without prejudice to the "provisions of this Act relating to the distribution of business in "the High Court, all jurisdiction vested in the High Court under "this Act shall belong to all the Divisions alike." Section 18 set out the general jurisdiction of the High Court and follows closely the provisions of section 16 of the Act of 1873. Section 18 (1) provides that the High Court shall be a superior court of record. Section 18 (2) vests in the High Court "the jurisdiction which was formerly vested in, or was capable of "being exercised by, all or any of the courts following:" and then follows a list including the High Court of Chancery and the Superior Courts of Common Law, but excluding the Court for Divorce and Matrimonial Causes. The subsection provides further jurisdiction, then subsection (3) states: "The jurisdiction "vested in the High Court shall, subject as otherwise provided "in this Act, include the jurisdiction which was formerly vested "in, or capable of being exercised by, all or any one or more of "the judges of the courts aforesaid respectively sitting in court "or chambers or elsewhere, when acting as judges or a judge, in "pursuance of any statute, law or custom, and all powers given "to any such court or to any such judges or judge by any statute, "and also all ministerial powers, duties and authorities incident "to any and every part of the jurisdictions so vested." Finally, section 21 reads: "The High Court shall have such jurisdiction— "(*a*) in relation to matrimonial causes and matters, as was

[28] [1942] Ch. 318.

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"immediately before the commencement of the Matrimonial "Causes Act, 1857, vested in or exercisable by any ecclesiastical "court or person in England in respect of divorce a mensa et "thoro, nullity of marriage, jactitation of marriage, or restitution "of conjugal rights, and in respect of any matrimonial cause or "matter, except marriage licences; and (*b*) with respect to "declarations of legitimacy and of validity of marriage, as is "hereinafter in this Act provided; and all such jurisdiction in "relation to matrimonial causes and matters as, under or by "virtue of any enactment which came into force after the com-"mencement of the Act of 1873 and is not repealed by this Act, "was immediately before the commencement of this Act vested "in or capable of being exercised by the High Court constituted "by the Act of 1873."

The effect of these sections is, I think, to preserve and confer on the Divorce Division the jurisdiction granted to the Court for Divorce and Matrimonial Causes by the Acts of 1873 and 1875, including the power to make garnishee orders.

In 1937, when the Matrimonial Causes Rules were revised, rule 81 was issued in the form of the present rule 82, save only that the word "enactment" was then represented by the word "statute."

This was the state of the rules and statutes at the time when *In re Woolgar*[29] was decided. If it is right that the Divorce Division enjoyed by virtue of statute the power to make garnishee orders, as it was indubitably the practice of the Division to do, it was, of course, inaccurate to state that "the only way" in which an order of the Divorce Court could be enforced was by way of writ of fieri facias or sequestration in accordance with rule 62 of the Matrimonial Causes Rules. It is to be observed, however, that the judge was not referred to the Judicature Acts, or to the question whether the court had power to make a garnishee order. He was solely concerned with the effect of the Matrimonial Causes Rules, and particularly with the question whether the new rule 81 enabled the Division to apply Order 42, rule 24, of the Rules of the Supreme Court, despite the wording of rule 62.

Unfortunately, I have to consider the effect of the rules in order to determine whether the Division, in making a garnishee order, applies Order 45 of the Rules of the Supreme Court, or whether its practice is still based on that of the superior courts of common law prior to 1873, as codified in that order. The question is a somewhat barren one since the distinction appears to involve little practical difference. Nobody can say that rule 82 is exactly pellucid, a criticism which comforts me in differing from the reasons which commended themselves to Simonds J. Rule 82 of the Matrimonial Causes Rules, 1957, reads: "Subject to the "provisions of these Rules and of any enactment, the Rules of

[29] [1942] Ch. 318.

"the Supreme Court shall, notwithstanding the provisions of "Order 68 thereof, apply with the necessary modifications to the "practice and procedure in any cause or matter to which these "Rules apply." Order 68, it will be remembered, excludes application of the Rules of the Supreme Court in the case of proceedings for divorce or other matrimonial causes. What does rule 82 mean? I think the rule is governed by the phrase "Subject to the provisions of these Rules and of any enactment" in the sense that, unless either the rules themselves or some enactment provide otherwise the Rules of the Supreme Court are to apply to any cause or matter to which the rules themselves apply. It does not seem to me that this rule attempts to deal with the jurisdiction of the court in any cause or matter to which the rules themselves do not apply. It follows that if the jurisdiction of the court to make a garnishee order is not a cause or matter to which the Matrimonial Causes Rules apply, it is not easy to find any rule to govern its process unless it can be said that it is not a proceeding for divorce or other matrimonial cause. If it is not such a proceeding, it would appear that Order 45 of the Rules of the Supreme Court could be applied. If it is such a proceeding but it is not a cause or matter to which the Matrimonial Causes Rules apply, there would seem to be no machinery stipulated for the process of the court.

In attempting to resolve these subtleties it is important to determine what is a "cause or matter to which these rules "apply," and what is the meaning of the phrase in Order 68 of the Rules of the Supreme Court "proceedings for divorce or other "matrimonial causes." Procedure by way of garnishee is clearly procedure to enforce an order of the court. If that order is an order requiring the payment of maintenance pursuant to some proceeding for divorce or other matrimonial cause, the order is, in my opinion, part of such proceeding or cause. The procedure for its enforcement must surely be ancillary to and partake of the nature of the order. Thus, in *Edmunds* v. *Edmunds* [30] Gorell Barnes J. is reported to have referred to *Whittaker* v. *Whittaker* [31] as an instance of garnishee proceedings in a matrimonial suit. I am therefore of opinion, despite the concession offered by Mr. Jackson, that these proceedings are covered by the provisions of Order 68 of the Rules of the Supreme Court. It was to nullify the effect of that order in relation to "proceedings for divorce or other matrimonial causes" and to enable the Divorce Division to supplement its own procedure in relation to such matters that the present rule 82 was first issued as rule 81 in 1937.

The Matrimonial Causes Rules provide for the making of orders of maintenance and alimony so that, in my opinion, garnishee process being ancillary to such orders must be "a matter" to which the rules apply. If this argument be right, I should have thought

[30] [1904] P. 362, 370. [31] (1881) 7 P.D. 15.

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that at any rate since 1937, the Divorce Division in making garnishee orders was applying the provisions of Order 45 of the Rules of the Supreme Court. It is true that rule 64 of the Matrimonial Causes Rules is entitled "Enforcement of orders," but nothing in its wording shows that the methods it provides are to be the exclusive methods of enforcing an order. If Parliament has provided another method I do not think that rule 82 prevents the application of the Rules of the Supreme Court. I derive some assistance on this point from the decision of Davies J. in *Worboys* v. *Worboys* [32] applying the Rules of the Supreme Court in regard to substituted service despite the provisions of the Matrimonial Causes Rules with regard to other forms of service.

In conclusion, I have no doubt that this Division is entitled to make garnishee orders, and in my opinion, the practice to be followed is that set forth in Order 45 of the Rules of the Supreme Court. That is, in fact, the practice which has been applied for the better part of 80 years, as is shown by the earlier textbooks to which I have referred. If I am wrong and this practice cannot be directly applied, it follows that this Division is still following the practice of the superior courts of common law sitting at Westminster, which practice is incorporated in that order and is, accordingly, that to be followed. In short, this court in the exercise of its jurisdiction conferred by statute follows the terms of Order 45 of the Rules of the Supreme Court.

I turn to the second point raised by Mr. Jackson, that the affidavit in support of the summons was not served on his client. I think the short answer is that Order 45 of the Rules of the Supreme Court does not require service of the affidavit on the judgment debtor. As to the third point, that since the debtor has already been committed for at any rate part of the amount involved, the judgment creditor will not be permitted to enforce the debt by garnishee, I think this point is disposed of by the decision in *Jinks* v. *Jinks*,[33] and by the provisions of section 5 of the Debtors Act, 1869. Accordingly, I will make this order absolute.

Order nisi made absolute.

Solicitors: *Wright & Bull; Michael Fox & Co.*

The husband appealed.

Joseph Jackson for the husband.
R. J. S. Harvey for the wife.

[32] [1953] P. 192; [1953] 2 W.L.R. 901; [1953] 1 All E.R. 857.

[33] [1936] 3 All E.R. 1051, C.A.

The following cases, in addition to those referred to in the judgment of Holroyd Pearce L.J., were cited in argument: *Bailey* v. *Bailey* [1]; *Linton* v. *Linton* [2]; *Re Mills' Estate* [3]; *Warter* v. *Warter* [4]; *Robins* v. *Robins* [5]; *Ivimey* v. *Ivimey* [6]; *Brydges* v. *Brydges and Wood* [7]; *De Gasquet James (Countess)* v. *Mecklenburg-Schwerin (Duke)* [8]; *Capron* v. *Capron* [9]; *In re Hedderwick* [10]; *Findlay* v. *Findlay* [11]; *In re Bidie.* [12]

Feb. 24, 1961. HOLROYD PEARCE L.J. This is an appeal from a garnishee order made by Phillimore J. against the husband in respect of arrears of maintenance. The question is whether the Divorce Court has jurisdiction to make such an order. Undoubtedly it has been making such orders for the past 80 years, but it is argued that it should not have done so. When a useful practice has been in force for so long the court is naturally loth to hold that it is invalid on technical grounds. If there is such a defect, it can easily be set right by alteration of a rule. In 1881, such an order was made in *Whittaker* v. *Whittaker.** It is interesting to find in Oakley on Divorce Practice (3rd ed., published in 1889) five pages (see pp. 171 to 176) dealing with garnishee as a method of procedure in the Divorce Division. Cababé on Interpleader and Attachment of Debts, published in 1881, deals at p. 147 with the development of garnishee proceedings from the Common Law Procedure Act, 1854, and says: "Now, however, "under Order 45 of the Rules of Supreme Court of 1875, the prac-"tice of attachment"—that is, attachment of debt—"applies "to all Divisions of the High Court." In 1904, in *Edmunds* v. *Edmunds*,† Gorell Barnes J. made such an order after examining the principles involved in garnishee proceedings arising out of decrees and orders in matrimonial suits. In that case it was not argued that the court had no jurisdiction to make such an order.

The Matrimonial Causes Act, 1857, conferred no such jurisdiction on the Divorce Court. The power to make garnishee orders originated under the Common Law Procedure Act, 1854, and it was amplified by the Common Law Procedure Act, 1860. That jurisdiction was only enjoyed originally by the superior courts of common law sitting at Westminster. The Supreme Court of Judicature Act, 1873, however, set up a Superior Court consisting of two Divisions, Her Majesty's High Court of Justice, and Her Majesty's Court of Appeal. Section 5 included in the former the judges of the Court of Probate, and of the Court for Divorce and Matrimonial Causes, and enacted: "All the judges of the said

[1] (1884) 13 Q.B.D. 855, C.A.
[2] (1885) 15 Q.B.D. 239.
[3] (1886) 34 Ch.D. 24; 3 T.L.R. 61, C.A.
[4] (1890) 15 P.D. 35.
[5] [1907] 2 K.B. 13; 23 T.L.R. 428.
[6] [1908] 2 K.B. 260, C.A.
[7] [1909] P. 187; 25 T.L.R. 505, C.A.
[8] [1914] P. 53; 30 T.L.R. 329.
[9] [1927] P. 243; 43 T.L.R. 667.
[10] [1933] Ch. 669; 49 T.L.R. 381.
[11] [1947] P. 122; 63 T.L.R. 391; [1947] 2 All E.R. 71, C.A.
[12] [1949] Ch. 121; 65 T.L.R. 25; [1948] 2 All E.R. 995.
* (1881) 7 P.D. 15.
† [1904] P. 362.

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"court shall have in all respects, save as in this Act is otherwise "expressly provided, equal power, authority, and jurisdiction." Section 16 provided: "The High Court of Justice shall be a "superior court of record, and, subject as in this Act mentioned, "there shall be transferred to and vested in the said High Court "of Justice the jurisdiction which, at the commencement of this "Act, was vested in, or capable of being exercised by, all or any "of the courts following . . ." The Court for Divorce and Matrimonial Causes is one of those mentioned. The section continues: "The jurisdiction by this Act transferred to the High Court of "Justice shall include (subject to the exceptions hereinafter con-"tained) the jurisdiction which, at the commencement of this "Act, was vested in, or capable of being exercised by, all or any "one or more of the judges of the said courts, respectively, "sitting in court or chambers, or elsewhere, when acting as "judges or a judge, in pursuance of any statute, law, or custom, "and all powers given to any such court, or to any such judges "or judge, by any statute; and also all ministerial powers, duties, "and authorities, incident to any and every part of the jurisdic-"tions so transferred."

Those terms are as wide as they can be, and it seems to me inescapable that those sections conferred on the judges of the Court for Divorce and Matrimonial Causes all the powers hitherto held by the superior courts of common law, which included the power to make garnishee orders.

Section 23, which provided for the making of rules, said: ". . . where no special provision is contained in this Act or in "any such rules or orders of court with reference thereto, it shall "be exercised as nearly as may be in the same manner as the "same might have been exercised by the respective courts from "which such jurisdiction shall have been transferred, or by any "of such courts." As no rules relating to garnishee proceedings were in force in 1881 when the garnishee order was made in *Whittaker* v. *Whittaker*,[3] the presumption is that the court was acting in a way as nearly as might be to the way in which the jurisdiction had been previously exercised by the superior courts of common law.

The judge in the present case rightly observed: "No court "can abrogate a jurisdiction conferred by Parliament either by "rule or by failure to make a rule," and he deduced that when the Supreme Court of Judicature Act, 1873, came into force in 1874, the Court for Divorce and Matrimonial Causes had jurisdiction to make garnishee orders.

The Supreme Court of Judicature Act, 1875, amended the Act of 1873. It provided for Rules of Court being made and altered. Section 17 contained provision for the making of rules. That section applied to the Court for Divorce and Matrimonial Causes. Schedule 1 to the Act contained Rules of Court which were to be

[3] (1881) 7 P.D. 15.

in force until altered by the rule-making authorities. One of those rules was Order 45, which varied very little the procedure for garnishee proceedings that had been laid down originally in the Common Law Procedure Acts, 1854 and 1860. The Supreme Court of Judicature (Consolidation) Act, 1925, repealed and re-enacted the provisions of the Acts of 1873 and 1875. In my view, nothing contained in the Act of 1925 altered the position in any material respect, and the judge was right in saying that under it, jurisdiction remained in the Divorce Court to make garnishee orders.

In 1924 there was first introduced into the Matrimonial Causes Rules a rule which adopted the Rules of the Supreme Court in certain respects. In the Matrimonial Causes Rules, 1924, it was rule 97, in the Matrimonial Causes Rules, 1937, it was rule 81, and in the Matrimonial Causes Rules, 1957, it is rule 82. Rule 82 says: "Subject to the provisions of these rules and of any enact-"ment, the Rules of the Supreme Court shall, notwithstanding "the provisions of Order 68 thereof, apply with the necessary "modifications to the practice and procedure in any cause or "matter to which these rules apply." I read that rule as meaning this: Where these rules do not otherwise provide, and where a statute does not otherwise order, the Rules of the Supreme Court shall apply with necessary modifications to the practice and procedure in any cause or matter to which the Matrimonial Causes Rules apply.

It is argued that that is not the right way of reading rule 82, and that it does not import Order 45 of the Rules of the Supreme Court into a matrimonial cause because rule 64 of the Matrimonial Causes Rules, 1957, which deals with enforcement of orders, makes no mention of garnishee proceedings. It is said that by construing rules 82 and 64 together, their effect is that the Rules of the Supreme Court shall not apply to any matter dealt with at all by the Matrimonial Causes Rules, 1957.

Reliance is placed on a decision of Simonds J. in *In re Woolgar*,[4] where he declined to apply Order 42, rule 24, of the Rules of the Supreme Court to arrears of maintenance.

Rule 62 of the Matrimonial Causes Rules, 1937, which was similar to the present rule 64 dealt with enforcement of orders, but made no reference to Order 42 of the Rules of the Supreme Court. Therefore, Simonds J. held that by implication it excluded Order 42. He said[5]: "It is said that the result of rule 81 is to "introduce the provisions of Order 42, rule 24, of the Rules of "the Supreme Court under which an order for alimony made by "the Divorce Court can be enforced, as if it were a judgment "to the same effect and, therefore, by way of proof in the "administration of the estate. But rule 81 begins with these "words: 'Subject to the provisions of these rules,' and I turn,

[4] [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583.

[5] [1942] Ch. 318, 320.

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"therefore, to rule 62, which prescribes the way (and, as I think, "the only way) in which an order of the Divorce Court may be "enforced. That rule would be wholly unnecessary if the result "of rule 81 was to substitute, as a means of enforcing the orders "of the Divorce Court, the provisions of Order 42, rule 24, of the "Rules of the Supreme Court."

With all respect, I find myself unable so to view this matter. The Judicature Acts were not referred to in argument, and it may be that Simonds J. might have taken the contrary view if they had been. Phillimore J., in the court below in the present case, found himself unable to follow that reasoning, and observed that it was impossible, merely by an omission of the rule, to take away a jurisdiction which the court already had. Moreover, in *Giles* v. *Giles*,[6] Gorell Barnes J. pointed out that the divorce rules are not exhaustive. Again, in this court in *In the Goods of Patrick*,[7] the court applied the Rules of the Supreme Court by analogy to Divorce Court procedure where the Divorce Court procedure had not made provision for the matter.

I cannot accept Mr. Jackson's careful argument that since rule 64 of the Matrimonial Causes Rules, 1957, refers to methods of enforcement, but is silent as to garnishee orders, it has the effect, on a proper construction of rule 82, of excluding any garnishee proceedings. Nor can I accept his argument that the jurisdiction which has been transferred to the Divorce Division by the Judicature Acts is limited to relief to be given, and excludes matters of practice and procedure.

A view similar to that which I am now expressing was put forward by Davies J. in the case of *Worboys* v. *Worboys*,[8] where he took from the Rules of the Supreme Court certain provisions for substituted service which were not embodied in the Matrimonial Causes Rules.

I agree with the very careful and exhaustive judgment of Phillimore J., and in my opinion this appeal should be dismissed.

HARMAN L.J. The ingenuity of the husband's counsel constitutes the only possible meritorious element in an appeal entirely without merit in other respects. It has no substance in that it would not produce any result if it succeeded, and it will make no tremor on the face of the law if it fails, as I hold that it does.

DAVIES L.J. I agree.

Appeal dismissed.

Solicitors: *Michael Fox & Co.; Wright & Bull.*

[6] [1900] P. 17.
[7] (1889) 14 P.D. 42; 5 T.L.R. 302, C.A.
[8] [1953] P. 192; [1953] 2 W.L.R. 901; [1953] 1 All E.R. 857.

[HOUSE OF LORDS.]

SHAW . . . . . APPELLANT;

AND

DIRECTOR OF PUBLIC PROSECUTIONS . RESPONDENT.

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1960
Dec. 12, 13, 14, 21.

Lord Parker C.J., Streatfeild and Ashworth JJ.

H. L. (E.)*
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Mar. 13, 14, 15, 16, 20, 21, 22; *May* 4.

Crime—Obscene libel—Advertisement—Booklet consisting mainly of advertisements by and names and addresses of prostitutes—Advertisements inviting sexual intercourse and in some cases indulgence in sexual perversions—"Tend to deprave and corrupt"—Reliance on publisher's honesty of purpose—Whether new Act bar to prosecution for conspiracy at common law—Obscene Publications Act, 1959 (7 *&* 8 *Eliz.* 2, *c.* 66), *ss.* 1, 2 (4).

Crime — Evidence — Obscenity — Advertisement for prostitutes — Their evidence of meaning of words—Police evidence of their practices—Admissibility.

Vagrancy—Prostitution—Living on the earnings of—Publication of booklet containing advertisements by prostitutes—Charge for advertisements—Whether publisher knowingly "living wholly or in part "on the earnings of prostitution"—Sexual Offences Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 69), *s.* 1.

Crime—Conspiracy—Contra bonos mores—Public mischief—Nature and ambit of offence—Publication of booklet containing advertisements by prostitutes—Whether statutory bar to bringing proceedings at common law—Obscene Publications Act, 1959 (7 *&* 8 *Eliz.* 2, *c.* 66), *s.* 2 (4).

The appellant published a booklet, the Ladies' Directory, of some 28 pages, most of which were taken up with the names and addresses of prostitutes; the matter published left no doubt that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversions. The appellant's avowed purpose in publication was to assist prostitutes to ply their trade when as a result of the Street Offences Act, 1959, they were no longer able to solicit in the street. The prostitutes paid for the advertisements and the appellant derived a profit from the publication. The appellant pleaded not guilty to an indictment charging him with (1) conspiracy to corrupt public morals in that he conspired with the advertisers and other persons by means of the Ladies' Directory and the advertisements to debauch and corrupt the morals of youth and other subjects of the Queen; (2) living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act, 1956 [1]; and (3) publishing an obscene article contrary to section 2 of the Obscene Publications Act, 1959.[2]

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD MORRIS OF BORTH-Y-GEST and LORD HODSON.

[1] Sexual Offences Act, 1956, s. 30 (1): "It is an offence for a man "knowingly to live wholly or in part "on the earnings of prostitution."

[2] Obscene Publications Act, 1959, s. 1: "(1) For the purposes of this "Act an article shall be deemed to "be obscene if its effect . . . is, if "taken as a whole, such as to tend "to deprave and corrupt persons who "are likely, having regard to all rele-"vant circumstances, to read, see or "hear the matter contained or "embodied in it."

S. 2: "(1) . . . any person who, "whether for gain or not, publishes "an obscene article shall be liable . . . "(*b*) on conviction on indictment to

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tions.

At the trial evidence was given by prostitutes that they had paid for the advertisements out of their earnings, that the advertisements were good at bringing clients in, and as to the ages of the persons resorting to them and the meaning of abbreviations and expressions in the advertisements; they also gave evidence of the practices in which they indulged and there was evidence by the police as to objects found at their addresses. The summing-up gave no direction to the jury as to the relevance of the appellant's honesty of purpose. The jury convicted the appellant. On appeal, on the grounds, inter alia, that there was no such offence at common law as the conspiracy alleged; that the conspiracy charged was barred by section 2 (4) of the Obscene Publications Act, 1959; that the appellant had not received the earnings of the prostitutes as such but merely the profits from the sale of the booklet; that there had been no direction as to his honesty of purpose, and that evidence had been wrongly admitted on the charge under the Act of 1959:—

Held, by the Court of Criminal Appeal, dismissing the appeal on all counts, inter alia, that the test of obscenity in section 1 (1) of the Obscene Publications Act, 1959, was whether the effect of the article was such as to tend to deprave and corrupt persons who were likely to read it, so that obscenity depended on the article and not the author, and that, therefore, intention and the appellant's honesty of purpose were irrelevant (post, p. 903).

Further, that the evidence of the prostitutes in so far as it was directed to the special meaning of abbreviations and phrases used in the advertisements was admissible on the charge under the Obscene Publications Act, 1959, and that the rest of their evidence and that of the police was not, but that the whole of that evidence was admissible on the conspiracy charge and, since there was no substantial miscarriage of justice, the conviction under the Act of 1959 should not be set aside on that ground (post, p. 903).

Dictum of Cockburn C.J. in *Reg.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, 370 applied.

On appeal to the House of Lords on counts 1 and 2:—

Held, by the House of Lords, (1) that for the purposes of section 30 (1) of the Sexual Offences Act, 1956, a person might fairly be said to be living in whole or in part on the earnings of prostitution if he was paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes (post, p. 914). That, accordingly, the appellant, who as part of his business accepted advertisements for reward from prostitutes of their readiness to prostitute themselves, knowingly lived in part on the earnings of prostitution within the meaning of the section.

Reg. v. *Thomas* [1957] 1 W.L.R. 747; [1957] 2 All E.R. 181; 41 Cr.App.R. 117; *Reg.* v. *Silver* [1956] 1 W.L.R. 281; [1956] 1 All E.R. 716; 40 Cr.App.R. 32 considered.

Calvert v. *Mayes* [1954] 1 Q.B. 342; [1954] 2 W.L.R. 18; [1954] 1 All E.R. 41, D.C. approved.

"a fine or to imprisonment for a term "not exceeding three years or both. ". . . (4) A person publishing an "article shall not be proceeded "against for an offence at common "law consisting of the publication of "any matter contained or embodied "in the article where it is of the "essence of the offence that the "matter is obscene."

S. 4: "(1) A person shall not be "convicted of an offence against sec-"tion 2 of this Act . . . if it is proved "that publication of the article in "question is justified as being for the "public good on the ground that it is "in the interests of science, literature, "art or learning, or of other objects of "general concern."

Per Lord Reid. The words "living on" in section 30 of the Sexual Offences Act, 1930, connote living parasitically.

(2) (Lord Reid dissenting) that a conspiracy to corrupt public morals was a common law misdemeanour and that there was evidence fit to be left to the jury on which the appellant could be found guilty of this offence. That it was irrelevant to this charge that section 2 (4) of the Obscene Publications Act, 1959, might bar proceedings against the appellant if no conspiracy was alleged, for the conspiracy alleged did not "consist of the publication" of the booklet, but of an agreement to corrupt public morals by means of the booklet, which might never be published (post, pp. 918, 936, 937).

Rex v. *Delaval* (1763) 3 Burr. 1434; *Reg.* v. *Mears and Chalk* (1851) 2 Den. 79; *Reg.* v. *Howell* (1864) 4 F. & F. 160 and *Reg.* v. *Berg, Britt, Carré and Lummies* (1927) 20 Cr.App.R. 38, C.C.A. approved and applied.

Per curiam. (Lord Reid dissenting) that there was in the courts as custodes morum of the people a residual power, where no statute had yet intervened to supersede the common law, to superintend those offences which were prejudicial to the public welfare (post, p. 917).

Observations of Lord Mansfield in *Rex* v. *Delaval* (1763) 3 Burr. 1434, 1439 approved.

Decision of the Court of Criminal Appeal, sub nom. *Reg.* v. *Shaw,* affirmed.

APPEAL from the Court of Criminal Appeal (Lord Parker C.J., Streatfeild and Ashworth JJ.).

The appellant, Frederick Charles Shaw, pleaded not guilty at the Central Criminal Court before Judge Maxwell Turner and a jury, on an indictment containing the following three counts: (1) "Conspiracy to corrupt public morals. Particulars of Offence. "... conspired with certain persons who inserted advertisements "in issues of a magazine entitled 'Ladies' Directory' numbered "7, 7 revised, 8, 9, 10 and a supplement thereto, and with certain "other persons whose names are unknown, by means of the said "magazine and the said advertisements to induce readers thereof "to resort to the said advertisers for the purposes of fornication "and of taking part in or witnessing other disgusting and immoral "acts and exhibitions, with intent thereby to debauch and cor-"rupt the morals as well of youth as of divers other liege subjects "of Our Lady The Queen and to raise and create in their minds "inordinate and lustful desires"; (2) living on the earnings of prostitution, contrary to section 30 of the Sexual Offences Act, 1956; and (3) publishing an obscene article, the Ladies' Directory, contrary to section 2 of the Obscene Publications Act, 1959.

The Ladies' Directory was a booklet of some 28 pages, most of which were taken up with the names and addresses of women who were prostitutes, together with a number of photographs of nude female figures, and the matter published left no doubt that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversions.

The appellant did not give evidence, but he had admitted

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publication and his avowed object in publishing was to assist prostitutes to ply their trade when, as a result of the Street Offences Act, 1959, they were no longer able to solicit in the streets. There was evidence that on October 22, 1959, prior to publication, he had taken advice as to whether publication would be legal, and had shown a police officer at Scotland Yard the first issue of the booklet and asked him if it would be all right to publish; apparently he had arranged that the Director of Public Prosecutions should see a copy. There was also evidence that he had assured the owner of a kiosk, whom he had asked to sell the booklet, that it would not be published unless it was legal. When later he was asked by a police officer if he was the Shaw who had published the Ladies' Directory he said: "Yes," and "I publish "this and distribute it for 5s. each to help the prostitutes who "advertise in it," but would not state how much he charged for advertisements, saying that he ran it as a business and that his solicitor thought it was all right. There was evidence that advertisers paid 25 guineas for the front cover, 15 guineas for the back cover, and inside, 10 guineas for a full-page advertisement, 8 guineas for a half-page photograph, and 2 guineas for a small printed advertisement; the amount paid by prostitutes advertising in issue No. 9 was calculated to £250 19s., but there was no evidence as to how much of that was profit. The appellant charged 2s. 6d. to sellers for the booklet and it was sold to the public for 5s. Evidence was given by five prostitutes that they had paid for the advertisements out of their earnings as prostitutes, that the advertisements were good at bringing clients in and as to the ages of the persons resorting to them; they also gave evidence as to the meaning of certain abbreviations and about the sexual perversions referred to in their advertisements, and there was police evidence as to the objects found at their addresses.

After the close of the evidence for the prosecution, counsel for the appellant submitted that the conspiracy alleged in count 1 disclosed no offence, and that, in the case of count 2, the evidence for the prosecution had disclosed no offence.

Judge Maxwell Turner ruled that a conspiracy to debauch and corrupt public morals was a common law misdemeanour and was indictable at common law and that the particulars of the offences set out in count 1 were particulars of such a conspiracy, if the jury found the facts alleged to be true. On the second count he ruled that there was evidence for the jury to consider.

No evidence was called for the defence.

In summing up the judge did not direct the jury as to the relevance of the appellant's honesty of purpose. In the course of his direction to the jury, after reading section 1 of the Obscene Publications Act, 1959, he said: "The test, therefore, that you "have got to apply is laid down by the Act of Parliament—is the "effect of this publication, taken as a whole, such as to tend to "deprave and corrupt persons who are likely to read it. . . . "If the effect of this document is thought by you to encourage or

"induce readers of it to resort to prostitutes for fornication and/or "for the other deviations we have heard about, and if that is a "thing which corrupts or depraves such people, and if you think "that they are then acting in a depraved and corrupt way, then "in my view the effect of this article would be to tend to "corrupt and deprave and it would be obscene within the defini-"tion of the Act. Whether to induce or encourage a person "likely to read this article to resort to prostitutes for this pur-"pose does, in fact, tend to corrupt and deprave, is, of course, a "matter for you, in the light of my previous observations to you "on the subject."

The jury convicted the appellant on all three counts and he was sentenced to nine months' imprisonment.

The appellant appealed against his conviction on all three counts to the Court of Criminal Appeal. On count 1 it was contended, in effect, that there was no such offence at common law as a conspiracy to corrupt public morals unless the acts alleged were offences against the criminal law or amounted to a civil wrong and that, as the acts alleged in the indictment were not in either of those classes, the conspiracy alleged disclosed no offence; further, that, since the proceedings were based on an obscene publication, they were barred by section 2 (4) of the Obscene Publications Act, 1959. On the second count it was contended that the judge had misdirected the jury in that he had failed to point out the distinction between services supplied to a prostitute for reward and the mere receipt of the earnings of a prostitute, and that the appellant had not received the earnings of prostitutes, but profits from the sale of the booklet. On the third count it was contended that there was misdirection in that the judge had failed to direct the jury as to the relevance of the appellant's honesty of intention; that the true test under the Act of 1959 was the effect of the article on the mind of the person reading it, and that the evidence of the prostitutes and the police officers as to the results of the advertisement, the ages of the persons resorting to the prostitutes and the practices they indulged in was inadmissible. On all counts the appellant stated as a ground of appeal that the publication was in the public interest. The appellant also appealed against his sentence.

W. R. Rees Davies for the appellant.
J. H. Buzzard for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Calvert* v. *Mayes* [3]; *Rex* v. *Hill* [4]; *Rex* v. *Manley* [5]; *Reg.* v. *Newland* [6]; *Rex* v. *Higgins* [7];

[3] [1954] 1 Q.B. 342; [1954] 2 W.L.R. 18; [1954] 1 All E.R. 41, D.C.

[4] [1914] 2 K.B. 386; 10 Cr.App.R. 56, C.C.A.

[5] [1933] 1 K.B. 529; 24 Cr.App.R. 25, C.C.A.

[6] [1954] 1 Q.B. 158; [1953] 3 W.L.R. 826; [1953] 2 All E.R. 1067; 37 Cr.App.R. 154, C.C.A.

[7] (1801) 2 East 5.

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Rex v. *Bassey*[8]; *Reg.* v. *Hudson*[9]; *Rex* v. *Taylor*[10]; *Rex* v. *Grey (Lord)*[11]; *Reg.* v. *Green*[12]; *Quinn* v. *Leathem*[13]; *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*[14]; *Rex* v. *Lynn.*[15]

Cur. adv. vult.

December 21, 1960. ASHWORTH J. read the following judgment of the court: On September 21, 1960, the appellant was convicted at the Central Criminal Court on an indictment containing three counts alleging the following offences: (1) Conspiracy to corrupt public morals; (2) knowlingly living on the earnings of prostitution, and (3) publishing an obscene article. The jury found him guilty on each of the three counts and it has been submitted on his behalf that the conviction on each count should be quashed. In presenting an able argument on behalf of the appellant, Mr. Rees Davies dealt with the counts in the opposite order to that in which they were set out in the indictment and we think it convenient to follow the same course.

In the third count the charge was brought under section 2 (1) of the Obscene Publications Act, 1959, and the article alleged to be obscene consisted of a booklet entitled "Ladies' Directory "Issue No. 9." The appellant admitted publication and his avowed object in publishing this and the two preceding issues was to assist prostitutes to ply their trade when, as a result of the Street Offences Act, 1959, they were no longer able to do so by soliciting in the streets. The booklet contained 28 pages and most of them were taken up with the names and addresses and, in some instances, photographs of women who were prostitutes. In addition there were in some instances expressions in abbreviated form which were said to indicate that the woman in question was prepared to indulge in sadistic or masochistic conduct. For the purposes of this judgment it is unnecessary to refer to the booklet in greater detail.

On this third count Mr. Rees Davies submitted that the judge failed to direct the jury, that the appellant's honesty of purpose was a relevant factor for their consideration. He did not suggest that the appellant's intention or purpose was in any sense conclusive of his guilt or innocence, but he submitted that the jury should have been directed to consider it. If these proceedings had been brought before the passing of the Obscene Pulications Act, 1959, in the form of a prosecution at common law for publishing an obscene libel, it would no doubt have been necessary to establish an intention to corrupt. But the Act of 1959 contains no such requirement and the test of obscenity laid down in

[8] (1931) 47 T.L.R. 222; 22 Cr. App.R. 160, C.C.A.
[9] [1956] 2 Q.B. 252; [1956] 2 W.L.R. 914; [1956] 1 All E.R. 814; 40 Cr.App.R. 55, C.C.A.
[10] (1675) Ventr. 293.
[11] (1682) 9 State Tr. 127.
[12] (1862) 3 F. & F. 274.
[13] [1901] A.C. 495; 17 T.L.R. 749, H.L.
[14] [1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142, H.L.
[15] (1788) 2 Durn. & E. 733.

section 1 (1) of the Act is whether the effect of the article is such as to tend to deprave and corrupt persons who are likely to read it. In other words obscenity depends on the article and not upon the author. Moreover, it is to be noted that section 4 of the Act, which provides a defence "if it is proved that publi-"cation of the article in question is justified as being for the "public good," does not refer to the purpose or intention of the publisher. Apart from this, the question of purpose was considered in *Reg.* v. *Hicklin*,[1] and in the course of his judgment Cockburn C.J. said[2]: "I think that if there be an infraction of "the law the intention to break the law must be inferred, and "the criminal character of the publication is not affected or "qualified by there being some ulterior object in view (which "is the immediate and primary object of the parties) of a different "and of an honest character."

Secondly, on this third count, Mr. Rees Davies submitted that evidence was wrongly admitted. Such evidence was given partly by some of the prostitutes mentioned in the booklet and partly by police officers. In so far as the prostitutes' evidence was directed to the special meaning of abbreviations and phrases used in the advertisements contained in the booklet, we are of opinion that it was plainly admissible. The abbreviation "corr.," for example, has apparently a well-known meaning to prostitutes and those who resort to them as indicating sadism and evidence to this effect was admissable to explain to a jury, who would probably be unaware of it, what the words would convey to many who were likely to read it. But the prostitutes' evidence went further and included evidence as to the result of advertisements, the ages of persons resorting to them, and the practices in which they indulged. The police evidence described the premises of some of the advertisers in the booklet and the objects which were found there. In our view, except to the extent already indicated, the prostitutes' evidence and that of police officers was not admissible on this third count in which the only issue was the question whether the article was obscene. On the other hand, as was conceded by Mr. Rees Davies, such evidence was plainly admissible on the first count alleging conspiracy, and, accordingly, the only complaint that could be made was that the jury should have been directed to disregard such evidence when considering the third count. No such direction was given, but it is only right to say that no objection to the evidence was taken at the trial by counsel then appearing for the appellant, nor was the judge invited to give any such direction or to order a separate trial of the third count.

Notwithstanding the force of the submissions on this point made on behalf of the appellant, we are of opinion that there was no substantial miscarriage of justice and that the conviction on this third count should not be set aside on this ground.

[1] (1868) L.R. 3 Q.B. 360. [2] Ibid. 370.

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On this third count, it was further submitted that in the course of his summing-up the judge wrongly directed the jury to have regard to what persons did after reading the article, in considering whether it was obscene within the meaning of the Act. It is true that there are words in one paragraph which may be said to justify this submission, but these words must be read in their context, and in our view they were explanatory of the words immediately preceding them and should not be regarded as a direction to the jury to consider what happened afterwards as a test of the article's obscenity. Lastly, an argument was put forward that, inasmuch as the persons likely to read the article were persons who had come to areas of prostitution such as Soho and Paddington and were seeking opportunity to indulge in the practices advertised in the booklet, they were already corrupt and depraved. The fallacy in this argument is that it assumes that a man cannot be corrupted more than once and there is no warrant for this.

The second count is the next to be considered. The main argument of Mr. Rees Davies was based on an alleged distinction between a person who supplies services for reward to a prostitute and a person who merely receives a prostitute's earnings. He pointed out that the offence which is now to be found in section 30 of the Sexual Offences Act, 1956, was previously to be found in the Vagrancy Act, 1898, as amended by the Criminal Law Amendment Act, 1912. It might, therefore, be inferred that the type of person against whom the Acts were directed was someone who could properly be regarded as a rogue or a vagabond, and was not someone who pursued a trade or calling of his own and happened to take money from a prostitute for goods or services supplied to her. In our view it is not open to this court to take so restricted a view of section 30 of the Act of 1956, having regard to the decision of this court in *Reg.* v. *Thomas*.[3] In that case proceedings were brought under the Vagrancy Act, 1898, and the amending Act of 1912, and the accused was a man who, knowing a woman to be a convicted prostitute, agreed to let her have the use of a room between the hours of 9 p.m. and 2 a.m., charging her £3 a night for the accommodation. At the Central Criminal Court Pilcher J. had declined to follow a ruling of Judge Maude in *Reg.* v. *Silver*,[4] and held that[5] "if there is evidence that a defendant has let a room, or a flat, at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine on the facts of each particular case, whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution." The accused was convicted and his application for leave to appeal was refused by this court. The judgment of the court[6] contains

[3] [1957] 1 W.L.R. 747; [1957] 2 All E.R. 342, C.C.A.

[4] [1956] 1 W.L.R. 281; [1956] 1 All E.R. 716.

[5] [1957] 1 W.L.R. 747, 749; [1957] 2 All E.R. 181.

[6] [1957] 1 W.L.R. 747, 749.

express approval of Pilcher J.'s direction and disapproval of the contrary ruling of Judge Maude.

In our view the principle of *Thomas'* case [7] is equally applicable in a case such as the one now before us. If a man knowingly assists a prostitute with the direct object of enabling her to carry on her trade and knowingly lives wholly or in part on the earnings of the prostitution which he assists, he is, in our opinion, guilty of an offence under section 30 of the Act of 1956.

It was further submitted that there was no evidence that the appellant charged inflated prices for the prostitutes' advertisements and therefore that *Thomas'* case [8] was distinguishable. This submission is not well-founded and involves a misunderstanding of the relevance of the inflated rent in that case. The purpose of tendering evidence as to the rent was to show that the room was not let for normal accommodation but for the prostitute's professional purposes, and although in the absence of such evidence or other evidence implicating the accused, it might be difficult to prove the charge in the case of a room being let to a prostitute, such evidence was not in our view an essential element in the prosecution's case.

Lastly, on the second count, it was submitted that the appellant did not receive the prostitute's earnings but merely profits arising from the sale of the booklet after all expenses had been met. This submission involves much too narrow a view of the facts. There would have been no profits at all but for the advertisements and the income derived by the appellant from the venture (which he admitted was considerable) was manifestly in essence the money paid by the prostitutes.

Accordingly, there is, in our view, no reason to set aside the conviction on the second count.

The first count, with which we now deal, raises in some ways a more difficult problem. The charge was one of conspiracy, and it is convenient to set out the relevant portion of the indictment: "Statement of Offence: Conspiracy to corrupt public morals. "Particulars of Offence: On divers days between the 1st day of "October 1959 and the 23rd day of July 1960 within the jurisdic-"tion of the Central Criminal Court, conspired with certain "persons who inserted advertisements in issues of a magazine "entitled "Ladies' Directory" numbered 7, 7 revised, 8, 9, 10 "and a supplement thereto, and with certain other persons "whose names are unknown, by means of the said magazine and "the said advertisements to induce readers thereof to resort to the "said advertisers for the purposes of fornication and of taking "part in or witnessing other disgusting and immoral acts and "exhibitions, with intent thereby to debauch and corrupt the "morals as well of youth as of divers other liege subjects of Our "Lady the Queen and to raise and create in their minds "inordinate and lustful desires."

[7] [1957] 1 W.L.R. 747. [8] Ibid.

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Conspiracy is an offence which takes many different forms but in the present appeal the matter was greatly simplified when Mr. Buzzard, on behalf of the prosecution, made it clear that the form of conspiracy, which he had alleged at the trial and to which he adhered, was a conspiracy to commit an unlawful act, and not a conspiracy to commit a lawful act by unlawful means. He reserved the right to contend, should it be necessary, that a conspiracy to corrupt the morals of a particular individual was an indictable offence by reason of the conspiracy, even if such corruption if done by one person would not be an offence. The unlawful act which he alleged was said to be a common law misdemeanour, namely, the corruption of public morals. His proposition was two-fold: at common law any act calculated or intended to corrupt the morals of the public or a portion thereof in general, as opposed to the morals of a particular individual or individuals, is indictable as a substantive offence. Secondly, an act calculated or intended to outrage public decency is also indictable as a substantive offence. Both parts of this proposition were naturally contested by Mr. Rees Davies and the main issue before us on this first count is whether the first of Mr. Buzzard's propositions is well-founded.

We were referred to a large number of cases, but before alluding to any of them in detail we may usefully refer to the speech of Lord Sumner in *Bowman* v. *Secular Society Ltd.*,[9] in which is set out an illuminating survey of this branch of the law from the beginning of the seventeenth century. He said[10]: "The time of Charles II was one of notorious laxity both in faith "and morals, and for a time it seemed as if the old safeguards "were in abeyance or had been swept away. Immorality and "irreligion were cognisable in the Ecclesiastical Courts, but "spiritual censures had lost their sting and those civil courts were "extinct, which had specially dealt with such matters viewed as "offences against civil order. The Court of King's Bench stepped "in to fill the gap."

The first reported occasion on which the Court of King's Bench thus stepped in appears to be *Rex* v. *Sidney*.[11] Amongst other acts alleged against Sir Charles Sidley were his exposure of his naked body upon a balcony in Covent Garden before a large gathering of people and making water on the persons below. In addition he was said to have thrown down bottles upon such persons' heads. This latter conduct was plainly within the jurisdiction of the Court of King's Bench but there was evidently an issue whether the other conduct was such as could be dealt with in the court. In the short report of the case there appears the statement that "this court is custos morum of all the King's "subjects and that it is high time to punish such profane "conduct." In 1780, in *Reg.* v. *Read*,[12] the court expressed a

[9] [1917] A.C. 406, 456; 33 T.L.R. 376, H.L.

[10] Ibid.

[11] (1663) sub nom. *Sir Charles Sedley's Case* 1 Sid. 168.

[12] (1708) Fortes.Rep. 98.

different view when considering a charge of publishing an obscene libel, but the judgment in the defendant's favour was only a "judgment nisi," that is, a provisional judgment. Not long afterwards the case of *Rex* v. *Curl* [13] came before the Court of King's Bench, in which the charge against the accused was that of publishing an obscene libel. Reliance was naturally placed on *Read's* case [14] by defending counsel, but the Attorney-General's argument to the contrary prevailed [15]: "What I insist upon is, "that this is an offence at common law, as it tends to corrupt "the morals of the King's subjects, and is against the peace "of the King. . . . I do not insist that every immoral act is "indictable, such as telling a lie, or the like; but if it is destruc-"tive of morality in general, if it does, or may, affect all the "King's subjects, it then is an offence of a public nature."

Lord Raymond C.J., in giving judgment, said [16]: "if it reflects "on religion, virtue, or morality, if it tends to disturb the civil "order of society, I think it is a temporal offence." After the case had been adjourned the court "gave it as their unanimous "opinion that this was a temporal offence. They said it was "plain that the force used in *Sidney's* case [17] was but a small "ingredient in the judgment of the court who fined him £2,000. "And if the force was all they went upon, there was no occasion "to talk of the court's being censor morum of the King's subjects. "They said that if *Read's* case [18] was to be adjudged, they should "rule it otherwise: and therefore in this case they gave judgment "for the King."

In 1875, in *Reg.* v. *Saunders*,[19] the main issue seems to have been whether a booth on Epsom Downs was a public place, but the decision is of importance as confirmation of the existence of a common law misdemeanour if conduct takes place which openly outrages decency and is injurious to public morality.

Similarly, in *Reg.* v. *Wellard*,[20] Grove J. said [21]: "I am of "opinion that this case comes within the ordinary and reasonable "meaning of the principle which makes it a misdemeanour to "outrage public decency and morality." Huddleston B. said [22]: "the principle is well established which is laid down in Black-"stone and in Hawkins' Pleas of the Crown, viz., that whatever "openly outrages decency, and is injurious to public morals, is a "common nuisance, and indictable as a misdemeanour at common "law."

Lastly, in 1927, the case of *R.* v. *Berg, Britt, Carré and Lummies* [23] came before this court. This court has seen the original indictment in that case. It contains two counts, the second of

[13] (1727) 2 Stra. 788.
[14] Fortes.Rep. 98.
[15] 2 Stra. 788, 789.
[16] Ibid.
[17] 1 Sid. 168.
[18] Fortes.Rep. 98.
[19] (1875) 1 Q.B.D. 15; 13 Cox C.C. 116, C.C.R.
[20] (1884) 14 Q.B.D. 63; 15 Cox C.C. 559, C.C.R.
[21] 15 Cox C.C. 559, 563.
[22] Ibid.
[23] (1927) 20 Cr.App.R. 38, C.C.A.

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which alleged a conspiracy to corrupt public morals and it is suggested that all the accused named in that count pleaded guilty to it. The issues raised in the appeal related only to the first count which charged all the accused with keeping a disorderly house, but in our view it is impossible to suppose, having regard to the eminence of the counsel engaged in the case,[24] that if the charge in the second count alleged an offence unknown to the law, the indictment would have been drafted in that way, that the prisoners would have been allowed to plead guilty or that the point would not have been taken by the court itself, presided over by Avory J.

In the course of their arguments before us counsel on both sides referred to a well-known textbook published in 1873—Law of Criminal Conspiracies, by R. S. Wright. We do not think it necessary to lengthen this judgment by discussing the points arising out of the author's comments on some of the cases already cited, or to decide to what extent they are open to question.

In our opinion, having regard to the long line of cases to which we have been referred, it is an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour. As the reports show, the conduct to which that principle is applicable may vary considerably, but the principle itself does not, and in our view the facts of the present case fall plainly within it.

The contrary view put forward by Mr. Rees Davies may be summarised as follows: He accepted for the purposes of his argument the claim of the Court of King's Bench to be custos morum but he contended that acting in that role the court had, so to speak, from time to time declared particular conduct to be an offence, thereby creating an offence rather than applying existing law to particular facts. He went on to contend that Parliament in the last 100 years had concerned itself with legislation on issues of morality, decency and the like, that such legislation must be taken to be in effect a comprehensive code, and that there is no longer any occasion for the court to create new offences in its capacity as custos morum. We are unable to agree with this argument, which fails to give sufficient weight to the repeated statements of the established principle of common law to which we have already referred. The courts in the relevant cases were not creating new offences or making new law: they were applying existing law to new facts.

It is perhaps worth adding that the principle itself is not in any way affected or qualified by the fact that in the course of time public opinion as expressed in juries' verdicts may change in regard to matters of public decency and morality. This was emphasised by Lord Sumner in *Bowman's* case[25]: "The fact that opinion

[24] Sir Henry Curtis-Bennett Q.C. (with him Frampton); Lawrence Byrne, Keeves and Sir Travers Humphreys.

[25] [1917] A.C. 406, 467.

"grounded on experience has moved one way does not in law "preclude the possibility of its moving on fresh experience in "the other; nor does it bind succeeding generations, when con-"ditions have again changed. After all, the question whether a "given opinion is a danger to society is a question of the times "and is a question of fact."

Support for the proposition expressly reserved by Mr. Buzzard relating to a conspiracy to corrupt the morals of a particular individual, is to be found in a number of cases, from two of which we take the following extracts: In *Rex* v. *Delaval*[26] Lord Mansfield said[27]: "It is true that many offences of the incontinent kind "fall properly under the jurisdiction of the ecclesiastical court, "and are appropriated to it. But, if you except those appropriated "cases, this court is the custos morum of the people, and has the "superintendency of offences contra bonos mores, and upon this "ground both Sir Charles Sedley and Curl, who had been guilty "of offences against good manners, were prosecuted here. How-"ever, besides this, there is in the present case, a conspiracy and "confederacy amongst the defendants, which are clearly and "indisputably within the proper jurisdiction of this court."

Lord Campbell in volume 3 of the Lives of the Chief Justices, refers to this case, and after quoting the words already cited, adds the following passage from Holliday 214 which evidently formed part of the judgment: "If Sir Francis Delaval had merely "seduced this unfortunate girl by his own solicitations he might "only have been liable to an action for damages at the suit of "her father: but entering into a wicked bargain by which he "purchased her from another, the two must be considered as "conspiring to ruin her and they are both guilty of a misde-"meanour." Secondly, in *Reg.* v. *Mears and Chalk*,[28] the two accused were indicted in three counts for conspiring to procure by false pretences a girl to have illicit carnal connection with a man. In giving judgment, Jervis C.J. said[29]: "It is unneces-"sary to discuss the first and second counts, and upon them we "give no opinion, because we all think that the third is a good "count; the court being clearly of opinion that a conspiracy to "solicitor prostitution, being against good morals and public "decency, is, independently of the statute, an indictable offence." Another illustration is afforded by *Reg.* v. *Howell*.[30] It is also to be noted that in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*,[31] the Lord Chancellor, Viscount Simon, evidently had this class of case in mind, although he did not find it necessary to deal with it. He said[32]: "I am omitting consideration of those "cases on the border line of illegality, where the combination was "held to amount to a criminal conspiracy because the purpose "aimed at, though not perhaps specifically illegal, was one which

[26] (1763) 3 Burr. 1434.
[27] Ibid. 1438.
[28] 4 Cox C.C. 423.
[29] Ibid. 427.
[30] 4 F. & F. 160.
[31] [1942] A.C. 435.
[32] Ibid. 439.

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"would undermine principles of commercial or moral conduct."

In the present case the issue involved in this third count was fully argued in the absence of a jury, and the judge's ruling was in the following terms: "In my opinion a conspiracy to debauch "and corrupt public morals is a common law misdemeanour and "is indictable at common law." We agree with this ruling. If the principle to which we have referred is part of the common law of this country, it must follow that a conspiracy of the type alleged is an indictable offence.

There are passages in the summing-up on this issue which Mr. Rees Davies criticised, but we do not find it necessary to deal with them in detail. In our view the judge took great care to summarise the arguments put forward by the prosecution and the defence respectively, and he made it clear to the jury that it was their task, using their common sense, to decide whether a conspiracy to corrupt was in fact established. In our view there is no substance in the criticism of the summing-up on this count.

A quite separate ground of appeal in regard to the first count was put forward in reliance on section 2 (4) of the Obscene Publications Act, 1959, which provides: "(4) A person publishing an "article shall not be proceeded against for an offence at common "law consisting of the publication of any matter contained or "embodied in the article where it is of the essence of the "offence that the matter is obscene." It was argued that the object of this subsection is to prevent proceedings at common law based upon an obscene article (especially when proceedings are also taken under the Act itself) and that, in the present case, the reference in the first count to the booklet shows that the proceedings on that count were based upon an obscene article. In our view, the short answer to this argument is that the offence at common law, namely, conspiracy to corrupt public morals, did not "consist of the publication" of the booklet. The common law offence alleged by the prosecution consisted of the agreement of the appellant and others to corrupt public morals by means of the booklets, and although it is unlikely that if the appellant had been acquitted on the third count he could have been convicted on the first, the two counts involved different issues and the verdict on each need not necessarily have been the same. In our view the primary object of subsection (4) was to exclude proceedings at common law for the common law offence of publishing an obscene libel. The offence has not been abolished by the Act of 1959 although as a result of the subsection proceedings in respect of it can no longer be brought.

For these reasons there is, in our view, no ground for setting aside the conviction on any of the three counts, and the appeal against conviction is dismissed.

By leave of the court the appellant also appealed against the sentence of nine months' imprisonment concurrent on each count, which the judge imposed. We see no ground for interfering with

what was in some respects a light sentence which would have been appropriate on any one of the counts standing by itself. The appeal against sentence is also dismissed.

Application was made for leave to appeal to the House of Lords under section 1 of the Administration of Justice Act, 1960.

LORD PARKER C.J. The court has come to the conclusion that in regard to count 1 they will certify that a point of law of general public importance is involved in the decision, and they give leave to appeal to the House of Lords. With regard to count 2, the court will certify similarly and give leave. With regard to count 3, the court is not satisfied that a point of law of general public importance is involved in the decision.

Appeals dismissed.
Leave to appeal on counts 1 *and* 2.

J. F. L.

W. R. Rees-Davies and *P. S. C. Lewis* for the appellant.

Sir Jocelyn Simon Q.C., S.-G., J. H. Buzzard and *M. D. L. Worsley* for the respondent.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Reg.* v. *Peirson* [1]; *Reg.* v. *Read* [2]; *Rex* v. *Curl* [3]; *Reg.* v. *Wellard* [4]; *Board of Trade* v. *Owen* [5]; *Reg.* v. *Penguin Books Ltd.* [6]; *Lloyd* v. *Johnson* [7]; *Bowry* v. *Bennet* [8]; *Rex* v. *Davies* [9]; *Herring* v. *Walround* [10]; *Rex* v. *Crunden* [11]; *Rex* v. *Carlile* [12]; *Dugdale* v. *Reg.* [13]; *Reg.* v. *Bradlaugh* [14]; *The Commonwealth* v. *Sharpless* [15]; *Roth* v. *United States* [16]; *Rigault* v. *Gallizard* [17]; *Rex* v. *Bentley* [18]; *Rex* v. *Whybrow* [19]; *Gilbert* v. *Gilbert and Boucher* [20]; *Rex* v. *Hill, Rex* v. *Churchman.* [21]

Their Lordships took time for consideration.

1 (1704) 2 Ld.Rym. 1197.
2 (1708) Fortes.Rep. 98.
3 (1727) 2 Stra. 788.
4 (1884) 14 Q.B.D. 63; 15 Cox C.C. 559.
5 [1957] A.C. 602, 633; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 81, H.L.
6 [1961] Crim.L.R. 176.
7 (1798) 1 B. & P. 340.
8 (1808) 1 Camp. 348.
9 [1906] 1 K.B. 32; 22 T.L.R. 97, D.C.
10 (1681) 2 Ch.Cas. 110.
11 (1809) 2 Camp. 89.
12 (1819) 3 B. & Ald. 167.
13 (1853) 22 L.J.M.C. 50.
14 (1877) 2 Q.B.D. 569.
15 (1815) 2 Sergeant & Pawle 91 (Pennsylvania).
16 (1956) 354 U.S. 476.
17 (1702) Holt 50.
18 [1923] 1 K.B. 403; 39 T.L.R. 105, C.C.A.
19 (1951) 35 Cr.App.R. 141, C.C.A.
20 [1928] P. 1; 43 T.L.R. 589, C.A.
21 [1914] 2 K.B. 386; 10 Cr.App.R. 56, C.C.A.

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May 4, 1961. Viscount Simonds. My Lords, the appellant, Frederick Charles Shaw, was, on September 21, 1960, convicted at the Central Criminal Court on an indictment containing three counts which alleged the following offences: (1) Conspiracy to corrupt public morals; (2) living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act, 1956, and (3) publishing an obscene publication contrary to section 2 of the Obscene Publications Act, 1959. He appealed against conviction to the Court of Criminal Appeal on all three counts. His appeal was dismissed but that court certified that points of law of general public importance were involved in the decisions on the first and second counts and gave him leave to appeal on them to this House. They refused so to certify in respect of the third count. I propose, my Lords, to deal in this opinion in the first place with the second count, for I have had the privilege of reading the speech which my noble and learned friend Lord Tucker is about to deliver on the first count, and so fully agree with him, that I find it convenient to add some general observations which can be regarded as supplementary to what he says.

My Lords, the particulars of the offence charged in the second count were that on divers days unknown between October 1, 1959, and July 23, 1960, the appellant lived wholly or in part on the earnings of prostitutes Before I refer to the statute on which the charge is based I must refer briefly to the relevant facts.

When the Street Offences Act, 1959, came into operation it was no longer possible for prostitutes to ply their trade by soliciting in the streets, and it became necessary for them to find some other means of advertising the services that they were prepared to render. It occurred to the appellant that he could with advantage to himself assist them to this end. The device that he adopted was to publish on divers days between the dates mentioned in the particulars of offences a magazine or booklet which was called "Ladies' Directory." It contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures, and in some cases details which conveyed to initiates willingness to indulge not only in ordinary sexual intercourse but also in various perverse practices. Learned counsel for the appellant made some point of the fact that the magazine contained also advertisements of models and clubs. I therefore mention it, but I do not think that it is of any importance. The profit derived by the appellant from this enterprise was two-fold. From the prostitutes whom he canvassed and advertised he received fees ranging from two guineas for quarter-page advertisements without photographs to ten guineas for full-page advertisements with photographs. There was evidence that one issue produced from this source a sum of £250 19s. Secondly, the appellant sold copies of the magazine to a Mr. Blass, the proprietor of a sweet and cigarette kiosk, and perhaps, though this is not very clear, to other persons at a price of five

shillings per copy. The weekly sales of Mr. Blass were said by him to have started at 30 to 40 and eventually reached about 80. It is manifest that the appellant received substantial sums from his undertaking. It is also clear from the evidence that the prostitutes paid for advertisement out of the earnings of their profession and that they or some of them obtained custom by means of it.

It is in these circumstances that the question must be asked whether the appellant lived wholly or in part on the earnings of prostitution, and I turn at once to the statute that makes it an offence to do so. That is now section 30 of the Sexual Offences Act, 1956, which is as follows:

"Section 30 (1). It is an offence for a man knowingly to live "wholly or in part on the earnings of prostitution.

"(2) For the purposes of this section a man who lives with or "is habitually in the company of a prostitute or who exercises "control direction or influence over a prostitute's movements in a "way which shows he is aiding or abetting or compelling her "prostitution with others shall be presumed to be knowingly "living on the earnings of prostitution, unless he proves the "contrary."

This section stems from section 1 of the Vagrancy Act, 1898, as amended by section 7 of the Criminal Law Amendment Act, 1912. The earlier of these two Acts was itself an amendment of the Vagrancy Act, 1824, but I do not think that any assistance is to be derived from a consideration of its ancestry. The Act of 1824 may be regarded as a convenient peg on which to hang divers offences to which the words "vagabondage and roguery" would not be entirely appropriate. Nor do I think that subsection (2) can throw much light on the meaning of the words "lives "on the earnings of prostitution" in subsection (1). It was at one time argued that the two subsections were coextensive, but this argument was abandoned by Mr. Rees Davies who presented the appellant's case with candour and ability. It is, I think, clear that the second subsection is probative and explanatory of the first but not an exhaustive definition of it.

What, then, is meant by living in whole or in part on the earnings of prostitution? It was not contended by the Crown that these words in their context bear the very wide meaning which might possibly be ascribed to them. The subsection does not cover every person whose livelihood depends in whole or in part upon payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution. The grocer who supplies groceries, the doctor or lawyer who renders professional service, to a prostitute do not commit an offence under the Act. It is not to be supposed that it is its policy to deny to her the necessities or even the luxuries of life if she can pay for them.

I would say, however, that, though a person who is paid for goods or services out of the earnings of prostitution does not necessarily commit an offence under the Act, yet a person does not necessarily escape from its provisions by receiving payment for the goods or services that he supplies to a prostitute. The argument that such a person lives on his own earnings, not on hers, is inconclusive. To give effect to it would be to exclude from the operation of the Act the very persons, the tout, the bully or protector, whom it was designed to catch. For they would surely claim that they served the prostitute, however despicable their service might seem to others. Somewhere the line must be drawn and I do not find it easy to draw it. It is not enough to say that here are plain English words and that it must be left to a jury to say in regard to any particular conduct whether the statutory offence has been committed. I have said enough, for instance, to show that the wider meaning of which the words are clearly capable is inadmissible. The jury should be directed that some limitation must be put upon the words. What is the limitation?

My Lords, I think that (apart from the operation of subsection (2)) a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes. I emphasise the negative part of this proposition, for I wish to distinguish beyond all misconception such a case from that in which the service supplied could be supplied to a woman whether a prostitute or not. It may be that circumstances will be equivocal though no example readily occurs to me. But a case which is beyond all doubt is one where the service is of its nature referable to prostitution and to nothing else. No better example of this could be found than payment by a prostitute for advertisement of her readiness to prostitute herself. I do not doubt that a person who make a business of accepting such advertisements for reward knowingly lives in part on the earnings of prostitution.

In one of the cases to which I shall refer a person receiving payment from a prostitute for services rendered by him is described as her coadjutor, and in another as trading in prostitution. These expressions indicate the distinction that I have in mind though neither of them accurately defines a legal relation. Thus a man who advertises prostitutes and receives payment from them for doing so embarks with them on a joint venture the object of which is that they may earn money by prostitution and in turn pay him for his services. No doubt, all that he is paid is not profit, for he has the expenses of publishing. But his net reward is the direct and intended result of their prostitution. If he had no other means of livelihood it would be truly said that he lived on their earnings: if he had other means, he would be doing so in part.

I must add a few words on the authorities that were called to our attention.[1] In *Reg.* v. *Thomas* [2] the accused, who was charged under the Vagrancy Act, 1898, as amended by the Act of 1912, had agreed with a woman whom he knew to be a convicted prostitute that she should have the use of a room between the hours of 9 p.m. and 2 a.m. at a charge of £3 per night. He was convicted upon a direction by Pilcher J., which was subsequently approved by the Court of Criminal Appeal. The learned judge said that [3]: "if there is evidence that a defendant has let a room, "or a flat, at a grossly inflated rent to a prostitute for the express "purpose of allowing her to ply her immoral trade, then it is for the "jury to determine on the facts each particular case, whether the "accused is in fact knowingly living wholly or in part on the "earnings of prostitution." The only criticism I would make of this direction is that it does not distinguish between rooms and flat and in that case that it attaches undue importance to the rent being "grossly inflated" or, as is sometimes said, "exorbitant." It appears to me that, whatever the rent, the jury might have concluded that the accommodation was provided for no other purpose than prostitution and would not have been provided for her unless she was a prostitute. The exorbitance of the rent would, in my opinion, become important only if there had been evidence that this sort of accommodation was a necessity or luxury commonly required by other women for other purposes than prostitution, a thing which is not easily imaginable. In reaching this conclusion Pilcher J. had found it necessary to differ from a ruling given by Judge Maude at the Central Criminal Court in *Reg.* v. *Silver*,[4] and in this too his decision was approved by the Court of Criminal Appeal. Judge Maude in that case held that it was not an offence for landlords and their agents to let flats to prostitutes at what were described as exorbitant rents and by the learned judge as "prostitute "rents," knowing that they would be used for the purpose of prostitution. I find this a more difficult case. If premises are let only for the purpose of prostitution and not also for occupation by the prostitute, as was the room in *Reg.* v. *Thomas*,[5] it is easy to conclude that an offence has been committed. But, if the flat is let for occupation, I am not prepared to say that the landlord commits an offence merely because he knows that his tenant is a prostitute and must be assumed to know that she will there ply her trade. The prostitute must live somewhere just as she must eat and drink to live. It is, I think, too fine a distinction to say that a grocer supplying her with groceries does not, but a landlord letting her a flat does, commit an offence. It is true that the

[1] Ante, pp. 901, 902.
[2] [1957] 1 W.L.R. 747; [1957] 2 All E.R. 181; 40 Cr.App.R. 117, C.C.A.
[3] [1957] 1 W.L.R. 747, 749.
[4] [1956] 1 W.L.R. 281; [1956] 1 All E.R. 716; 40 Cr.App.R. 32.
[5] [1957] 1 W.L.R. 747.

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flat is the scene of her prostitution, but, if she did not eat and drink, she would not have a body to prostitute. Therefore in such a case as *Silver*[6] (where the flats appear to have been let for occupation) the landlord can only be convicted of an offence upon the ground that the rent is exorbitant. This may be a tenable view upon the footing that, to the extent to which the rent is in excess of normal, he extorts it from the prostitute upon no other ground than that she is a prostitute. He may be said, therefore, knowingly to live or, as was said in the course of the argument, to prey upon her earnings. But, as I have said, I find this a difficult case and would express no final opinion on it.

A third case to which I would refer is *Calvert* v. *Mayes*.[7] It was, I think, a very clear case, the substantial point in which was that the accused received payment not from the prostitutes but from the American airmen, who availed themselves of their services. The argument that for this reason he did not live in part on their earnings was rightly rejected by the Divisional Court. It is interesting in that Sellers J., in the course of his judgment, referred to the accused as "trading in prostitution," an expression which, as I have already pointed out, is an apt, if colloquial, way of describing a person who lives on the earnings of prostitution.

Your Lordships were also referred to some civil cases such as *Pearce* v. *Brooks*[8] and *Upfill* v. *Wright*.[9] They, I think, give little assistance upon the interpretation of the relevant words in the Sexual Offences Act. But it is at least satisfactory to know that the conclusion, to which your Lordships come upon that Act, marches with the view taken in civil cases of a contract made for an immoral purpose.

My Lords, as I have already said, the first count in the indictment is "Conspiracy to currupt public morals," and the particulars of offence will have sufficiently appeared. I am concerned only to assert what was vigorously denied by counsel for the appellant, that such an offence is known to the common law, and that it was open to the jury to find on the facts of this case that the appellant was guilty of such an offence. I must say categorically that, if it were not so, Her Majesty's courts would strangely have failed in their duty as servants and guardians of the common law. Need I say, my Lords, that I am no advocate of the right of the judges to create new criminal offences? I will repeat well-known words: "Amongst many other points of happiness and "freedom which your Majesty's subjects have enjoyed there is "none which they have accounted more dear and precious than "this, to be guided and governed by certain rules of law which "giveth both to the head and members that which of right "belongeth to them and not by any arbitrary or uncertain form

[6] [1956] 1 W.L.R. 281.
[7] [1954] 1 Q.B. 342; [1954] 2 W.L.R. 18; [1954] 1 All E.R. 41, D.C.
[8] (1866) L.R. 1 Ex. 213.
[9] [1911] 1 K.B. 506; 27 T.L.R. 160, D.C.

"of government." These words are as true today as they were in the seventeenth century and command the allegiance of us all. But I am at a loss to understand how it can be said either that the law does not recognise a conspiracy to corrupt public morals or that, though there may not be an exact precedent for such a conspiracy as this case reveals, it does not fall fairly within the general words by which it is described. I do not propose to examine all the relevant authorities. That will be done by my noble and learned friend. The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before. It is not thus that the common law has developed. We are perhaps more accustomed to hear this matter discussed upon the question whether such and such a transaction is contrary to public policy. At once the controversy arises. On the one hand it is said that it is not possible in the twentieth century for the court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment falls. It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. Today a denial of the fundamental Christian doctrine, which in past centuries would have been regarded by the ecclesiastical courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed. When Lord Mansfield, speaking long after the Star Chamber had been abolished, said[10] that the Court of King's Bench was the custos morum of the people and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to

[10] *Rex* v. *Delaval* (1763) 2 Burr. 1434, 1439.

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superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend Lord Tucker refers. Let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them.

I have so far paid little regard to the fact that the charge here is of conspiracy. But, if I have correctly described the conduct of the appellant, it is an irresistible inference that a conspiracy between him and others to do such acts is indictable. It is irrelevant to this charge that section 2 (4) of the Obscene Publications Act, 1959, might bar proceedings against him if no conspiracy were alleged. It may be thought superfluous, where that Act can be invoked, to bring a charge also of conspiracy to corrupt public morals, but I can well understand the desirability of doing so where a doubt exists whether obscenity within the meaning of the Act can be proved.

I will say a final word upon an aspect of the case which was urged by counsel. No one doubts—and I have put it in the forefront of this opinion—that certainty is a most desirable attribute of the criminal and civil law alike. Nevertheless there are matters which must ultimately depend on the opinion of a jury. In the civil law I will take an example which comes perhaps nearest to the criminal law—the tort of negligence. It is for a jury to decide not only whether the defendant has committed the act complained of, but whether in doing it he has fallen short of the standard of care which the circumstances require. Till their verdict is given it is uncertain what the law requires. The same branch of the civil law supplies another interesting analogy. For, though in the Factory Acts and the regulations made under them, the measure of care required of an employer is defined in the greatest detail, no one supposes that he may not be guilty of negligence in a manner unforeseen and unprovided for. That will be a matter for the jury to decide. There are still, as has recently been said, "unravished remnants of the common law."

So in the case of a charge of conspiracy to corrupt public morals the uncertainty that necessarily arises from the vagueness

of general words can only be resolved by the opinion of twelve chosen men and women. I am content to leave it to them.

The appeal on both counts should, in my opinion, be dismissed.

LORD REID. My Lords, I agree with my noble and learned friend that the appeal on the second count ought to be dismissed but I regret that I am unable to concur in his reasons and I feel bound to express my own view because, in my opinion, those reasons could result in cases not within the scope of the Act being brought in and cases within its scope being left out. I would begin by asking two questions: What was the mischief which Parliament must have had in mind? and: What is the natural meaning of the words "to live on the earnings of "prostitution"?

The mischief is plain enough. It is well known that there were and are men who live parasitically on prostitutes and their earnings. They may be welcome and merely cohabit, or they may bully women into earning money in this way. They prey or batten on the women. Such men are clearly living on the earnings of prostitution: if they have or earn some other income then they are living in part on such earnings. The question, to my mind, is how much further the Act must be held to go, bearing in mind that it is a penal statute and therefore should not be extended to apply to cases which its terms do not clearly cover.

Such men may render services as protectors or as touts, but that cannot make any difference even if their relationship were dressed up as a contract of service. And a man could not escape because he acted in some such capacity for a number of women. His occupation would still be parasitic: it would not exist if the women were not prostitutes. It appears to me that the accused in this case comes well within this class. His occupation of gathering and publishing these advertisements would not exist if his customers were not prostitutes. He was really no more than a tout using this means of bringing men to the prostitutes from whom he received money.

If this were an ordinary case I would be content to leave it there because, if I go further, I am in effect prejudging cases which are not before us and of which the facts may be beyond the sphere of common knowledge. But I appreciate the desirability of giving some general guidance as to the meaning of this Act. So I pass to my second question, the natural meaning of the words in the Act. "Living on" normally, I think, connotes living parasitically. It could have a wider meaning but if it is to be applied at all to those who are in no sense parasites then I think its meaning must be the same whether we are considering the earnings of prostitution or of any other occupation or trade.

If a merchant sells goods to tradesmen is he living on the earnings of their trades? or if a landlord lets premises for business purposes is he living on the earnings of those businesses? or if he

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lets to a man of leisure is he living on that man's dividends? Those are the sources of the rent which he receives but I do not think that one would normally say that he is living on those sources. It is not an impossible use of the words—only unusual. And a penal statute ought not to be widened by reading its words in an unusual sense unless there is very good reason for doing so.

And would it make any difference if the merchant supplied goods which could only be used for the purposes of the purchaser's trade or which he knew that the purchaser could not require if he were not engaged in that trade? I do not think so. I find it impossible to say that a merchant who sold goods to a farmer would be living on the earnings of agriculture if the goods could only be used for agriculture, but would not be living on the earnings of agriculture if the goods, though paid for out of the profits of agriculture, were for purely personal use or might be used either for agriculture or for some other purpose. Why then should the words mean something different when we are dealing with the earnings of prostitution?

One reason would be that the context requires it but I find nothing in this context to require it. Another might be that otherwise cases plainly within the mischief would escape. But even if that were a good reason I do not think that it applies here.

What kind of case would escape if one takes what I think is the natural meaning of the words? I take first the landlord. Suppose a landlord lets a flat to an apparently respectable woman and later discovers that she is carrying on prostitution there as her means of livelihood. Is he thereafter knowingly living on the earnings of prostitution? And would it make a difference if when he let it he either suspected or expected that she would use it for prostitution? We were informed that prostitutes sometimes live in one flat and use another for prostitution, and sometimes they live and carry on their trade in the same place. Is a landlord guilty in the former case but innocent in the latter? And if in the latter case the woman decides to go somewhere else to live does the landlord thereupon become guilty if he continues to take rent from her? I can find nothing in the words or the policy of the Act to require us to pick and choose in such cases.

But I am far from saying that a landlord can never be guilty of living on the immoral earnings of his tenant. To my mind, the most obvious case is where he takes advantage of her difficulty in getting accommodation to extract from her in the guise of rent sums beyond any normal commercial rent. In reality he is not then merely acting as landlord; he is making her engage in a joint adventure with him which will bring to him a part of her immoral earnings over and above rent. And there may well be other ways in which he can make himself a participator in her earnings and not merely a recipient of rent. The line may sometimes be difficult to draw but juries often have to decide broad questions of that kind.

Then I take the tradesman. Is the criterion to be whether he supplied goods or services which he knew that this woman would not require if she were not a prostitute, or is it to be whether the goods or services are of a kind which no honest woman would require? I doubt very much whether either distinction would be easy to draw in practice. Presumably Brooks in *Pearce* v. *Brookes* [11] would not have required the brougham if she had not been a prostitute. Whether the brougham was of a kind which some honest woman might have required I do not know. If a case of that kind occurred today would it depend on such niceties whether Pearce was living on Brooks's immoral earnings? We were informed that sometimes decorators or furnishers are asked to do or supply something which it is at least unlikely that an honest woman would require. But it is, perhaps, difficult to set limits to honest eccentricity.

I suppose there might be a tradesman who was as purely parasitical as the accused and there might be a tradesman who used his trade as a means to become a joint adventurer with prostitutes. But leaving such possible cases aside, I could not hold that a tradesman who supplies goods or services to a prostitute in the ordinary course of his business is living on her immoral earnings. I cannot find or think of any case which cannot be adequately dealt with on what I think to be the ordinary and natural meaning of the words of the Act.

My Lords, I turn to the first count. With regard to it I have had the advantage of reading the speech about to be delivered by my noble and learned friend Lord Tucker, but I regret to say that I find myself in fundamental disagreement with it. I must therefore state my reasons with some particularity.

In my opinion there is no such general offence known to the law as conspiracy to corrupt public morals. Undoubtedly there is an offence of criminal conspiracy and undoubtedly it is of fairly wide scope. In my view its scope cannot be determined without having regard first to the history of the matter and then to the broad general principles which have generally been thought to underlie our system of law and government and in particular our system of criminal law.

It appears to be generally accepted that the offence of criminal conspiracy was the creature of the Star Chamber. So far as I am able to judge the summary in Kenny's Outlines of Criminal Law, section 59, 17th ed., p. 88, is a fair one. There it is said that the criminal side of conspiracy was "emphasised by the Star Chamber "which recognised its possibilities as an engine of government "and moulded it into a substantive offence of wide scope whose "attractions were such that its principles were gradually adopted "by the common law courts." The Star Chamber perhaps had more merits than its detractors will admit but its methods and principles were superseded and what it did is of no authority today.

[11] L.R. 1 Ex. 213.

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The question is how far the common law courts in fact went in borrowing from it.

I think that Lord Goddard C.J. was repeating the generally accepted view when he said: "A conspiracy consists of agreeing "or acting in concert to achieve an unlawful act or to do a lawful "act by unlawful means" (*Reg.* v. *Newland* [12]). But what is an "unlawful act"? To commit a crime—yes, but what about offences which can only be dealt with summarily and punished lightly: they are certainly unlawful acts but (I quote from the Law of Criminal Conspiracies, by R. S. Wright J., p. 33) they "are not in themselves of grave enough consequence to be "matters for indictment; and if so it must in general be imma-"terial whether the results are produced by one person or by two "or more persons. To permit two persons to be indicted for a "conspiracy to make a slide in the street of a town or to catch "hedge sparrows in April would be to destroy that distinction "between crimes and minor offences which in every country it is "held important to preserve." To commit a tort—yes in certain cases, but for somewhat similar reasons it seems to be at least doubtful whether it is an offence to conspire to commit a tort which is neither malicious nor fraudulent nor accompanied by violence.

Then there is undoubtedly a third class of act which an individual can do with impunity but a combination cannot. Perhaps the best known example is conspiring to injure a man in his trade if done without justification. I need only refer to the series of cases in this House from *Mogul S.S. Co.* v. *McGregor, Gow & Co.*[13] to the *Harris Tweed* case.[14] No one has ever attempted to define what makes an act "unlawful" so as to bring it within this class; the law seems to be haphazard, depending largely on historical accident. Perhaps as good a summary as any is that which goes back to early editions of Professor Kenny's book (now [17th ed.], section (iv), pp. 393, 451): ". . . certain other "acts, which . . . are not breaches of law at all, but which never-"theless are outrageously immoral or else are, in some way, "extremely injurious to the public." One thing does, however, appear to be reasonably clear. So far as I have been able to trace all who took part in the *Mogul S.S. Co.*[15] series of cases and who mentioned the matter, except Lord Esher, were of opinion that to make or carry out a contract which is unenforceable by reason of immorality or otherwise is not an unlawful act in this sense.

There are two competing views. One is that conspiring to corrupt public morals is only one facet of a still more general offence, conspiracy to effect public mischief; and that, like the categories of negligence, the categories of public mischief are

[12] [1954] 1 Q.B. 158; [1953] 3 W.L.R. 826; [1953] 2 All E.R. 1067. C.C.A.

[13] [1892] A.C. 25; 8 T.L.R. 182, H.L.

[14] [1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142, H.L.

[15] [1892] A.C. 25.

never closed. The other is that, whatever may have been done two or three centuries ago, we ought not now to extend the doctrine further than it has already been carried by the common law courts. Of course I do not mean that it should only be applied in circumstances precisely similar to those in some decided case. Decisions are always authority for other cases which are reasonably analogous and are not properly distinguishable. But we ought not to extend the doctrine to new fields.

I agree with R. S. Wright J. when he says (op. cit. p. 36): "There appear to be great theoretical objections to any general "rule that agreement may make punishable that which ought not "to be punished in the absence of agreement." And I think, or at least I hope, that it is now established that the courts cannot create new offences by individuals. So far at least I have the authority of Lord Goddard C.J. in delivering the opinion of the court in *Newland* [16]: "The dictum in *Rex* v. *Higgins* [17] was "that all offences of a public nature, that is, all such acts or "attempts as tend to the prejudice of the public are indictable, "but no other member of the court stated the law in such wide "terms. It is the breadth of that dictum that was so strongly "criticised by Sir Fitzjames Stephen in the passage in his "History of the Criminal Law (vol. 3, p. 359) . . . and also by Dr. "Stallybrass in the Law Quarterly Review, vol. 49, p. 183. In "effect it would leave it to the judges to declare new crimes and "enable them to hold anything which they considered prejudicial "to the community to be a misdemeanour. However beneficial "that might have been in days when Parliament met seldom or "at least only at long intervals it surely is now the province of "the legislature and not of the judiciary to create new criminal "offences." Every argument against creating new offences by an individual appears to me to be equally valid against creating new offences by a combination of individuals.

But there is this historical difference. The judges appear to have continued to extend the law of conspiracy after they had ceased to extend offences by individuals. Again I quote from R. S. Wright J. (p. 88): "In an imperfect system of criminal "law the doctrine of criminal agreements for acts not criminal "may be of great practical value for the punishment of persons "for acts which are not, but which ought to be made punishable "irrespective of agreement."

Even if there is still a vestigial power of this kind it ought not, in my view, to be used unless there appears to be general agreement that the offence to which it is applied ought to be criminal if committed by an individual. Notoriously, there are wide differences of opinion today as to how far the law ought to punish immoral acts which are not done in the face of the public. Some think that the law already goes too far, some that it does not go far enough. Parliament is the proper place, and I am firmly of

[16] [1954] 1 Q.B. 158, 167. [17] (1801) 2 East 5.

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opinion the only proper place, to settle that. When there is sufficient support from public opinion, Parliament does not hesitate to intervene. Where Parliament fears to tread it is not for the courts to rush in.

Before turning to the question whether the authorities on a fair construction warrant indictment on this charge, I must notice the offence of conspiring to effect public mischief. The most recent authority is *Newland's* case.[18] There I do not think that the court went beyond the ambit of earlier decisions. One of the early uses of this doctrine of conspiracy appears to have been to deal with various forms of cheating which no one would say ought not to be punished but which the common law had not made offences if done by an individual. Newland had conspired to obtain advantage for himself by using false and deceptive documents and devices to obtain for sale on the home market goods which manufacturers were only allowed to sell for export. Lord Goddard C.J. said[19]: "It is enough to show that they [the "suppliers] would not have acted as they did but for the false "representations and dishonesty of the persons who obtained the "goods for them."

In my judgment this House is in no way bound and ought not to sanction the extension of "public mischief" to any new field, and certainly not if such extension would be in any way controversial. Public mischief is the criminal counterpart of public policy, and the criminal law ought to be even more hesitant than the civil law in founding on it in some new aspect. I think that the following comments are as valid today as they were in 1824: "I am not much disposed to yield to arguments of public "policy. I think the courts of Westminster Hall . . . have gone "much further than they were warranted in going in questions "of policy: they have taken on themselves, sometimes, to decide "doubtful questions of policy; and they are always in danger of "so doing because courts of law look only at the particular case, "and have not the means of bringing before them all those "considerations which ought to enter into the judgment of those "who decide on questions of policy" (*per* Best C.J. in *Richardson* v. *Mellish*[20]). "I . . . protest . . . against arguing too "strongly upon public policy—it is a very unruly horse and when "once you get astride it you never know where it will carry you. "It may lead you from the sound law. It is never argued at all "but when other points fail" (*per* Burrough J.[21]).

It may, perhaps, be said that there is no question here of creating a new offence because there is only one offence of conspiracy—agreeing or acting in concert to do an unlawful act. In a technical sense that is true. But in order to extend this offence to a new field the court would have to create a new unlawful act: it would have to hold that conduct of a kind which has not

[18] [1954] 1 Q.B. 158.
[19] Ibid. 164.
[20] (1824) 2 Bing. 229, 242.
[21] Ibid. 252.

hitherto been unlawful in this sense must now be held to be unlawful. It appears to me that the objections to that are just as powerful as the objections to creating a new offence. The difference is a matter of words; the essence of the matter is that a type of conduct for the punishment of which there is no previous authority now for the first time becomes punishable solely by a decision of a court.

I therefore proceed to consider the authorities on the footing that the courts cannot now create a new offence, or a new kind of criminal conspiracy, or at least that, if any such power still exists, this is not a proper sphere in which to exercise it.

The majority of the cases cited to us were instances of one or other of four well-established offences; offences which can be committed by an individual as well as by a combination. They are publication of an obscene libel, indecent exposure, exhibition in public of indecent things or acts, and keeping a disorderly house. I shall deal with the relevance of these in a few moments when I come to the facts of the present case.

But there is a group of four cases which are more directly relevant here—*Lord Grey's* case,[22] *Delaval's* case,[23] *Mears'* case,[24] and *Howell's* case.[25] These were all cases of conspiracy to seduce a girl under 21 or to induce a young girl to become a prostitute. I would agree that they are good authority for it being criminal to conspire to seduce a young girl. But I would not agree that by analogy they must be held to be good authority for it being criminal to conspire to "seduce" a man of mature years. Indeed, I think that the judges who decided these cases would have been very surprised to learn that they had thereby decided that conspiring to seduce a man is a crime. And it must be observed that there was no public element in these cases: they were conspiracies to seduce a particular girl. So if we are to proceed by analogy it must be a crime today to conspire to seduce a particular man and the offence cannot be limited to a conspiracy to corrupt *public* morals.

But in argument more stress was put on words which are reported to have been used by the judges than on the actual decisions, and in particular on the statement by Lord Mansfield and others that the Court of King's Bench was custos or censor morum. It was said that they thereby decided or recognised that any conspiracy to corrupt morals or, as the learned trial judge put it in the present case, "to lead morally astray" was an indictable offence. I do not think so. As the reports of those days are not full reports of the judgments, we do not have the precise context, but I think it much more probable that those judges were intending to say that they then had power to create new offences, that this power extended to the moral field, and

[22] (1682) 9 State Tr. 127.
[23] (1763) 3 Burr. 1434.
[24] (1851) 2 Den. 79; 4 Cox C.C. 423.
[25] (1864) 4 F. & F. 160.

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that the acts in these particular cases should be held to be punishable. It must be observed that these references to the court being censor or custos morum occur equally in decisions in cases of conspiracy and in cases against individuals. In the eighteenth century courts created new offences in the field of morals both against individuals (see, for example, *Curl's* case [26]) and against combinations. So if, contrary to my view, the references established a general offence of conspiring to corrupt public morals, then surely they must also have established that it is a general offence for an individual to act so as to corrupt public morals or to attempt to do so. If it was established in the eighteenth century that there was a general offence of conspiring to corrupt public morals (or to lead members of the public morally astray) then, as the essence of criminal conspiracy is doing or agreeing to do an unlawful act, it must follow that for two centuries every act which has tended to lead members of the public astray morally has been an unlawful act, and the respondent's argument would apply equally to make unlawful every act which tends to lead a single individual morally astray. In the unending controversy about the proper relationship between law and morals no one seems to have suspected that. Hitherto, I think, there has been a wide measure of agreement with Professor Kenny's view that only *certain* acts which are *outrageously* immoral are unlawful in this sense.

I claim little knowledge of the history of English criminal law—any such knowledge that I may have is of a different system. But it seems that most crimes must have been the creation of judges of a remoter time, because Parliament played a comparatively small part, and there was no reception of any foreign system. And it seems that they proceeded piecemeal, taking care no doubt to move in advance of contemporary opinion, and that they did not first invent a general theory or a general offence and then apply it at once to a wide variety of particular cases. A somewhat similar situation arose in connection with equally general statements by equally eminent judges that Christianity is part of the law of England. That was dealt with in this House in *Bowman* v. *Secular Society Ltd.*,[27] where it seems to me that more attention was paid to what the courts had in fact done than to the language that judges had used in doing it.

But the best test appears to me to be to look at the views expressed by the authors and later editors of standard works on crime. Passages were cited to us from Hawkins' Pleas of the Crown, East's Pleas of the Crown, and Blackstone, as well as from later standard works. None of the appears to have realised that any such general and far-reaching offence had been established. Hawkins refers to open lewdness grossly scandalous (8th ed., vol. 1, p. 358), Blackstone (8th ed., vol. 4, p. 64) to open and notorious lewdness; East to

[26] (1727) 2 Stra. 788.

[27] [1917] A.C. 406; 33 T.L.R. 376.

scandalous and open breaches of morality exhibited in the face of the people (p. 3), and Russell (11th ed., vol. 2, ch. 97, p. 1633) deals separately with each of the specific offences which I have already mentioned. We were referred to no passage supporting the view for which the respondent now contends, and I cannot think that it is only now, after nearly two centuries, that it has been vouchsafed to us to discover the true meaning of these old cases.

I must now deal with the particulars of the first count and the facts proved to see whether they disclose that the accused committed some offence of more limited scope than conspiracy to corrupt public morals. It is alleged that the accused and others conspired by means of the publication of certain advertisements to induce readers thereof to resort to prostitutes named in these advertisements for the purposes of (a) fornication, (b) taking part in "other disgusting and immoral acts," or (c) witnessing "other "disgusting and immoral exhibitions." I shall not deal with (c) because no attempt was made to prove this. The intent alleged is twofold: (a) with intent thereby to debauch and corrupt the morals of certain of the lieges, and (b) with intent thereby to raise and create in their minds inordinate and lustful desires. I find this very obscure. Which of the lieges are referred to? Is it only those persons who are induced to resort to the prostitutes, or is it all persons who read the publication? If it means that debauching and corrupting only occur (or may occur) when a man resorts to a prostitute, that is one thing: but if it means that a man may be debauched and corrupted merely by reading the advertisements, that appears to me to raise a different and wider question and to involve a consideration of the Obscene Publications Act, 1959. I am inclined to think that these intents are stated in the wrong order and that what is meant is with intent to raise inordinate and lustful desires in the minds of those who read the advertisements and then to debauch or corrupt those who are thereby induced to resort to the prostitutes. I am not at all sure whether the proposition is that an offence is committed merely by conspiring to publish matter which tends to raise in the minds of readers inordinate and lustful desires, or whether the real offence is said to be conspiring to publish matter which tends to induce men to resort to prostitutes.

No authority was cited to us which goes so far as to hold that any writing could be held to be an obscene libel merely on the ground that, although its language is in itself decent and inoffensive, it may tend to raise in the minds of its readers some lustful desire—I leave aside for the moment the word "inordinate" in the particulars. In Victorian times very strict views were held about books or pictures that were in any way "suggestive," but no authority was cited to us which in any way indicates that it was ever held to be an indictable offence merely to publish such matter without there being something more to bring it into the category of being obscene.

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Section 1 of the 1959 Act defines "obscene" by enacting that an article (which includes all matter to be read or looked at) shall be deemed to be obscene if its effect is to tend to deprave and corrupt. But I cannot find any intention to widen the old law of obscene libel or to make it possible for a prosecutor to charge as obscene libel publication in wholly inoffensive terms of any matter which tends to raise lustful desires in the mind of a reader whether that matter be allusion to or commendation of fornication or merely the name and address of a prostitute.

But I need not pursue that matter because, as I understood the Solicitor-General, he did not argue that these advertisements were obscene libels and that must mean that merely reading them does not tend to deprave or corrupt—if it did they would be obscene libels by virtue of the definition in the Act, conspiracy to publish them would obviously be a crime, and the point now in controversy would never have arisen.

So any depraving and corrupting must be the result of resorting to the prostitutes and the offence, if any, must be conspiring to tempt the lieges to resort to prostitutes. Prostitution is not an offence: it is not said that the woman or any man resorting to her is guilty of any offence. The argument is that if two or more persons (who may include the prostitute herself) combine to issue such an invitation to members of the public they are guilty of an offence. It could not matter whether the invitation was made by words or in some other way. So both Pearce and Brooks in *Pearce* v. *Brooks*[28] would today be guilty of an indictable offence by reason of having acted in concert to enable Brooks to attract men for the purpose of prostitution. That seems to me to be novel doctrine. It hardly seems to accord with views expressed in the *Mogul*[29] series of cases to which I referred earlier, and I cannot believe that it is right.

But the advertisements also contain much more objectionable matter. The particulars refer to inducing readers to take part in "other disgusting and immoral acts" and with this I think there must be coupled the reference in the intent charged to "inordinate" desires. The evidence shows that the invitations were to resort to certain of the prostitutes for the purpose of certain forms of perversion. That I would think to be an offence for a different reason.

I shall not examine the authorities because I think that they establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it. In my view it is open to a jury to hold that a public invitation to indulge in sexual perversion does so outrage public decency as to be a punishable offence. If the jury in this case had been properly directed they might well have found the accused guilty for this reason. And the offence would be the

[28] L.R. 1 Ex. 213. [29] [1892] A.C. 25.

same whether the invitation was made by an individual or by several people acting in concert. But it appears to me to be impossible to say the same with regard to ordinary prostitution. The common law has never treated the appearance of a prostitute in public as an indictable offence however obvious her purpose might be, and an Act of Parliament has been found necessary to stop the nuisance of prostitutes parading in the public street.

Finally I must avert to the consequences of holding that this very general offence exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved. Some suggestion was made that it does not matter if this offence is very wide: no one would ever prosecute and if they did no jury would ever convict if the breach was venial. Indeed, the suggestion goes even further: that the meaning and application of the words "deprave" and "corrupt" (the traditional words in obscene libel now enacted in the 1959 Act) or the words "debauch" and "corrupt" in this indictment ought to be entirely for the jury, so that any conduct of this kind is criminal if in the end a jury think it so. In other words, you cannot tell what is criminal except by guessing what view a jury will take, and juries' views may vary and may change with the passing of time. Normally the meaning of words is a question of law for the court. For example, it is not left to a jury to determine the meaning of negligence: they have to consider on evidence and on their own knowledge a much more specific question—Would a reasonable man have done what this man did? I know that in obscene libel the jury has great latitude but I think that it is an understatement to say that this has not been found wholly satisfactory. If the trial judges charge in the present case was right, if a jury is entitled to water down the strong words "deprave," "corrupt" or "debauch" so as merely to mean lead astray morally, then it seems to me that the court has transferred to the jury the whole of its functions as censor morum, the law will be whatever any jury may happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law.

LORD TUCKER. My Lords, with regard to the conviction of the appellant under count 2 of the indictment I am in complete agreement with the speech of my noble and learned friend on the Woolsack.

The first count charged the appellant in the following terms:—"Statement of offence: Conspiracy to corrupt public morals. "Particulars of offence: Frederick Charles Shaw on divers days "between the 1st day of October, 1959, and 23rd July, 1960, "within the jurisdiction of the Central Criminal Court conspired

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"with certain persons who inserted advertisements in issues of "a magazine entitled 'Ladies' Directory' numbered 7, 7 revised, "8, 9, 10 and a supplement thereto, and with certain other "persons whose names are unknown, by means of the said maga- "zine and the said advertisements to induce readers thereof "to resort to the said advertisers for the purposes of fornication "and of taking part in or witnessing other disgusting and im- "moral acts and exhibitions with intent thereby to debauch and "corrupt the morals as well as youth as of divers other liege "subjects of Our Lady the Queen and to raise and create in "their minds inordinate and lustful desires."

It should, I think, be stated at the outset that the words "or "witnessing" in the above particulars were not relied upon by the prosecution at the trial as constituting an essential ingredient in the alleged conspiracy nor was there any evidence that the advertisements constituted an invitation to the public to resort to the addresses of the advertisers as spectators for the purpose of witnessing disgusting and immoral acts and exhibitions. The case made by the prosecution was that the advertisements constituted invitations to the male public of all ages to visit the addresses of prostitutes for the purpose of fornication and in some instances taking part in perversive practices. I shall accordingly treat the indictment as if the words "or wit- "nessing" had been omitted.

Counsel for the appellant put in the forefront of his address the submission that there is no such offence known to the law as a conspiracy to corrupt public morals. Before turning to authority I would invite your Lordships to pause to consider for a moment how far-reaching are the consequences of such a proposition if it be correct. It has for long been accepted that there are some conspiracies which are criminal although the acts agreed to be done are not per se so criminal or tortious if done by individuals. Such conspiracies form a third class in addition to the well-known and more clearly defined conspiracies to do acts which are unlawful, in the sense of criminal or tortious, or to do lawful acts by unlawful means. Assuming that the corruption of public morals by the acts of an individual may not be criminal or tortious, does it follow that a conspiracy by two or more persons to this end is not indictable? The difficulty with regard to this third class of conspiracy has always been to define its limits or give it a label which will include all its manifestations. It was referred to by Viscount Simon L.C. in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*[30] as one in which "the purpose "aimed at, though not perhaps specifically alleged, was one "which would undermine principles of commercial or moral con- "duct." The late Professor Kenny in the 11th edition of his Outlines of Criminal Law at p. 288, in a passage which he repeated in later editions, wrote: "*An unlawful purpose.* The

[30] [1942] A.C. 435, 439.

"term 'unlawful' is here used in a sense which is unique; and "unhappily has never yet been defined precisely. The purposes "which it comprises appear to be of the following species:

"(i) . . .

"(ii) . . .

"(iii) . . .

"(iv) Agreements to do certain other acts which (unlike all "those hitherto mentioned) are not breaches of law at all, but "which nevertheless are outrageously immoral or else are in some "way extremely injurious to the public." He gives a number of examples.

An instance in modern times is to be found in the case of *Reg.* v. *Newland*,[31] where the appellants had been convicted of conspiring to effect a public mischief by obtaining and distributing on the home market for eventual retail sale decorated domestic pottery which by orders made under the Defence General Regulations manufacturers and registered exporters were permitted to supply for export only. The orders did not in terms deal with persons who obtained such goods from a manufacturer representing that they were for export, and then having obtained them sold them on the domestic market. It was contended on behalf of the appellants that there was no such offence known to the law as set out in the indictment. In delivering the judgment of the Court of Criminal Appeal Lord Goddard C.J. said[32]: "It is "much too late to object that a conspiracy to effect a public "mischief is an offence unknown to the law. There have been "at least three reported cases during the present century in "which that charge has been made and convictions upheld: *Rex* "v. *Brailsford*,[33] *Rex* v. *Porter*[34] and *Rex* v. *Bassey*[35] . . . The "court is well aware of the caution with which they should "approach the consideration of an offence which is alleged to "consist of doing acts which tend to effect public mischief as, "if extended, it might enable judges to declare new offences "which should be the business of the legislature. The objections "to such a course were forcibly pointed out by Sir Fitzjames "Stephen, the most prominent institutional writer on criminal "law in the last century, in his History of the Criminal Law, "vol. 3, p. 359. We think that we may say that the court should "approach the subject at least with the same degree of caution "as must be exercised when considering a plea in a civil action "that something has been done contrary to public policy . . . "No one has ever attempted to define what may or may not "constitute a public mischief and we have certainly no desire to "increase the number of criminal offences by adding to the cate-"gory of misdemeanours. But there are two points which in "our opinion do not make it necessary for us to consider whether

[31] [1934] 1 Q.B. 158.

[32] Ibid. 165.

[33] [1905] 2 K.B. 730; 21 T.L.R. 727.

[34] [1910] 1 K.B. 369; 26 T.L.R. 200; 3 Cr.App.R. 237, C.C.A.

[35] (1931) 47 T.L.R. 222; 22 Cr. App.R. 160, C.C.A.

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"there is here any attempt to create a new offence. In the first "place it is well known that there may be many acts which if "done by an individual would not be indictable, or even action-"able as a tort, and yet may become both actionable and criminal "if done by a combination of persons as the result of a con-"spiracy, and for this really elementary proposition we need only "refer to *Quinn* v. *Leathem*."[36]

My Lords, I have referred to this case as, in my opinion, the decision of the present and other similar cases does not depend upon the label which is to be attached to a particular conspiracy. Can it be doubted that a conspiracy to corrupt public morals is a conspiracy to effect a public mischief? Is it to be said that a conspiracy to sell decorated domestic pottery in the home market by means of devices contrived to evade the object of Board of Trade orders is a criminal conspiracy but an agreement to do acts calculated to corrupt public morals is not? Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury? Similarly, with regard to a conspiracy to encourage and promote Lesbianism today, or incestuous sexual intercourse in the year 1907? My Lords, if these questions are to be answered in the negative I would expect to find some clear authority during the past centuries which would justify such an answer. I know of none.

I have, I think, sufficiently indicated my view that the decision of this case does not depend upon a detailed examination of the old authorities in order to ascertain whether in every case the act or acts in question, whether performed or proposed, constituted common law misdemeanours in themselves at the date of the decisions. If they did, then the conspiracy alleged was admittedly criminal, but if they did not, it would, in my view, be equally criminal if the acts were of a nature to satisfy a jury that they were wrongful in the sense of being calculated to corrupt and deprave public morals. I therefore do not propose to refer to the cases where individuals have been convicted of the common law misdemeanour of public indecency by exposure or other indecent acts in the face of the public such as that of *Sir Charles Sidney*[37] in the year 1663, or other similar cases culminating in 1875 with that of *Reg.* v. *Saunders*,[38] where the defendants were held to have been properly convicted on counts charging them with keeping a booth on Epsom Downs for the purpose of a disgusting and indecent exhibition to which they invited all persons within the reach of their voices. This was held to constitute a common law misdemeanour. Counsel for the

[36] [1901] A.C. 495; 17 T.L.R. 749, H.L.

[37] (1663) 1 Sid. 168.

[38] (1875) 1 Q.B.D. 15; 13 Cox C.C. 116.

appellant argued with force that such cases are distinguishable from the present and other cases where the acts, though immoral, were not acts of indecency done in the face of the public, but as I do not consider it necessary to explore this aspect of the case I turn, therefore, to the authorities which are more immediately relevant, namely, those in which conspiracy was charged. In *Rex* v. *Delaval*,[39] in the year 1763, the charge was that the defendants had joined in an unlawful combination and conspiracy to remove a girl, an infant about 18, out of the hands of the defendant Bates (musician) to whom she was bound as apprentice by her father (a gentleman's coachman) without the knowledge or approbation of her father, and to place her in the hands of Sir Francis Delaval for the purpose of prostitution. For which purpose she was discharged by Bates, her master, from the indentures of her apprenticeship to him, in consideration of £200 (the penalty of them) paid to him by Sir Francis; and was then bound by the usual indentures of apprenticeship to Sir Francis. The charge went on to set out the part played by Fraine, the attorney, in drawing up the indentures, and the agreement between Sir Francis and Bates.

Having adjourned the motion for an information against the defendants for conspiracy in order that the court might be satisfied that the girl's father was not a party to the conspiracy, and being satisfied that such was not the case, Lord Mansfield delivered the judgment of the court. He described[40] the conspiracy as one "to put this young girl, an apprentice to one of them, into the "hands of a gentleman of rank and fortune for the purpose of "prostitution; contrary to decency and morality and without the "knowledge or approbation of her father, who prosecutes them "for it and has now cleared himself of all imputation and appears "to be an innocent and an injured man. . . .

"Thus she has been played over by Bates, into his hands, for "this purpose. No man can avoid seeing all this; let him wink "ever so much.

"I remember a cause in the court of Chancery wherein it "appeared that a man had formally assigned his wife over to "another man: and Lord Hardwick directed a prosecution for "that transaction, as being notoriously and grossly against public "decency and good manners. And so in the present case.

"It is true that many offences of the incontinent kind fall "properly under the jurisdiction of the ecclesiastical court and "are appropriated to it. But if you accept those appropriated "cases this court is the custos morum of the people, and has the "superintendency of offences contra bonos mores: and upon this "ground, both Sir Charles Sidley and Curl who had been guilty "of offences against good manners were prosecuted here.

"*However, besides this, there is in the present case, a con-*"*spiracy and confederacy amongst the defendants: which are*

[39] 3 Burr. 1434.

[40] Ibid. 1437, 1438, 1439.

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"*clearly and indisputably within the proper jurisdiction of the* "*court.*" (The italics are mine.)

My Lords, some writers have been at pains to point out grounds upon which this case might have been decided, but I suggest it is not necessary or even permissible to go outside the expressed reasons of Lord Mansfield. Furthermore, it is to be observed that at that date not only was there no crime of abduction of a girl over 16, not being an heiress (see Holdsworth, History of English Law, vol. 4, pp. 504 and 515), but the girl's master was willing and she was not in the custody of her father. There is no such tort as seduction in the absence of loss of services which was not, and could not have been, alleged, and there is no mention of breach of contract anywhere in the case.

It is clear and compelling authority in support of the existence of the crime of conspiracy to corrupt the morals of an individual and a fortiori of the public. In *Reg.* v. *Mears and Chalk*[41] the indictment contained three counts. The third count alleged that the accused "did between themselves conspire combine con- "federate and agree together wickedly and designedly to procure "by false pretences false representations and other fraudulent "means the said Johanna Carroll, then being a poor child under "the age of 21 years, to wit the age of 15 years, to have illicit "carnal connection with a man, to wit a certain man whose "name is to the jurors aforesaid unknown. Contrary to the form "of the statute in such case made and provided, and against the "peace of Our Lady the Queen, her Crown and dignity."

Jarvis C.J. in giving judgment said[42]: "It is unnecessary to "discuss the first and second counts, and upon them we give no "opinion, because we all think that the third is a good count; the "court being clearly of opinion that a conspiracy to solicit prosti- "tution, being against good morals and public decency is, "*independently of the statute*, an indictable offence." (Italics are mine.) *Reg.* v. *Howell*[43] was a case of conspiracy to solicit, persuade and procure an unmarried girl of the age of 17 to become a common prostitute. A count so framed was upheld. Bramwell B. said: "I believe that it is not an offence at common law for "a woman to be a common prostitute. But, in my opinion, that "is not the criterion. There are many unlawful things which are "not the subject of criminal proceedings of any kind . . . We "have all the necessary ingredients of the offence of conspiracy." In *Rex* v. *Berg, Britt, Carré and Lummies*[44] the second count in the indictment charged the above-named and three others with conspiracy to corrupt public morals, and the particulars thereof were that they on divers days therein stated "conspired together "and with other persons unknown to debauch and corrupt the "minds and morals of such persons as should be induced or permit- "ted to come to certain premises being the basement flat No. 25

[41] (1851) 2 Den. 79; 4 Cox C.C. 423.
[42] 4 Cox C.C. 423, 427.
[43] (1864) 4 F. & F. 160, 164.
[44] (1927) 20 Cr.App.R. 38.

"Fitzroy Square in the said county and there remain tippling "whoring and behaving in an obscene and disorderly manner." Berg pleaded not guilty to both counts. He was found not guilty on count 1 which charged him with aiding and abetting Britt and Carré in keeping a disorderly house, but guilty on count 2. The Court of Criminal Appeal in the present case were in error in saying that all the accused named in that count pleaded guilty. Inspection of the original indictment shows that Berg in fact pleaded not guilty to both counts. The report of the hearing before the Court of Criminal Appeal is not very satisfactory, but as Berg had been acquitted on count 1 he must have been appealing against his conviction on count 2 and this is confirmed by the argument[45] of his counsel (Mr. Byrne). The original indictment shows that the report is inaccurate in the description of the conspiracy count. The words "disorderly house" do not in fact appear in count 2 but only in count 1. All the appeals were dismissed by a court presided over by Avory J., who stated that the gist of the indictment was that the accused were lewd and immoral persons assembled for the purpose of unnatural practices.

Finally, in 1960, there was the unreported case of *Reg.* v. *Dale*,[46] in which the accused were convicted at the Central Criminal Court on a count in an indictment charging a conspiracy to corrupt and debauch such persons as should resort to a certain disorderly house therein named.

It was further contended for the appellant that in any event the particulars in the indictment and the evidence adduced in support thereof were insufficient to support a conviction for conspiring to corrupt public morals. It was said that neither fornication nor prostitution are illegal and that, in any event, there is no precedent for holding that such conduct tends to corrupt and deprave adult males.

My Lords, I think that these were matters for the decision of the jury and that the learned judge was right in ruling that there was a case to be left to them. There was material in this case to support the view that some of the advertisements in the magazines indicated that the advertisers were willing to take part in acts of sexual perversion. This element was, I think, conclusive against the appellant's submsision, but I am not to be taken as expressing the view that in the absence of this feature the case should have been withdrawn from the jury, who must be the final arbiters in such matters, as they are on the question of obscenity. They alone can adequately reflect the changing public view on such matters through the centuries. As regards lack of precedent, apart from the recent cases of *Britt*[47] in 1927, and *Dale*[48] in 1960, I would remind your Lordships of the words of Parke J. in *Mirehouse* v. *Rennell*[49]: "The case, therefore, is in some sense new,

[45] (1927) 20 Cr.App.R. 38.
[46] Unreported.
[47] 20 Cr.App.R. 38.
[48] Unreported.
[49] (1833) 1 Cl. & F. 527, 546.

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"as many others are which continually occur; but we have no "right to consider it, because it is new, as one for which the law "has not provided at all; and because it has not yet been decided, "to decide it for ourselves, according to our own judgment of "what is just and expedient. Our common law system consists "in the applying to new combinations of circumstances those "rules of law which we derive from legal principles and judicial "precedents; and for the sake of attaining uniformity, consis-"tency and certainty, we must apply those rules, where they are "not plainly unreasonable or inconvenient, to all cases which "arise; and we are not at liberty to reject them, and to abandon "all analogy to them, in those to which they have not yet been "judicially applied, because we think that the rules are not as "convenient and reasonable as we ourselves could have devised. "It appears to me to be of great importance to keep this principle "of decision steadily in view, not merely for the determination "of the particular case, but for the interests of law as a science."

My Lords, the Solicitor-General supported the conviction and the judgment of the Court of Criminal Appeal on count 1 of the present indictment on two alternative grounds: (1) that conduct calculated and intended to corrupt public morals is indictable as a substantive offence and consequently a conspiracy to this end is indictable as a conspiracy to commit a criminal offence; alternatively (2) a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury.

The Court of Criminal Appeal dismissed the appeal on the ground that the case fell within the first of these propositions. I have, I hope, sufficiently indicated that I prefer to base my decision on the second, but in so saying I must not be taken as rejecting the first.

A further submission by the appellant must now be mentioned. It was argued that in any event count 1 offended against the provisions of section 2 (4) of the Obscene Publications Act, 1959, which reads: "2 (4) A person publishing an article shall not be "proceeded against for an offence of common law consisting of "the publication of any matter contained or embodied in the "article where it is of the essence of the offence that the matter "is obscene."

My Lords, I agree with the judgment of the Court of Criminal Appeal that the short answer to this argument is that the offence at common law, alleged, namely, conspiracy to corrupt public morals, did not "consist of the publication" of the magazines, it consisted of an agreement to corrupt public morals by means of the magazines which might never have been published.

Finally, it was said that the learned judge did not sufficiently direct the jury as to the meaning of the words "debauch and "corrupt" in count 1, and one passage in particular in his charge to the jury was subjected to criticism in which he said: "Well, "members of the jury, no doubt you will take the view that

"whatever else you have to decide in this case it is quite unnecessary for you to decide the merits or demerits of extra-marital intercourse. And really the meaning of debauched and corrupt is again, just as the meaning of the word induce is, essentially a matter for you. After all the arguments, I wonder really whether it means in this case and in this context much more than lead astray morally. You will have to consider it in your own minds, and, as I say, you must put your own interpretation on the meaning of the words." The words "lead astray morally" were objected to and were said to amount to a misdirection. In this and other passages later in his judgment he makes it clear that it is for the jury to construe and apply these words to the facts proved in evidence and reach their own decision, and neither in the passage cited nor in the judgment as a whole can I find anything that amounts to misdirection.

For these reasons I am of opinion that the appeal with regard to the conviction on count 1 also fails.

LORD MORRIS OF BORTH-Y-GEST. My Lords, I have had the privilege of reading in advance the speeches which have been delivered by my noble and learned friend on the Woolsack and by my noble and learned friend Lord Tucker, and I am in agreement with them.

The appellant was convicted not only on the two counts which are before your Lordships but also on a third count, which was one of publishing an obscene article contrary to section 2 of the Obscene Publications Act, 1959. The article in question consisted of one issue of the Ladies' Directory. Before they could convict of that charge the jury had to be satisfied that the appellant published the article and that it was obscene. It is provided by the Act that for the purposes of the Act an article is deemed to be obscene if its effect taken as a whole is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The jury must have been satisfied that the effect of the article was to tend to deprave and corrupt those who were likely to read or see it. While I concur with your Lordships in thinking that the provision contained in section 2 (4) of the Act did not debar the prosecution from presenting and passing the charge contained in count 1, I have wondered whether they might not in this particular case have been content to put matters to the test by reference only to the other counts. It was the appellant who conceived and carried out the plan of producing the publications in question. He did so for his own gain. The conspiracy features of his conduct added little in this case to the real gravity of his actions.

I join, however, with those of your Lordships who affirm that the law is not impotent to convict those who conspire to corrupt public morals. The declaration of Lord Mansfield (see *Jones* v.

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Randall,[50] that "whatsoever is contrary, bonos mores est [sic] "decorum, the principles of our law prohibit, and the King's court, "as the general censor and guardian of the public manners, is "bound to restrain and punish," is echoed and finds modern expression in Kenny's Outlines of Criminal Law (17th ed., section 451, p. 393) in the statement that agreements by two or more persons may be criminal if they are agreements to do acts which are outrageously immoral or else are in some way extremely injurious to the public. There are certain manifestations of conduct which are an affront to and an attack upon recognised public standards of morals and decency, and which all well-disposed persons would stigmatise and condemn as deserving of punishment. The cases afford examples of the conduct of individuals which has been punished because it outraged public decency or because its tendency was to corrupt the public morals.

It is said that there is a measure of vagueness in a charge of conspiracy to corrupt public morals, and also that there might be peril of the launching of prosecutions in order to suppress unpopular or unorthodox views. My Lords, I entertain no anxiety on these lines. Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved. If there were prosecutions which were not genuinely and fairly warranted juries would be quick to perceive this. There could be no conviction unless 12 jurors were unanimous in thinking that the accused person or persons had combined to do acts which were calculated to corrupt public morals. My Lords, as time proceeds our criminal law is more and more being codified. Though it may be that the occasions for presenting a charge such as that in count 1 will be infrequent, I concur in the view that such a charge is contained within the armour of the law, and that the jury were in the present case fully entitled to decide the case as they did.

I would dismiss the appeal.

Lord Hodson. My Lords, I am in full agreement with the speeches by my noble and learned friend on the Woolsack, and by my noble and learned friend Lord Tucker, and wish only to add a few sentences on the first count.

I am wholly satisfied that there is a common law misdemeanour of conspiracy to corrupt public morals. The judicial precedents which have been cited show conclusively to my mind that the courts have never abandoned their function as custodes morum by surrendering to the legislature the right and duty to apply established principles to new combinations of circumstances. The words of Parke J. in *Mirehouse* v. *Rennell*[51] read by my noble and learned friend Tucker are not out-dated and, in

[50] (1774) Lofft. 384, 385.

[51] 1 Cl. & F. 527, 546.

my opinion, are applicable to this case. I would stress that in applying the law to the facts which now fall for consideration I do not rest upon the narrow ground that here was a conspiracy to issue a public invitation to indulge in sexual perversion which so outrages public decency as to constitute a punishable offence. It is unnecessary to dwell upon the details of the publications which your Lordships have been obliged to look at. It is sufficient to say that although there are descriptions of sexual eccentricities which to persons of normal instincts may be fairly described as perverted, these eccentricities add nothing to the substance of the charge of conspiracy to corrupt public morals. They amount in the main to the use of theatrical trappings usually associated with prostitution and irregular sexual intercourse but are in themselves neither more nor less unlawful than prostitution itself.

I will not add to what has already been said about the word "unlawful," agreeing, as I do, that it has not to be narrowly construed as connoting the commission of a criminal offence.

It has been contended before your Lordships that these advertisements ought to be treated as if they tended only to corrupt the morals of men and should be treated on a different footing from advertisements which would tend to corrupt the morals of women, since the law has shown anxiety to protect women from predatory males who have conspired to debauch them, whereas there is no instance of any anxiety in the converse direction. Even if there is any validity in this distinction, which in these days when much is heard of the equality of the sexes I am not disposed to admit, it has no application to the present case. The advertisements no doubt are primarily directed to male persons but are not so limited. They were exposed for sale and available to both sexes. They are, as a cursory examination reveals, designed to glamourise prostitution, and to show by the prices charged to prostitutes for advertising their wares the profits likely to be realised from engaging in their occupation. In the ordinary use of language it seems to me to be plain that the publication of these advertisements to both sexes may properly be held by a jury to tend to corrupt public morals.

That prostitution is not a punishable offence does not involve, as I have already indicated, that it is regarded as a lawful activity. If it were lawful such a case as *Pearce* v. *Brooks*[52] must have been differently decided. Even if Christianity be not part of the law of England yet the common law has its roots in Christianity, and has always regarded the institution of marriage as worthy to be supported as an essential part of the structure of the society to which we belong. I do not see any reason why a conspiracy to encourage fornication and adultery should be regarded as outside the ambit of a conspiracy to corrupt public morals. It is suggested, as I understand it, that this throws the

[52] L.R. 1 Ex. 213.

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net too wide, and in some way it is desirable to show a tenderness towards prostitution as a recognised and necessary evil. I do not accept this approach.

Since a criminal indictment is followed by the verdict of a jury it is true that the function of custos morum is in criminal cases ultimately performed by the jury, by whom, on a proper direction, each case will be decided. This I think is consonant with the course of the development of our law. One may take, as an example, the case of negligence where the standard of care of the reasonable man is regarded as fit to be determined by the jury. In the field of public morals it will thus be the morality of the man in the jury box that will determine the fate of the accused, but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law.

I would dismiss the appeal.

Appeal dismissed.

Solicitor: *Gerald Black & Co.; Director of Public Prosecutions.*

J. A. G.

[PRIVY COUNCIL.]

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1961
May 8.

KANAGASUNDERAM NADESAN . . . . Appellant;

AND

VAITHILINGAM RAMASAMY . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Land—Fidei commissum—Gift of undivided share—Subject to fidei commissum—Partition—Fidei commissum thereafter attaching to land allotted in severalty—Partition Ordinance, No. 10 *of* 1863, *s.* 9—*Inapplicable to rights of fidei commissarii.*

By section 9 of the Partition Ordinance, 1863, of Ceylon: "The "decree for partition or sale . . . shall be good and conclusive "against all persons whomsoever, whatever right or title they have "or claim to have in the said property . . ."

The appellant's grandfather in 1928 gave by deed to the appellant's father (the donee), one of four sons of the donor, one-fourth share of certain undivided land subject to a fidei commissum in favour of the donee's descendants. The fidei commissum provided, inter alia, that "if found necessary" the donee "may dispose the "same by way of donation or dowry to his descendants . . ." In purported exercise of that power the donee made an irrevocable donation of the same land to a daughter, one of his ten children living at the date of his death. Pursuant to subsequent dealings

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* *Present*: Viscount Simonds, Lord Radcliffe, Lord Hodson, Lord Guest and the Rt. Hon. L. M. D. de Silva.

with that one-fourth share one V., having apparently become entitled to it, instituted proceedings for partition, the other parties to the suit being the three brothers of the donee, to each of whom an equal undivided one-fourth share of the property had been given. A partition decree having been made and a certain lot of land allotted to V., he purported by deed to sell it to the present respondent. The appellant thereupon claimed against the respondent a declaration of title to an undivided tenth share of the partitioned lot. The respondent alleged, inter alia, that the effect of section 9 of the Partition Ordinance, 1863 (then in force) was to confer on him an absolute and indefeasible title whether or not the fiduciary (donee) or any purchaser from him had been guilty of fraud:—

Held (it having been found that there had been a fraudulent exercise by the donee of the power reserved to him, and that the respondent was not a purchaser for value without notice of the fidei commissum), that section 9 of the Ordinance had no bearing on the rights of fidei commissarii who had no present right or interest in the land which was being partitioned.

Property burdened with a fidei commissum might be partitioned under the Partition Ordinance, but such partition had not the effect of destroying the fidei commissum which thereafter attached to the land allotted in severalty to the fiduciary. The appellant was, accordingly, entitled to the declaration claimed.

Dona Maria Abeyesekera Hamini v. *Daniel Tillekeratne* [1897] A.C. 277 applied.

Babey Nona v. *Silva* (1906) 9 N.L.R. 251 and *Gooneratne* v. *Bishop of Colombo* (1931) 32 N.L.R. 337 approved.

Kusmawathi v. *Weerasinghe* (1932) 33 N.L.R. 265 explained.

Adamjee v. *Sadeen* [1957] A.C. 94; [1957] 2 W.L.R. 67, P.C. considered.

Judgment of the Supreme Court of Ceylon reversed.

In his appeal (No. 30 of 1960) from a judgment and decree of the Supreme Court of Ceylon (Basnayake C.J. and K. D. de Silva J.) (November 2, 1956) the appellant sought to have restored a judgment in his favour given by the District Court of Point Pedro (A. W. Nadaraja D.J.) (April 2, 1954).

The following facts are taken from the judgment of the Judicial Committee: The appellant as plaintiff claimed a declaration of title to an undivided tenth share of certain land which had itself been allotted out of a larger extent of land, in the circumstances that will be stated, to the predecessor in title of the respondent. He claimed also ejectment of the respondent and damages.

The appellant's father, Nagamattu Kanagasunderam, was one of four sons of Aramugam Nagamattu who, by deed of March 19, 1928, donated to him subject to a fidei commissum in favour of his descendants one-fourth share of certain land known as Sadaijakadu in the district of Jaffna. The fidei commissum was in these terms: "I declare that the donee should not encumber the "said lands by way of documents such as any transfer, otty, "mortgage, donation and dowry etc. or encumber the same in any "other way or alienate the same but possess the same during his "lifetime and die leaving behind the same to devolve on his

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"descendants but if found necessary he may dispose the same by "way of donation or dowry to his descendants and will have no "right to make these properties or property or any part of the "properties or property bound for any kind of debts and would "not be liable even for the penalties of courts."

The appellant was one of the ten children of his father living at his death in January, 1948. The father will for brevity's sake be called "the fiduciary."

On September 6, 1934, the fiduciary in purported exercise of the power contained in the recited deed made an irrevocable donation of the same land to his daughter, Vadivelambikai. The donation was expressed to be made in consideration of the natural love and affection which he bore to her and for diverse other causes and considerations thereunto moving him. The validity of this gift was of primary importance.

On the same day, September 6, 1934, Vadivelambikai and her husband in consideration of the sum of Rs. 5,000 conveyed the same land to her grandfather Ponniah Mailerumperumah absolutely. It appeared from the note of the attesting notary that Rs. 2,000 only were paid to the vendors in his presence. On the same day Ponniah Mailerumperumah mortgaged the same land to one Parupathipillai for Rs. 2,000. Of this sum Rs. 500 only were given to Vadivelambikai, the remainder being appropriated by the fiduciary.

On November 16, 1936, Ponniah Mailerumperumah sold the same land to the fiduciary. The deed stated the consideration to be Rs. 10,000 paid by the fiduciary to him. The note of the attesting notary stated that out of the consideration Rs. 2,400 was paid in his presence and the balance was acknowledged to have been received. The mortgage for Rs. 2,000 was presumably discharged.

On December 7, 1936, the fiduciary and his wife mortgaged the same land to Ponnampalan Vythilingam to secure Rs. 6,000 and interest thereon, and on the same day Ponniah Mailerumperumah renounced any claim he might have to the property.

On October 11, 1941, the fiduciary and his wife in consideration of the sum of Rs. 5,000 conveyed the same land to the said Vythilingam. He was already a mortgagee for Rs. 6,000 and interest but nothing was said about this in the deed.

Vythilingam being thus apparently entitled to one-fourth undivided share of the lands donated by the deed of March 19, 1928, instituted proceedings for partition in the District Court of Jaffna on June 25, 1942. The other parties to the suit were the three brothers of the fiduciary, to each of whom an equal one-fourth share of the property had been given. In due course a decree was made by that court under which certain lands known as Lot 3 were allotted in severalty to Vythilingam. Lot 3 was the subject of the present dispute. No mention was made in the decree of the fidei commissum created by the deed of 1928.

Vythilingam, having thus obtained Lot 3, purported by deed

dated August 23, 1945, to sell it to Ramasamy, the present respondent and defendant in the action. The consideration was expressed to be Rs. 13,500.

The appellant, who had been born in 1926, commenced these proceedings in January, 1952. The Supreme Court of Ceylon set aside the judgment and decree of the District Court in favour of the appellant and dismissed his action.

1961. April 11, 12, 13. *E. F. N. Gratiaen Q.C.* Ceylon, and *Walter Jayawardena* for the appellant.

Dingle Foot Q.C., *R. K. Handoo* and *Dick Taverne* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Abdul Hameed Sitti Kadija* v. *De Saram* [1]; *Abeyawardene* v. *West* [2]; *Ferdinandus* v. *Fernando* [3]; *Maharani Beni Pershad Koeri* v. *Dudh Nath Roy* [4] *Lingangowda* v. *Basangowda* [5]; *Fanny Skinner* v. *Bank of Upper India Ltd.* [6]; *Vatcher* v. *Paull* [7]; *Estate Wilton* v. *Estate Biddlecombe* [8]; *Rodrigo* v. *Perera* [9]; *Abeyesundere* v. *Abeyesundere* [10]; *Fernando* v. *Shewakram* [11]; *Soysa* v. *Miskin.* [12]

May 8. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: The questions that arise are (1) whether the fiduciary was empowered by the deed of 1928 to donate the whole of the land subject to the fidei commissum to a single descendant: their Lordships will deal very shortly with this question. (2) Whether upon the assumption that he was so empowered he exercised the power fraudulently, that is, not with an entire and single view to the real purpose and object of the power but for the purpose of carrying into effect a bye or sinister object (see *Portland* (*Duke*) v. *Topham* (*Lady*) *; (3) whether, even if the exercise of the power was fraudulent, the respondent could either upon the ground that he was a purchaser for value without notice or by virtue of the Partition Ordinance maintain his title to the land against the appellant as fidei commissarius.

Upon the first question, viz., whether upon the true construction of the relevant clause in the deed the power vested in the fiduciary by the words "but if necessary he may dispose the "same by way of donation or dowry to his descendants" was validly exercised by a donation of the whole of the property to one child and the consequent disinheritance of his other nine

[1] [1946] A.C. 208.
[2] [1957] A.C. 176; [1957] 2 W.L.R. 281, P.C.
[3] (1903) 6 N.L.R. 328.
[4] (1899) L.R. 26 I.A. 216.
[5] (1927) L.R. 54 I.A. 122.
[6] (1935) L.R. 62 I.A. 115.
[7] [1915] A.C. 372, P.C.
[8] S.A.L.R. [1933] C.P.D. 441.
[9] (1923) 24 N.L.R. 420.
[10] (1909) 12 N.L.R. 373.
[11] (1917) 20 N.L.R. 27.
[12] (1945) 46 N.L.R. 385.
* (1864) 11 H.L.C. 32, H.L.

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children then living, the trial judge upheld the plea of the appellant, but for some reason that was not explained this plea was abandoned before the Supreme Court. Their Lordships thought fit, as the question was purely one of law, to allow it to be raised, but, having done so, do not propose to decide it. It is unnecessary to do so in view of their other conclusions in the case, and they think it proper not to make any observations which might be prejudicial if and when a similar question arises upon other deeds with clauses bearing a marked resemblance to this.

Upon the second question, viz., whether the power was fraudulently exercised, the trial judge, having seen and heard the witnesses, came to a clear conclusion in the appellant's favour. The Supreme Court was of opinion that he was wrong, holding that the evidence fell short of the clear proof that is required to establish a fraudulent exercise of power, especially where the person who has exercised it is dead. Their Lordships have carefully considered the several transactions in which the fiduciary was concerned and the oral evidence and cannot concur in the views of the Supreme Court. There is no reason to suppose that the trial judge was unaware of the jealousy with which evidence directed against a dead man is to be regarded, or of the suspicion that could be justly entertained of the testimony of the appellant's mother. There is, on the other hand, as their Lordships think, with great respect to the Supreme Court, some ground for doubting whether that court directed its mind to the precisely relevant point. For its conclusion upon the evidence was that "the evidence in the case fails to establish that Kanagasunderam "[the fiduciary] sold the land to Vythilingam in order to defraud "his children by Sivapakiam." But the alleged fraud began at an earlier stage, when the fiduciary donated the whole property to his daughter. It may well be that even then the subsequent transaction was contemplated, but the initial fraud lay in the deed of September 6, 1934. As to this deed, their Lordships, regarding the oral and documentary evidence with all proper jealousy and suspicion, entertain no doubt that the fiduciary exercised his power not in order to benefit his daughter Vadivelambikai, one of the fidei commissarii, but with a view to his own advantage. There was some evidence that the daughter's husband was at one time unemployed and in poor circumstances, but it properly did not, in face of the other evidence, satisfy the judge that the daughter and the daughter alone was the beneficiary of the transactions. She and her husband had gone to Malaya and were not called as witnesses. Her mother, the wife of the fiduciary, gave evidence which, if accepted, was conclusive. Their Lordships see no reason why it should not have been accepted. It was not contradicted and had the ring of truth. The trial judge correctly concluded that the power reserved to the fiduciary was fraudulently exercised by him.

That, however, does not end the matter. It was urged on behalf of the respondent that, whether or not there was fraud in

the exercise of the power, he was a purchaser for value without notice of the fraud and his title was accordingly unassailable. If the premise was established, it would be necessary for their Lordships to examine the consequent plea. But again the finding of fact of the trial judge is conclusive. He was amply justified by the evidence in finding that the deed of 1934 and the succeeding deeds relied on by the respondent were "executed fraudulently "and collusively with intent to defraud the plaintiff (appellant) "as a beneficiary" under the deed of 1928, and that the respondent was aware of the fidei commissum and had constructive notice of the fact that the fiduciary was planning a method of defeating it. His own conduct in regard to the lots allotted in the partition to the fiduciary's brothers gave support, if support were needed, to this view.

Their Lordships, having come to the conclusion that the respondent was not a purchaser for value without notice of the property in dispute, have finally to consider whether he was nevertheless protected from any adverse claim by the Partition Decree of June 13, 1944. He alleged that the effect of section 9 of the Partition Ordinance, 1863, which was then in force, was to confer on him an absolute and indefeasible title whether or not the fiduciary or any purchaser from him had been guilty of fraud. Upon this part of the case their Lordships have not the advantage of a judgment by the judges of the Supreme Court.

Section 9 of the Ordinance is in the following terms: "9. The "decree for partition or sale given as hereinbefore provided shall "be good and conclusive against all persons whomsoever, what-"ever right or title they have or claim to have in the said property, "although all persons concerned are not named in any of the "said proceedings, nor the title of the owners, nor of any of them "truly set forth, and shall be good and sufficient evidence of such "partition and sale and of the titles of the parties to such shares "or interests as have been thereby awarded in severalty: Pro-"vided that nothing herein contained shall affect the right of any "party prejudiced by such partition or sale to recover damages "from the parties by whose act, whether of commission or "omission, such damages had accrued."

It must first be said that there is a long current of authority in the courts of Ceylon to the effect that property burdened with a fidei commissum may be partitioned under the Ordinance, and that such partition has not the effect of destroying the fidei commissum which thereafter attaches to the land allotted in severalty to the fiduciary. The substance of these propositions had already been laid down by this Board in *Dona Maria Abeyesekera Hamini* v. *Daniel Tillekeratne*.[2] Lord Watson said[3]: "Not one of these "enactments [one of them being the Ordinance in question] "professes to deal with or alter the law of fidei commissum; and,

[2] [1897] A.C. 277.

[3] Ibid. 285.

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"in their Lordships' opinion, they cannot be construed as having "that effect."

The first case in the courts of Ceylon to which it is necessary to refer is *Babey Nona* v. *Silva*.[4] There, the precise point being raised, Lascelles A.C.J. said: "In my opinion the balance of "reason and authority is in favour of the view that property "subject to fidei commissum may be the subject of partition, and "I hold, in the case under consideration, that the property in "dispute, though subject to fidei commissum, was lawfully "partitioned. But the partition decree in no way extinguishes "the reversionary interest of the fidei commissarius. It merely "sets apart a specific portion of the common estate to which the "rights of the fidei commissarius attach in severalty. By no "reasonable construction of the Ordinance can it be held that the "effect of a partition decree is to enlarge the life interest of the "fiduciarius into absolute ownership." The Chief Justice then quoted the passage already cited from the judgment delivered by Lord Watson. In *Weeresekera* v. *Carlina*[5] the same Chief Justice assisted by De Sampayo (then A.J.) reaffirmed what had been said in *Babey Nona* v. *Silva*,[6] saying that he saw no reason to differ from it. In *Dassanaika* v. *Tillekeratne*[7] the matter was treated as settled law by Wood Renton C.J. In *Marikar* v. *Marikar*[8] the only question was whether the rule well established in regard to fidei commissa prevailed also in regard to trusts, but there are in the judgment of Bertram C.J. some pertinent observations about the interests which were dealt with in partition proceedings. In *Gooneratne* v. *Bishop of Colombo*[9] (a useful case in which numerous previous authorities were examined) Lyall Grant J. said: "The net result of the cases seems to be that no "partition can affect the rights of a subsequent fidei commis-"sarius except to the extent of attaching his rights to a divided "portion of the land instead of to an undivided share and also "perhaps to the extent of substituting money for land, the latter "only in exceptional circumstances and under safeguards." It was urged by counsel for the respondent that this chain of authority was broken by *Kusmawathi* v. *Weerasinghe*.[10] But this is not so. Macdonell C.J., who decided that case, was careful to cast no doubt on *Babey Nona*[11] and the succeding cases but (rightly or wrongly) distinguished the case before him, saying[12]: "The donor of the land charged by her with a fidei commissum "under which she, the donor, was not a fiduciarius, thereafter "enlarged by virtue of a partition decree the rights, dominial or "usufructuary, remaining to her after her gift, into the full and "conclusive ownership that a partition decree title gives, which

[4] (1906) 9 N.L.R. 251, 255.
[5] (1912) 16 N.L.R. 1.
[6] 9 N.L.R. 251.
[7] (1917) 4 Cey.W.Rptr. 334.
[8] (1920) 22 N.L.R. 137.
[9] (1931) 32 N.L.R. 337, 344.
[10] (1932) 33 N.L.R. 265.
[11] 9 N.L.R. 251.
[12] 33 N.L.R. 274.

"ownership she, not being a fiduciarius, could transmit unbur-"dened by the fidei commissum to her successors in title." No doubt is cast on the title of a fidei commissarius as against his fiduciary or a person claiming through him. As has been already said, it is unnecessary to consider whether in the law of Ceylon the equitable doctrine of purchase for value without notice has any place. Observations will be found in favour of the view that it has, but the contrary view has also been entertained, see, e.g., *Tillakaratna* v. *De Silva*.[13] The only question which their Lordships are now considering is the effect of a partition decree under the Ordinance of 1863 which makes no mention of a fidei commissum. Upon that question no doubt has been expressed.

It remains, so far as authority is concerned, to mention the case recently heard by this Board upon which reliance was placed by the respondent, *Adamjee* v. *Sadeen*.[14] That case proved upon examination to have no bearing upon a case in which a fidei commissarius claimed against his fiduciarius or his successors in title. The long and careful judgment delivered by Lord Cohen does not mention, much less purport to overrule, the long line of authority to which reference has been made. It asserts in a different context the conclusive character of a partition decree and emphasises that section 9 of the Ordinance may in some circumstances even bar the title of a person whose interest has been concealed by the fraudulent collusion of the parties to a partition suit.

Their Lordships have referred to the line of authority by which for 50 years the courts of Ceylon have held themselves bound, and they would be reluctant to disturb it even if they came to a different conclusion upon section 9 of the Ordinance. But that is far from being the case. It appears to them that this section has no bearing upon the rights of fidei commissarii who have no present right or interest in the land which is being partitioned. They are not owners or co-owners to whom section 1 can apply: they may not even be in existence at the date of the partition suit. It is difficult to see what part they can play in such a suit. It might have been prudent to provide that in a partition decree, by which land was allotted in severalty to one who appeared to be a fiduciarius, some mention should be made of his capacity. But this might well have created grave embarrassment. The absence of such a provision cannot, as it appears to their Lordships, bring them within the scope of section 9. It is true enough that the words "against all persons whomsoever" etc. are wide and general. But it is not a new doctrine that wide and general words may be limited by the field in which they are found.

Their Lordships accordingly reject this submission of the respondent both on reason and authority.

[13] (1947) 49 N.L.R. 25.

[14] [1957] A.C. 94; [1957] 2 W.L.R. 67, P.C.

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The appellant does not seek to disturb that part of the order of the trial judge which provided for payment by him to the respondent of Rs. 1,500 for improvements and for jus retentionis until the same be paid.

For the reasons herein stated their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside and the decree and order of the trial judge restored. The respondent must pay the appellant's costs here and below.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

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[COURT OF APPEAL.]

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April 28.
Ormerod, Willmer and Danckwerts L.JJ.

GAVAGHAN *v.* EDWARDS.

[Plaint No. Q1641A.]

Vendor and Purchaser—Memorandum in writing—Two documents—Standard form of contract—Date for completion to be agreed—Subsequent oral agreement on date—Solicitor acting for both parties—Note of agreement by solicitor—Whether authorised to sign memorandum—Law of Property Act, 1925 (15 *&* 16 *Geo.* 6, *c.* 20), *s.* 40.
Solicitor—Authority—Memorandum of contract—Solicitor acting for both vendor and purchaser.

The plaintiff agreed to sell and the defendant agreed to purchase a house. The terms of the sale were contained in a standard form of contract which the vendor obtained from an estate agent and which vendor and purchaser signed over a sixpenny stamp. The contract stated that the date for completion was to be agreed between the parties. Apart from the date of completion, all the other conditions of the contract were agreed and referred to in the document which the parties had signed.

The vendor's solicitor was instructed to act in the purchase on behalf of the purchaser as well as the vendor. Subsequently, the vendor and purchaser orally agreed on the date for completion. The vendor informed the solicitor of the agreed date, and the solicitor wrote to the purchaser asking for confirmation. The purchaser telephoned the solicitor and confirmed the date, and the solicitor endorsed a note to that effect on a copy of the letter that he had sent the purchaser.

The purchaser refused to complete and the vendor sued the purchaser for damages for breach of contract. On the question whether there was a memorandum in writing of the contract as required by section 40 of the Law of Property Act, 1925 [1]:—

[1] Law of Property Act, 1925, s. 40: "(1) No action may be brought "upon any contract for the sale or "other disposition of land or any "interest in land, unless the agree-"ment upon which such action is "brought, or some memorandum or "note thereof, is in writing, and "signed by the party to be charged "or by some other person thereunto "by him lawfully authorised."

Held, that as the parties had in fact agreed and there was no conflict of interest between them, there was nothing contradictory in the position of a solicitor acting for both parties which would prevent him from creating an additional memorandum for the purpose of recording a final term agreed by the parties so as to bind either or both of his clients; and as the solicitor had received specific confirmation from the purchaser of the sole matter not originally agreed between the parties, his copy letter and note endorsed thereon constituted a memorandum binding on the purchaser (post, p. 952).

Wright v. *Pepin* [1954] 1 W.L.R. 635; [1954] 2 All E.R. 52 distinguished.

APPEAL from Judge Ingress Bell, sitting at Gloucester County Court.

The following statement of facts is taken substantially from the judgment of Danckwerts L.J. The material events relating to the sale and purchase of the house in question began in April and May of 1958. A man called Harris apparently introduced the plaintiff, William Gavanagh, hereinafter called "the vendor," to the defendant, Ronald James Edwards, hereinafter called "the purchaser," in April or at the beginning of May, and early in May the vendor telephoned the purchaser and said he was now able to talk business. On May 6, 1958. the two parties met at the vendor's house and agreed a price of £4,500. It appears from what subsequently happened that this was a much better price than the vendor might have expected because as the result of what happened subsequently the house was sold for £3,300 and it is not claimed that that was an unduly low price. This may account for the unwillingness of the purchaser to go through with the sale. The vendor said he would see his solicitor and have something ready for the purchaser to sign. It was suggested that it might be convenient if the same solicitor was employed, that is to say, the vendor's solicitor, with a view to saving money. However, the vendor on May 7, 1958, went to an estate agent and obtained a standard form which he typed out, filling in the blanks, and this form was in fact signed, it appears, by both parties over a sixpenny stamp. It was what might be described as a rather detailed and complete contract or formal contract. It was dated May 7, 1958, made between the vendor and the purchaser, and clause 2 provided that "the property is sold subject "to the Law Society's Conditions of Sale, 1953, with any amend-"ments thereof which may be effective at the date hereof (such "conditions being hereinafter referred to individually by the "designation 'general condition' together with the number "thereof) so far as they are not varied by or inconsistent here-"with." The price was stated, there was a provision for a deposit, and provision for vacant possession to be given on completion. Clause 6 provided: "The date fixed for completion is "to be agreed between the parties," and then it provided that completion was to take place at the office of the vendors' solicitors.

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The purchaser did not complete the purchase and the vendor had to sell the house to someone else. On a claim by the vendor against the purchaser for damages for breach of contract, the judge held that the standard form of contract was not a completed and binding contract but that the solicitor instructed on behalf of both parties had made a memorandum in writing of the contract, and, accordingly, he gave judgment for the vendor.

The purchaser appealed.

J. H Ellison for the purchaser.
M. R. Hoare for the vendor.

The following cases were cited in argument, in addition to those referred to in the judgment: *Cohen* v. *Roche* [2]; *North* v. *Loomes* [3]; *Johnson* v. *Humphrey* [4]; *Smith-Bird* v. *Blower* [5]; *Grindell* v. *Bass*.[6]

ORMEROD L.J. I will ask Danckwerts L.J. to deliver the first judgment.

DANCKWERTS L.J. stated the facts and continued: There is a cross notice in respect of a point which was decided against the vendor and the point of the cross notice is that the judge held that the standard form of contract was not a completely binding contract because the provision: "The date fixed for "completion is to be agreed between the parties" by implication eliminated the provision regarding completion which will be found in the Law Society's conditions of sale (which is a date seven weeks from the creation of the written agreement). It is unnecessary for us, it seems to me, to consider that point, which was decided against the vendor, because on the view which I have reached the judge reached a conclusion correctly in favour of the vendor upon the other point which is before us upon the purchaser's appeal.

I think it was actually not at the original meeting on May 6, 1958, but at the subsequent meeting on May 7, 1958, when the standard contract was signed that the vendor suggested that the purchaser should go to the vendor's solicitors, and on May 8, 1958, the agreement was taken to the vendor's solicitors, Rowberry & Co., and the solicitor in charge of the matter was one Apperley. I think it must be fairly clear that the vendor told his solicitor on that occasion that the purchaser wished the solicitor to act for him also as well as for the vendor. On May 9, 1958, a letter was written by one Apperley of Rowberry & Co. to the purchaser as follows: "Dear Sir, 128b, Cheltenham Road, Gloucester. "Mr. Gavaghan has passed to us the contract signed by you and

[2] [1927] 1 K.B. 169; 42 T.L.R. 674.
[3] [1919] 1 Ch. 378.
[4] [1946] 1 All E.R. 460.
[5] [1939] 2 All E.R. 406.
[6] [1920] 2 Ch. 487; 36 T.L.R. 867.

"him for your purchase of the above property. We understand "that you would like us to act also for you in the matter, which "we shall be pleased to do. It appears that completion is not "likely to take place for some little time, but we will in the "meanwhile proceed with what is necessary and will get in "touch with you again as soon as required." No answer was returned by the purchaser to the letter. On the other hand, he did not write back saying: "It is not right; I do not want you "to act for me," and I think it is a fair inference that he accepted that the instructions which had been given to the solicitor on behalf of the purchaser had been correctly given. By inference, therefore, it seems to me that from the date of the receipt of that letter, or perhaps even at an earlier date when he received instructions from the vendor, Rowberry & Co. and Apperley must be taken to have been instructed to act in regard to the purchase on behalf of the purchaser as well as the vendor. It is hardly necessary to say that I regard this situation as very unsatisfactory. In many cases it may work perfectly all right, but if anything whatever goes wrong with regard to the sale, a solicitor who is acting for both parties is almost certainly placed in a position where the interests conflict and a difficult situation is likely to arise.

Apparently, at some date which must have been just before the next letter, which is of May 15, 1958, the vendor and the purchaser met and agreed on the date for completion. January 31, 1959, must have been the date agreed because on May 15, 1958, the firm of Rowberry & Co., that is, Apperley, wrote another letter to the purchaser in these terms referring to the property: "Further to our letter of the 9th instant, Mr. Gavaghan "now informs us that the date for completion agreed between "you and him under the contract is 'January 31, 1959, or earlier "'by arrangement.' May we take it please that this is in "order?" It is signed "Rowberry & Co." and then there is a note apparently endorsed on the copy of this letter—the original, of course, had been sent to the purchaser—"16/5/58 Edwards "phoned and confirmed above." I do not think it has been really disputed in the evidence that such a telephone conversation did take place; nor has it been really disputed that there was in fact an agreement reached between the vendor and the purchaser that the date for completion should be as is stated in that letter. But the real point which is taken is that a solicitor normally has no authority either to enter into a contract or to sign a memorandum on behalf of his client even though employed in regard to the completion of the sale which is in question, and, therefore, if there was no authority to sign on behalf of the purchaser, there is no memorandum in accordance with section 40 of the Law of Property Act, 1925, signed by the party to be charged or some agent on his behalf.

Now, it is no doubt correct (and there are cases which so hold) that the mere fact of the relationship of solicitor and client being

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constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum, and I may refer to *Forster* v. *Rowland* [1] and *Smith* v. *Webster*.[2] But that is not a hard and fast rule which is not capable of alteration. On the facts of the case, as it seems to me, from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client. There are cases where such an authority has been implied from the terms of the particular relationship created on the facts of the case. *Rosenbaum* v. *Belson* [3] is such a case, although the circumstances of that case are no doubt different from the present. The striking feature in the present case, as it seems to me, is that there was a contract which on its terms was so complete that it needed no further implementation in any way except in regard to one single term and that was the date for completion. That was plainly, upon the evidence, a term which in fact was agreed between the parties subsequently, and the only point is whether, when the solicitor subsequently by way of confirmation wrote the letter of May 15, that would bind his client so as to complete a memorandum which would satisfy section 40 of the Act of 1925.

Now there are cases where the conflict of interest between the two parties and the position, therefore, of a solicitor may be so difficult that he could not properly do something which would bind one party to the other. No doubt that was the situation in *Wright* v. *Pepin*,[4] which was decided by Harman J. with regard to an acknowledgment for the purpose of the Limitation Act, 1939, and where the solicitor in question, acting for both parties, was held not to be able to give an acknowledgment which would prevent the statute running. But that seems to me to be a very different case from the present. It seems to me that where the parties have in fact agreed, as is the situation in the present case, there is nothing contradictory in the position of a solicitor acting for both parties which will prevent him creating an additional memorandum for the purpose of recording a final term agreed by the parties so as to bind either or both of his clients. To my mind the inference from what happened in the present case is plainly that the solicitor had such authority. He may not have had authority to make a memorandum before he wrote the letter of May 15, 1958, but as the result of the conversation which took place with his client, the purchaser, when his client confirmed that the position was as stated in the letter, that seems to me to authorise the signing of the memorandum, as a matter of confirmation apart from any difficulties, if there were any, which existed before that as to the terms of the solicitor's instructions and authority.

[1] (1861) 7 H. & N. 103; 158 E.R. 410.
[2] (1876) 3 Ch.D. 49, C.A.
[3] [1900] 2 Ch. 267.
[4] [1954] 1 W.L.R. 635; [1954] 2 All E.R. 52.

In those circumstances it seems to me the necessary memorandum for the purpose of satisfying section 40 of the Act of 1925 was completed by the letter of May 15, 1958, to which there is a signature by the solicitor as agent on behalf of the purchaser. It seems to me that on this point the judge reached the right conclusion and that really disposes of the case. Accordingly, the appeal should be dismissed.

ORMEROD L.J. I agree and there is nothing I wish to add.

WILLMER L.J. I also agree.

Appeal dismissed with costs.
Application for leave to appeal to the House of Lords refused.

Solicitors: *Devonshire & Co. for Bretherton & Sons, Gloucester; Kinch & Richardson for T. Warren-Green, Cheltenham.*

N. P.

[PROBATE, ETC., DIVISION.]

JACKS *v.* WILKIE AND JACKS.

1960
Dec. 14, 16.
Cairns J.

Husband and Wife—Co-respondent—Petition against, for damages only—Whether a matrimonial cause—Filed before decree nisi made absolute—Striking out—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 3 (2).

A husband was granted a decree nisi of divorce in an undefended suit, on the ground of the wife's adultery with the co-respondent, who was ordered to pay the costs of the suit. On the day before that decree nisi was made absolute, the husband filed a petition claiming damages against the co-respondent. The registrar struck out the second petition on the ground that it infringed rule 3 (2) of the Matrimonial Causes Rules, 1957.[1] On appeal by the husband:—

Held, that the second petition was a matrimonial cause within rule 3 of the Matrimonial Causes Rules, 1957, and, therefore, rightly struck out.

Quaere, whether such a claim would lie after decree absolute.

APPEAL from registrar.

A husband petitioned for divorce on the ground of the wife's adultery with the co-respondent. The suit was undefended, and

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[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

[1] Matrimonial Causes Rules, 1957, r. 3 (2): "A petition shall not be "filed if there is before the court "another petition by the same petitioner which has not been dismissed "or otherwise disposed of by a final "order."

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on July 28, 1959, the husband was granted a decree nisi of divorce and an order for costs against the co-respondent. On March 8, 1960, the day before the decree nisi was made absolute, the husband filed a petition claiming damages only against the co-respondent in respect of his adultery. On July 14, 1960, the registrar ordered that the second petition be struck out, on the ground that it infringed the Matrimonial Causes Rules, 1957, r. 3 (2).[1] The husband appealed.

Dennis Smith for the husband.
W. R. K. Merrylees for the co-respondent.

The following case, in addition to those referred to in the judgment, was cited in argument: *Jacobs* v. *Jacobs and Ceen.*[2]

Cur. adv. vult.

Dec. 16. CAIRNS J. read the following judgment which after stating the facts, set out above continued: Mr. Smith puts forward three contentions: (1) that, as is indicated by rule 3 (1) of the Matrimonial Causes Rules, 1957, which reads: "Every matrimonial cause shall be commenced by filing a petition addressed to the High Court," rule 3 is dealing only with matrimonial causes, and a claim for damages only is not a matrimonial cause; (2) that the word "petition" in rule 3 (2) must be given a limited meaning, since otherwise it would prevent a petitioner from having on the file at the same time a petition for divorce and, for example, a petition for a declaration of legitimacy, and is to be read as meaning a petition for relief in respect of the petitioner's marriage; (3) that the decree nisi is a final order disposing of the divorce petition.

I can deal shortly with this third point. Whether or not a decree nisi is in some sense a final order, it does not dispose of the petition; unless a petition is dismissed it is not disposed of until decree absolute.

The second point is also, in my opinion, free from difficulty if a suit for damages only can properly be regarded as a matrimonial cause. It may be right to say that some limitation must be imposed on the meaning of the word "petition," but I can see no good reason for construing it more narrowly than as "a petition in a matrimonial cause."

The really difficult point is the first one. It does appear to me that rule 3 is dealing only with matrimonial causes, or, perhaps I should say, with matrimonal causes and matters, having regard to sub-rule (5), which reads: "Except where these rules otherwise provide every other application in a matrimonial cause or matter—(*a*) shall be made to a registrar, and (*b*) shall be made

[1] See note on p. 953.

[2] [1950] P. 146; 66 T.L.R. (Pt. 1) 121; [1950] 1 All E.R. 96.

"by summons." Mr. Smith has built up a formidable argument to the effect that a claim for damages is not a matrimonial cause or matter. That argument is in two parts, one based on statute and the other on the cases.

The Matrimonial Causes Rules were made under the Supreme Court of Judicature (Consolidation) Act, 1925, and section 225 of that Act defines a "matrimonial cause" as any action for divorce, nullity of marriage, judicial separation, jactitation of marriage or restitution of conjugal rights. If it be said, as Mr. Merrylees was inclined to say, that a suit for damages alone is a "matrimonial matter," the answer is that the definitions of "cause," "plaintiff" and "defendant" in the same section, read together, show plainly that such a suit is a "cause" and therefore it cannot be a "matter," because "matter" is defined as "every proceeding in court not in a cause." Therefore, says Mr. Smith, a suit for damages alone is a cause but not a matrimonial cause.

Mr. Merrylees points out, on the other hand, that Part 8 of the Act of 1925 is headed "Matrimonial Causes and Matters," and that section 189, the section which dealt with claims for damages whether on a petition for divorce or not, was in Part 8. He argues that the Matrimonial Causes Rules are made under section 99 (1) (*j*) of the same Act, giving power to make rules with respect to matters which were then regulated by rules and regulations in force with respect to practice and procedure in matrimonial causes and matters, which must include everything in Part 8. A weakness of this argument is that Part 8 also includes legitimacy declarations (see section 188), and yet it was thought necessary to refer to these specifically in section 99 (1) (*j*).

If Mr. Smith is right there are no rules of court at all relating to claims for damages alone in respect of adultery. This is so improbable a situation that I should not accept it as the actual one unless driven to it, and, in my opinion, there are cogent reasons for saying that such a claim for damages is a matrimonial cause. The long title of the Matrimonial Causes Act, 1950, begins: "An Act to consolidate certain enactments relating to "matrimonial causes in the High Court in England and to "declarations of legitimacy and of validity of marriage and of "British nationality. . . ." I note that in this title declarations of legitimacy and of validity of marriage are specifically mentioned, but there are no words which would cover actions for damages unless they are within the expression "matrimonial "causes." Yet it is section 30 of this Act, replacing section 189 of the Judicature Act, which now gives the right to claim damages for adultery. Another reason why I consider that a claim for damages is a matrimonial cause is this: if the wife were alive she had, under section 33 of the Matrimonial Causes Act, 1857, to be joined as a respondent, and although this provision is not now contained in a statute (and it would be begging the

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question to say that it is contained in rule 9 of the Matrimonial Causes Rules, 1957), it cannot be supposed that if this kind of claim was a matrimonial cause from 1857 onwards it has since ceased to be. Again, any damages recovered may clearly be dealt with under section 30 (3) of the Matrimonial Causes Act, 1950, and settled on the children of the marriage, if any, or as provision for the maintenance of the wife.

These various grounds tend, in my opinion, to support the view that a claim for damages is a matrimonial cause. I acknowledge the difficulty of the restricted definition in the Judicature (Consolidation) Act, 1925, but as against that can be set the provisions of the same Act on which Mr. Merrylees relies. Moreover, as he pointed out, the definition in the Act is only conclusive when construing the Act itself, and, I may add, not even then if the context otherwise requires.

In my opinion, on the construction of the statutes and rules, a suit for damages for adultery is a matrimonial cause. I must, however, examine the cases referred to by Mr. Smith and see whether this view is contrary to authority.

In *Kent* v. *Atkinson*,[1] Hill J. held that a petition for damages was independent of, and not ancillary to, a petition for divorce, and could be brought notwithstanding the death of the wife. He suggested, obiter,[2] that the action would lie after the decree absolute. This does not, in my opinion, prevent the suit from being a matrimonial cause.

In *Hopkins* v. *Hopkins and Castle*[3] Langton J. heard an action for damages which had been instituted after decree nisi. The case is reported on the question of the extent to which defences available in the divorce proceedings and not then raised can be set up in answer to a claim for damages. Mr. Smith is entitled to point out that the fact that the petition was filed after decree nisi was not held to be a bar to the proceedings, and although no rule corresponding to the present rule 3 (2) was then in force there was a long established practice to the same effect. (See *Demetriou* v. *Demetriou*.[4]) However, as the point was not taken the case is, in my view, no real authority on the matter.

In *O'Neill* v. *O'Neill and Piggott*[5] it was held by the Court of Appeal that a co-respondent could appeal against an award of damages after decree absolute, notwithstanding his failure to appeal against the decree nisi. (See the Judicature (Consolidation) Act, 1925, s. 31 (1) (*e*).) This further emphasises what had been held in *Kent* v. *Atkinson*,[6] that the claim for damages is not merely ancillary to the claim for dissolution of marriage, but it does not prevent the former from being a matrimonial cause.

Finally, in *Har-Shefi* v. *Har-Shefi*,[7] the Court of Appeal held

[1] [1923] P. 142; 39 T.L.R. 404.
[2] [1923] P. 142, 148.
[3] (1933) 50 T.L.R. 99.
[4] [1950] P. 261; [1950] 2 All E.R. 49, C.A.
[5] 65 T.L.R. 624; [1949] 2 All E.R. 649, C.A.
[6] [1923] P. 142.
[7] [1953] P. 161; [1953] 2 W.L.R. 690; [1953] 1 All E.R. 793.

that the Divorce Division had jurisdiction to entertain a suit for a declaration that a marriage is invalid. It was argued here that such a proceeding is not included in any definition of a matrimonial cause or matter and, therefore, cannot be within the Matrimonial Causes Rules, and there is no reason why a claim for damages should not be in the same position. I can see no analogy between the two types of case. I express no opinion whether or not an action for such a declaration is a matrimonial cause or matter, but if it is not it is because it is not mentioned in the Matrimonial Causes Act, 1950, while an action for damages is.

I therefore conclude that the registrar was right to strike out this petition. This does not necessarily mean that after decree nisi the husband cannot set up a claim for damages. He may be able, by leave, to amend his petition under rule 15 in order to do so. On grounds of fairness it seems highly desirable that he should have to obtain leave before making such a claim at so late a stage, because the co-respondent might have allowed to go undefended a suit which he would have defended if a claim for damages had originally been made. Of course, if Hill J. was right in the view he expressed obiter in *Kent* v. *Atkinson*,[8] the claim may still lie after decree absolute. It may be, however, that it is then too late, because the petitioner is no longer a husband. The courts have not in modern times viewed with favour separate claims for damages for adultery (see *per* Langton J. in *Hopkins* v. *Hopkins and Castle*[9]), and it need not be a matter for any regret if a husband who does not claim damages in his petition for divorce finds himself without a right to make such a claim thereafter.

In the present case I am of opinion that the registrar was right in striking out the petition, and the appeal must, therefore, be dismissed.

Appeal dismissed with costs.

Solicitors: *Johnson, Jecks & Landons, for Landons, Brentwood; Clare & Clare.*

[8] [1923] P. 142, 148.

[9] (1933) 50 T.L.R. 99.

[QUEEN'S BENCH DIVISION.]

1961
May 10.

Lord Parker C.J., Ashworth and Lawton JJ.

RUTBERG *v.* WILLIAMS.

Shipping—Load line—Overloading—Commercial venture—No evidence of extent of increased earning capacity—Whether power to impose additional fine—Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 9), *s.* 44.

The defendant, the master of the Swedish ship *Indus*, pleaded guilty to an information that the vessel sailed from Helsingborg to Cardiff with a cargo of 4,679 tons of iron ore, being so loaded that the load line was submerged to a depth of 2·85 inches, contrary to section 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932 [1] (as applied by section 57). There was no evidence as to the extent of any increase in the earning capacity of the ship, but the magistrate, having regard to the fact that it was a commercial adventure and seeing no reason to suspect that the earning capacity had not been increased by the overloading, imposed the maximum penalty for the offence, £100, together with an additional fine of £100 for each inch or part of an inch that the load line was submerged. The defendant appealed against the additional fine:—

Held, that section 44 (2) required that regard should be had to the extent to which the earning capacity of the ship was increased by reason of the submersion, and that, since there was no evidence of the extent of the increased earning capacity, the magistrate had no power to impose the additional fine.

CASE STATED by the Cardiff stipendiary magistrates.

The defendant, Vilhelm Gustav Henning Rutberg, pleaded guilty to an information charging that on September 19, 1960, at Cardiff, he was the master of the S.S. *Indus*, of Stockholm, which vessel was loaded so as to submerge in salt water when the ship had no list the appropriate load line on each side of the ship, contrary to section 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, as applied by section 57. No evidence was called and the following facts were not challenged by the defendant and were taken as admitted. The S.S. *Indus*,

[1] Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44: "(1) A British load line ship "registered in the United Kingdom "shall not be so loaded as to sub-"merge in salt water, when the ship "has no list, the appropriate load "line on each side of the ship, that "is to say, the load line indicating or "purporting to indicate the maximum "depth to which the ship is for the "time being entitled under the load "line rules to be loaded. (2) If any "such ship is loaded in contravention "of this section, the owner or master "of the ship shall for each offence be "liable to a fine not exceeding one "hundred pounds and to such addi-"tional fine, not exceeding the "amount hereinafter specified, as the "court thinks fit to impose having "regard to the extent to which the "earning capacity of the ship was, "or would have been, increased by "reason of the submersion. (3) The "said additional fine shall not exceed "one hundred pounds for every inch "or fraction of an inch by which the "appropriate load line on each side "of the ship was submerged, or "would have been submerged if the "ship had been in salt water and had "had no list."

a Swedish vessel of 2,806 tons gross, was loaded with a full cargo of 4,679 tons of iron ore at Helsingborg, leaving there on September 14, 1960, for Cardiff, where she arrived on September 19, 1960, after a voyage of five days. Upon arrival in the port of Cardiff the ship was loaded so as to submerge the appropriate load line on each side of the ship in salt water to a depth of 2·85 inches. The defendant had given as his explanation of the overloading the fact that the weather was boisterous at an exposed jetty near Helsingborg when loading was being completed which had made it difficult to read the draught correctly. The charterparty was not produced, and no evidence was given of its contents or the freight rate.

It was contended on behalf of the defendant that as no evidence had been given and no admission made as to the extent to which the earning capacity of the ship was or would have been increased by reason of the submersion, there was no power to impose an additional fine over and above the maximum basic fine for the offence of £100 provided by section 44 (2) and (3) of the Act.

It was contended on behalf of the prosecutor that notwithstanding the absence of any evidence or admission there was power to impose an additional fine under the subsections.

The magistrate was of opinion that he had power to impose an additional fine, having regard to the fact that it was obviously a commercial venture and he saw no reason to suspect that the earning capacity of the ship had not been increased by the admitted overloading. He was further of the opinion that there was nothing in the Act to limit the amount of the additional fine other than section 44 (3), and imposed a total fine of £400 upon the defendant, being a fine of £100 for the offence and an additional fine of £100 for every inch or fraction of an inch by which the appropriate load line of the ship was submerged.

The defendant appealed against the imposition of the additional fine of £100 for every such inch or part of an inch that the load line was submerged.

M. J. Mustill for the defendant.
J. R. Cumming-Bruce for the prosecutor.

The following case was cited in argument: *Reg.* v. *Vestry of St. Pancras.*[2]

LORD PARKER C.J. stated the facts, read section 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, and continued: The point taken in this appeal is that the magistrate had no jurisdiction to impose an additional fine at all

[2] (1890) 24 Q.B.D. 371; 6 T.L.R. 175, C.A.

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in the absence of any evidence as to the extent of any increase in the earning capacity of the ship. Section 44 provides that the court can impose such additional fine as it thinks fit to impose "having regard to the extent to which the earning capacity of the "ship was . . . increased." On those words it is said—and this seems to be clearly right—that the mere fact that the magistrate is satisfied that the earning capacity was increased is insufficient because he has to have regard to the extent to which it was increased.

In the present case it was quite clear that this was a commercial venture, and almost certainly there was an increase in the earning capacity, but no evidence at all was tendered as to the extent of that increase. The magistrate stated: "I was of "opinion that I had power to impose an additional fine, having "regard to the fact that this was obviously a commercial venture "and I saw no reason to suspect that the earning capacity of the "ship had not been increased by the admitted overloading." In my judgment, the magistrate was fully entitled to come to the conclusion that it was a commercial venture and that the earning capacity of the ship had been increased, but that, as it seems to me, is not sufficient to enable him to impose an additional fine because he must, in imposing the additional fine, have regard to the extent of the increase, and he had no evidence whatsoever as to that extent. Accordingly, in my judgment, the appeal succeeds to the extent that the additional fine of £300 must be quashed.

Ashworth J. I agree.

Lawton J. I agree.

Appeal allowed with costs.

Solicitors: *Holman, Fenwick & Willan, for Lean & Lean, Cardiff; Treasury Solicitor.*

J. F. L.

[COURT OF CRIMINAL APPEAL.]

REGINA *v.* TERRY.

C. C. A.

1961
May 8.

Lord Parker C.J., Ashworth and Lawton JJ.

Crime—Homicide—Diminished responsibility—Direction to jury—Duty of judge to explain diminished responsibility—Medical evidence—Transcript of medical evidence handed to jury—Whether adequate direction—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

The appellant was charged with the capital murder of a bankguard whom he had killed during a bank raid. One defence raised was that he suffered from diminished responsibility under section 2 (1) of the Homicide Act, 1957.[1] In support of that defence two psychiatrists gave evidence, based on what the appellant had told them of his delusions, and which they accepted, that he was suffering from schizophrenia; they agreed, however, that if there were not those delusions, there was no other abnormality of mind. Two medical witnesses for the Crown gave evidence that the appellant was sane and that what he had told his psychiatrists was untrue. The judge did not sum up the medical evidence in detail but, having referred briefly to the two views expressed, handed a copy of the shorthand note of the medical evidence to the jury, inviting them to read it at their leisure. In his summing-up the judge read section 2 of the Homicide Act, 1957, to the jury, without explaining its terms, but after they had retired he recalled them and gave them a further direction. The jury convicted the appellant. On appeal:—

Held, that merely to hand a transcript of the medical evidence to the jury was a bad practice and in the ordinary case would not be an adequate direction; but that in this case, since the sole issue, which was plainly before the jury, was whether the story told by the appellant to his psychiatrists was genuine or whether he was shamming and it was untrue, there was no reason for a detailed summing-up of the medical evidence; and that, therefore, the court could not interfere with the conviction.

Per curiam. It is no longer proper merely to put the terms of section 2 (1) of the Homicide Act, 1957, before the jury, but they should be given a proper explanation of its terms as interpreted in *Reg.* v. *Byrne* [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1, C.C.A.

APPEAL against conviction.

The appellant, Victor John Terry, was convicted at Lewes Assizes, before Stable J., of the capital murder of one, John Pull, a bankguard. He was indicted with three others, Hosier and Tucker, who were charged with non-capital murder, and a girl, Salter, charged with being accessory after the fact. The appellant had committed the killing in the course of a bank raid and at the trial one of the defences put forward was that he was suffering

[1] Homicide Act, 1957, s. 2 (1): "Where a person kills or is a party to "the killing of another, he shall not "be convicted of murder if he was "suffering from such abnormality of "mind (whether arising from a con-"dition of arrested or retarded "development of mind or any in-"herent causes or induced by disease "or injury) as substantially impaired "his mental responsibility for his acts "and omissions in doing or being a "party to the killing."

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from diminished responsibility under section 2 (1) of the Homicide Act, 1957. In support of that defence, two psychiatrists, Dr. Paterson and Dr. Brown, gave evidence that in their opinion the appellant believed himself to be possessed by the spirit of a deceased American gangster, Jack Legs Diamond, and that that was consistent with schizophrenia. They also stated that there was a family history of epilepsy which would make the appellant unstable and more likely to be addicted to drugs and to have a tendency to schizophrenia. Both the witnesses had had interviews with the appellant, and accepted and based their evidence on what he told them. Other witnesses were called by the defence, who gave evidence that the appellant took drugs, and described incidents which could support the opinion of the psychiatrists. Two witnesses, Dr. Pearce and Dr. Brisby, who gave evidence for the Crown, expressed the opinion that the appellant was sane and that the story he had told his psychiatrists was untrue and was put on for the benefit of the doctors.

The judge, summing up to the jury, read section 2 of the Homicide Act, 1957, without giving them an explanation of its terms. Referring to the medical evidence, the judge said: "I "am not going to attempt to analyse these three volumes of "medical evidence; I am going to hand you the transcript of the "shorthand notes and you can study them at your leisure." He then told them that, without going through it in detail, they could take it that both Dr. Paterson and Dr. Brown had expressed the opinion that the appellant was suffering from an abnormality of mind induced by disease such as substantially to impair his mental responsibility, and went on to refer to the evidence of Dr. Pearce and Dr. Brisby that the appellant was putting on an act and was shamming, and said: "If you come to the conclusion "that this story that he told the psychiatrists of being moti-"vated and activated by the mind of Jack Legs Diamond is false, "that it is an act he has been putting on, then, members of the "jury, does not the whole defence of abnormality of mind fall "to the ground?" When the jury retired, they were handed the transcript of the medical evidence, of some 100 pages, which had been used by the judge and marked in places by him.

After the jury had retired, they were recalled by the judge and referred to various passages dealing with diminished responsibility in *Rose* v. *The Queen*[2] and *Reg.* v. *Byrne*.[3]

The appellant appealed against his conviction on the grounds, inter alia, that the judge failed adequately or at all to direct the jury upon the medical evidence, or to analyse or explain its worth and effect to them.

The facts are fully stated in the judgment of the court.

[2] [1961] 2 W.L.R. 506; [1961] 1 All E.R. 859, P.C.

[3] [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1, C.C.A.

M. A. B. King-Hamilton Q.C. and *J. Bolland* for the appellant.

Geoffrey Lawrence Q.C. and *Petre Crowder* for the Crown.

The following case was cited in argument: *Reg.* v. *Spriggs*.[4]

LORD PARKER C.J. This appellant, Victor John Terry, was convicted at the Sussex Assizes of the capital murder of one, Pull, on November 10, 1960. From that conviction he now appeals to this court.

The short facts, so far as it is necessary to state them, are as follows: The killing was committed by the appellant in the course of a raid on a bank at Worthing, a branch of Lloyds Bank. The raid was made as the result of a carefully pre-arranged plan between the appellant and two other youths, Tucker and Hosier. They all lived in London, but the appellant had apparently worked in Worthing for a short time that year. On November 9, 1960, the day before the raid, they bought a shot gun and ammunition in London, and one of them, Hosier, took and drove away a parked Wolseley car without the owner's consent. Soon after the bank opened on November 10, 1960, about two minutes past ten o'clock, the three of them went to the bank in the car. Hosier stayed outside in the car, and the appellant and Tucker went inside. The appellant had the gun with him at the time loaded and cocked. There was a young cashier called Barker there. The two of them walked past him and down a passage to a space at the back where there was a safe, and it was at that moment that the deceased man, Pull, who had been in a cloakroom, emerged from the cloakroom carrying a kettle. Pull apparently had a slight mannerism that when he was about to talk to anybody he would raise his hand shoulder high, and on this occasion, faced with two strangers, and particularly the appellant, he apparently raised his hand and, on the evidence, he did actually touch the appellant. The appellant appeared then to draw back and to raise the gun. The gun was fired pointing slightly upwards and the full shot went into Pull's left eye. He fell to the ground and died shortly afterwards. The appellant and Tucker then turned to the young cashier and said something like: "Where is "the money?" and they seized a bag containing over £1,000 in cash. They went out to the waiting car and drove away. On those bare facts it is plain that this is a case of murder in the course of theft, and a very deliberate one.

The defence was twofold, first, that the gun had gone off by accident, and secondly and alternatively, that the appellant was suffering from diminished responsibility within section 2 of the Homicide Act, 1957, two defences which do not run easily in double harness. [His Lordship considered the summing-up in

[4] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.

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regard to the defence of accident and continued:] The court can see nothing there which would cause any reason for interference with the conviction.

The second defence, diminished responsibility, was advanced by two eminent psychiatrists for the defence, Dr. Paterson and Dr. Brown. The appellant had many interviews with them. He told Dr. Paterson at any rate, and I think Dr. Brown, although Dr. Brown may merely have read Dr. Paterson's report, a long story of his history from his childhood onwards down to the date and time of the killing. It is unnecessary to go into it in any detail, but the story was that for years he had not felt at all normal. In one passage he said that he felt doomed at 13, and he had a feeling of being possessed at 15, and when he was asked: "So your whole outlook is different when you are the "real you from when you have the feelings?" he said: "Yes, "but when I am normal I still think that I was born to be "doomed, but I cannot think why I want to be a great gang-"ster." For the relevant period, that is, from November 9, 1960, down to November 13, 1960, when he was arrested, he told the story that, except for five minutes in a cinema at Portsmouth, he had felt that he was possessed by the spirit of a deceased American gangster, one Jack Legs Diamond, whose commands in effect he had to obey even if he knew what he was required to do was wrong. He said that he had had that feeling for a number of years.

The psychiatrists also spoke of a family history of epilepsy which they said would make him an unstable personality, one liable to be addicted to drugs and one in whom schizophrenia would more easily develop. They also spoke of the history which they had been given, not solely by the appellant but by other witnesses, of his having taken drugs for a period of at any rate some five months.

If we understand it aright, Dr. Paterson was saying: This young man was suffering from abnormality of mind, the abnormality being the delusion that he was possessed by another or, as it was sometimes put, that he was living in a dream world. Dr. Paterson said that that was induced by schizophrenia aggravated by drugs and rendered more likely by epilepsy in the family. Finally, he expressed the opinion that thereby the appellant's ability to control his acts was impaired and substantially impaired.

Dr. Brown also proceeded on the basis that, having heard the appellant's story, it was clear that he was suffering from delusions, and that those delusions amounted to an abnormality of mind. As regards the disease he expressed it rather differently by saying that the appellant was "an extremely psychopathic "personality who has had episodes of a schizophrenic type of "psychosis, especially under the influence of drugs." He did, however, add that but for the drugs the killing would not have taken place. Both these psychiatrists had to rely on what they

were told by the appellant. They said they accepted his story. They did not think he was shamming, and it was on his story almost entirely that they based their evidence. As against that, Dr. Pearce and Dr. Brisby, who were called for the Crown, were emphatic that the appellant had throughout been putting on an act for the benefit of the psychiatrists, in other words, that he was shamming.

The summing-up by the judge in regard to diminished responsibility has been criticised in a number of respects. Perhaps the most serious criticism is that not only in the first instance did the judge merely refer without explanation to the words of section 2 of the Homicide Act, 1957, but that he made little attempt to review the medical evidence in detail. Thus he said: "Members of the jury, I am not going to attempt to analyse "these three volumes of medical evidence; I am going to hand "you the transcripts of the shorthand note and you can study "them at your leisure"; and at the end of his summing-up: "Members of the jury, that concludes all I have to say to you. "Here are the transcripts of the medical evidence, which I will "hand to you. I am afraid there is only one copy for you; but "you can study the whole thing and analyse it."

The court would like to say emphatically that they disapprove of such a practice. It is true that in 1958 in *Reg.* v. *Spriggs*,[1] this court laid down that it was sufficient for the judge to hand copies of section 2 to the jury without any further explanation of the terms of the section; but it is to be observed that in that case the judge went with meticulous care into the evidence given on one side and the other, reviewing it in detail. In the present case it is said that the judge really went further than that, because not only in the first instance did he only refer to the section, but he made no attempt to make a meticulous and careful review of the medical evidence. In the opinion of this court, ever since the case of *Rose* v. *The Queen*[2] in the Privy Council, it is not sufficient merely to refer to the words of the section. That decision referred with approval to the interpretation that this court put on the section in *Reg.* v. *Byrne*,[3] and in the light of that interpretation it seems to this court that it would no longer be proper merely to put the section before the jury, but that a proper explanation of the terms of the section as interpreted in *Reg.* v. *Byrne*[3] ought to be put before the jury. In fairness, however, to the judge, it must be stated that after the jury had retired he called them back and did read out to them various passages from the two cases mentioned above.

So far as the handing of the transcripts of the medical evidence to the jury is concerned, the court feels that that is a bad practice

[1] [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300, C.C.A.

[2] [1961] 2 W.L.R. 506; [1961] 1 All E.R. 859, P.C.

[3] [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1, C.C.A.

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and, in an ordinary case, would not be an adequate direction to the jury in regard to the medical evidence. Medical evidence on these matters is difficult to follow and difficult to understand, and it would be quite impossible for a jury in a jury room without any assistance really to understand and appreciate the effect of the evidence. The practice was made worse in the present case in that only one transcript was available, and that a transcript which had been marked by the judge in red pencil and with pages turned down. That, as it seems to this court, is an objectionable practice.

Other criticisms made of this summing-up are that the judge did not adequately refer to the medical evidence in regard to drugs, in regard to the family history and matters of that sort. The court feels that in an ordinary case there would be considerable ground for those matters of criticism, but this is in some ways a rather curious case. It went on for some eight days, and no less than 100 pages of the transcript are occupied with this medical evidence, but at quite an early stage it became clear that the opinions formed by Dr. Paterson and Dr. Brown were in the main the result of the story which the appellant had told them. Thus, it is to be observed that early on in the cross-examination of Dr. Paterson, Mr. Lawrence, in going through the necessary ingredients of section 2, began to ask him about the abnormality of mind which he suggested was there: "(Q.) What "is the abnormality of mind which you say this man was suffer-"ing from at the time when he committed these acts? (A.) That "he had a delusion that he was possessed by another person—by "a spirit. (Q.) Anything else? (A.) No, that is the main thing. "(Q.) That is the abnormality? (A.) Yes. (Q.) I do not know "whether that has got anything to do with schizophrenia or not—"has it? (A.) Yes, it has. (Q.) Then we will examine its con-"nection in a moment; but let us concentrate for the moment on "the abnormality. That is an abnormality of mind that can have "absolutely no effect in this case at all unless it was genuine? "(A.) Yes, quite. (Q.) In other words, it is a delusion which is "subjective to Terry himself? (A.) Yes. (Q.) If in fact objec-"tively—and it is the jury who have to determine the state of "this man's mind—he was not suffering from any such delusion "at all, then we need not trouble about any of the other words "in the section, need we? (A.) No."

A little later on he was referred to the answer that he had given: "(Q.) Then I put to you that it followed that if there never was "such a delusion, there was then no abnormality of mind? "(A.) I do not say that it follows; I do not think it follows that "there is no abnormality of mind." Then it became quite clear from the questions of the judge that the witness was not appreciating the question, and the judge then said: "(Q.) Now will "you apply your mind to the hypothesis that Mr. Lawrence is "putting to you? He is simply putting it as an hypothesis; he

"is not asking you to accept the position that this man was not "living in a dream world, but on the hypothesis that he was not, "is there any other abnormality of mind?" and the answer was: "No, my Lord." Later on in the cross-examination the matter became still more clear because a time was reached when the judge said to Mr. Lawrence: "Mr. Lawrence, I imagine the "jury would agree with the proposition that if Terry's story was "true and the whole of this operation was carried out by him "while he really thought he was 'Legs' Diamond, a distin-"guished Chicago gangster, obviously they would not be able to "hold him responsible for what he was doing, if that story is "true." Mr. Lawrence, in answer, said: "If it is true, yes, my "Lord." Then he asked a question of the witness in these terms: "So we are getting down to the rival views, the other "view of the matter that this is an ordinary case of full respon-"sibility of the criminal, who planned it deliberately risking the "consequences of not resisting the temptation to commit "crime?" He answered: "Yes. (Q.) And the whole thing ulti-"mately depends, does it not, on whether what Terry is putting "up to the psychiatrist is believable or not? (A.) Yes."

It is perfectly clear, therefore, that at the end of the eight days and when the jury retired, the real and only question was: Was Terry fooling his psychiatrists or was his story a genuine story? If it was a genuine story, it was clear, as the judge himself said, that on the evidence he must be suffering from diminished responsibility. On the other hand, if he was fooling the psychiatrists, there was Dr. Paterson saying: "There is no other "abnormality of mind other than these so-called delusions to "which I can refer." In the light of what clearly, therefore, was the question in the end, it seems to this court that the summing-up by the judge is quite unexceptionable. Thus, he told the jury that without, as it were, going through the medical evidence in detail, they can take it that both Dr. Paterson and Dr. Brown had unequivocally expressed the opinion that Terry was suffering from an abnormality of mind induced by disease such as substantially to impair his mental responsibility. Having said that, the judge then went on to refer to the emphatic evidence of Dr. Pearce and Dr. Brisby that the appellant had put on an act and was shamming. Having dealt with that, the judge said: "If you "come to the conclusion that this story that he told the psychia-"trist of being motivated and activated by the mind of Jack Legs "Diamond is false, that it is an act he has been putting on, then, "members of the jury, does not the whole defence of abnormality "of mind fall to the ground?"

It is said by Mr. King-Hamilton, to whom the court is indebted for his argument, that even if that were the real issue at the end, yet the judge's summing-up failed in two respects. First, it is said that even if the appellant's story of his delusions was not to be accepted, there was other evidence which came

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from independent sources, independent of the appellant, which pointed in that direction and to which the judge should have referred. I need not refer to the points in detail, but they were matters such as the fact that he had had eleven jobs in two years, that for some reason or another his father at one period thought he ought to see a psychiatrist, that there was evidence that he was seen for six minutes with his arms rigid, flexing his muscles looking into a mirror, which it was said was a catatonic episode, and there were other matters of that sort. It is sufficient to say that the burden of proof is put upon the defence, and that none of these matters were matters of such substance as required reference being made to them by the judge, particularly having regard to the answers which I have referred to which Dr. Paterson had made in cross-examination.

Secondly, it is said, and this is really the high-water mark of what can be said, that the judge, at any rate on this real live issue as to whether the appellant was putting on an act or not, ought to have given the jury detailed directions about it. The court has come to the conclusion that there was very little that the judge could say. The matter had been going on for eight days. The sole issue for the jury was whether they accepted Dr. Paterson and Dr. Brown in saying that in their opinion he was not putting on an act, or whether they accepted Dr. Pearce and Dr. Brisby in being certain that he had been putting on an act. The court feels that in the circumstances of this case, that being the sole issue, there was little more that the judge could reasonably be expected to do.

The court has given this matter anxious consideration. They are indebted for the arguments of counsel on both sides but, having fully considered the matter, they can find no ground to interfere. Accordingly, the appeal is dismissed.

King-Hamilton Q.C. asked the court to certify under section 1 of the Administration of Justice Act, 1960, that a point of law of general public importance was involved in the decision.

LORD PARKER C.J. The court feels unable to certify that there is a point of law of general public importance involved and, accordingly, no question of an appeal to the House of Lords arises.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. F. L.

[PRIVY COUNCIL.]

AHMED REFAI BIN ADHAM SALIH AND OTHERS . . . . . APPELLANTS;

AND

VALLIYAMMAI ATCHI AND ANOTHER . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Administration of Estates—Right to follow assets of estate—Right of unsatisfied creditor — Equitable right — Defeated by transfer by devisee in consideration of marriage.

Ceylon—Administration of estates—Secretary of District Court appointed administrator—Corporation sole—Code of Civil Procedure (Legislative Enactments of Ceylon, 1938 *Rev., c.* 86), *s.* 520.

Corporation—Corporation sole—Administration of estates—Administrator de bonis non—Secretary of court—Whether corporation sole —Ceylon.

Judicial Precedent—Decision long undisturbed—Administration—Officer of court appointed as administrator—Effect—Decision of 12 *years' standing* (post, p. 977).

A testator, who died in 1931, specifically devised the land the subject-matter of the present action to his son, who was also appointed executor of his will. The son, in the course of the administration, had mortgaged four properties of the testator (the subject-matter of this action not being one) in favour of a creditor, whose executor was the first respondent, to secure a loan. The testator's son died in 1940, before completing the administration, having previously obtained the release of two of the four mortgaged properties and having also, in 1938, conveyed the disputed land to himself—executor to devisee—and thereupon transferred it by way of gift to his son. In 1943 the first respondent obtained the appointment under section 520 of the Civil Procedure Code of the secretary of the District Court, Colombo, as administrator de bonis non of the estate of the testator, and letters of administration were issued to him. On his retirement from office without completing administration his successor was appointed administrator and, in turn, on his retirement, his successor was, in July, 1949, directed to be substituted, but no letters of administration were issued to the last.

In November, 1949, the first respondent sought to enforce the outstanding mortgage, naming the "Secretary of the District Court, Colombo," as defendant. On proof of the mortgage debt, the secretary administrator not having appeared, a decree was made in 1951 that the secretary should pay to the first respondent the outstanding debt with interest. Execution was then levied on property in the hands of the administrator to satisfy the decree debt, and it resulted in the seizure of the disputed land which was then in possession of the appellants, having been transferred to them by their mother who had received it as a provision made on her marriage by her brother, the son of the testator's son. The appellants having obtained a court order for release of the property seized, the first respondent began the present proceedings

* *Present*: LORD RADCLIFFE, LORD DENNING, LORD HODSON, LORD GUEST, the RT. HON. L. M. D. DE SILVA.

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which resulted in an order that he was entitled to execute the decree of 1951 against the appellants' property:—

Held, (1) that the Civil Procedure Code created the holder of the office of secretary of the District Court a corporation sole for the discharge of his functions qua administrator, and therefore notwithstanding the changes in the holder of the office there was a proper defendant before the court in the mortgage proceedings and the last holder of the office did not require a grant of letters of administration for himself (post, p. 977).

Samarasekera v. *Secretary, District Court* (1949) 51 N.L.R. 90 approved.

Desirability of remedying the difficulties attending the reconciliation of the requirements of the Civil Procedure Code with the responsibilities of the secretary of the court as administrator commented on.

(2) That the right of an unsatisfied creditor to follow assets of the estate into the hands of devisees or legatees and those claiming through them for the purpose of obtaining payment was fundamentally an equitable right which might be defeated by, inter alia, a transfer from the devisee to someone who took in consideration of marriage. Accordingly, since the appellants derived title to the disputed property through their mother and she took it from her brother in consideration of marriage, it was not liable to be seized to satisfy the first respondent's decree (post, p. 978).

Dilkes v. *Broadmead* (1860) 2 Giff. 113; *Spackman* v. *Timbrell* (1837) 8 Sim. 253; *Fernando* v. *Fernando* (1902) 2 Browne 277; *Staples* v. *De Saram* (1867) Ramanathan (1863–68) 265 and *Gavin* v. *Hadden* (1871) 8 Moo.P.C.(N.S.) 90 considered.

Judgment of the Supreme Court of Ceylon reversed.

Appeal (No. 3 of 1960) from a judgment and decree of the Supreme Court of Ceylon (Basnayake C.J. and Pulle J.) (December 4, 1957) reversing a judgment and decree of the District Court of Colombo (G.M. de Silva D.J.) (July 5, 1954).

The following facts are taken from the judgment of the Judicial Committee: The testator whose will and estate are involved was one Hadjie Ibrahim Bin Ahamed who died on May 9, 1931, having specifically devised the land which is the subject-matter of the present action to his son Ahmed Bin Ibrahim. The latter was also appointed executor of the will and in due course took out probate in the District Court of Colombo.

At the date of the testator's death eight properties belonging to him were charged to a creditor as security for sums owing to him. In 1935 the executor obtained the court's sanction to his selling four of these properties and borrowing on the security of the other four. With the moneys so realised, the existing creditor was paid off and a new mortgage was created upon the four retained properties. This was a mortgage for the sum of Rs. 30,000 in favour of the lender, Km. N. Sp. Natchiappa Chettiar, whose executrix was the first respondent, Valliyammai Atchi. The land now in dispute (hereinafter referred to as " the disputed " land ") was not one of these four properties.

Ahmed Bin Ibrahim died on November 5, 1940, without having fully administered his father's estate. Before his death he had, however, done two things that were material to this case. He

obtained a release from the mortgage of two of the four properties in consideration of Rs. 5,000 which he paid to the mortgagee in reduction of the mortgage debt out of the assets of the estate; and on December 13, 1938, at a time when, as found by the District Judge in his judgment in this action, the administration was nearly at an end and when he was making similar assents in favour of other specific devisees, he conveyed the disputed land to himself, executor to devisee, and on the same day transferred it by way of gift to his son Mohamed Ghouse bin Ahmed. Prima facie, therefore, it had ceased to be assets of the estate by the year 1938.

On November 27, 1943, the first respondent, acting as executrix of the unpaid mortgage creditor, moved the District Court of Colombo for the appointment of the secretary of the court as administrator de bonis non of the testator, and on May 26, 1944, an order was made appointing Mr. Culanthaivalu, the then secretary, official administrator of the estate and declaring him entitled to letters of administration accordingly. These letters were issued to him on October 12, 1944. For the moment it was sufficient to notice that by the year 1948 Mr. Culanthaivalu had retired from the post of secretary without completing administration and a Mr. Peiris, the new secretary, was appointed administrator in his place, and that when Mr. Peiris in his turn retired he was succeeded as secretary by a Mr. Palliyaguru. On July 7, 1949, an order was made in the administration proceedings relating to the testator's estate by which Mr. Palliyaguru was directed to be substituted for Mr. Peiris, but no letters of administration were issued to Mr. Palliyaguru.

It was not until matters had reached this state that the present action was begun. On November 21, 1949, the first respondent filed her plaint, naming the "Secretary of the District "Court, Colombo," as the defendant, praying enforcement of the mortgage bond by payment of the sum of Rs. 45,431 and further sums of interest and, failing due payment, sale of the mortgaged properties under order of the court. Mr. Palliyaguru appeared to but did not defend the action: on the other hand, two persons, Ahmed Bin Hassen and Mohammed Bin Hassen, who claimed to be specific devisees under the testator's will of the two mortgaged properties, intervened asking to be added as parties and allowed to defend. The upshot of this was that the first respondent came to terms with them and on October 24, 1951, an agreement was recorded in the proceedings under which the first respondent agreed to release the properties from the mortgage, not to ask for any hypothecary decree in respect of them and in no event to go against those properties for execution of the decree she was proposing to obtain. In exchange the interveners undertook what prima facie seemed to be the smaller sacrifice of withdrawing any objection to decree being entered against the administrator, on the first respondent satisfying the court as to the amount due on the mortgage.

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No explanation was ever given in the course of these proceedings as to why the first respondent entered into such an unusual transaction, which denuded the estate she represented of the security which it had held for 16 years, or why the second respondent, as administrator, expressed no views about a transaction to which he could hardly have been indifferent. According to the evidence given at the trial, each of the two properties was worth about Rs. 50,000, so the holder of the mortgage bond had been amply secured at the date of the release.

However that might be, the action went ahead on that basis, the first respondent filed an affidavit proving her debt as claimed, the second respondent did not appear, and on December 7, 1951, the District Court made an order sanctioning the agreed release of the two properties as well as the earlier release of the two other properties originally subject to the mortgage and decreed that the second respondent should pay to the first the sum of Rs. 45,431, together with interest on Rs. 23,522/97 at the rate of 8 per centum per annum from November 22, 1949, to the date of the order and thereafter on the aggregate amount of the decree at 5 per centum per annum until payment in full.

The next thing that happened was the issue of a writ of execution addressed to the fiscal of the Western Province directing him to levy upon the " houses, lands, goods, debts and credits " of the administrator for satisfaction of the decree debt. It was not now necessary to inquire whether this could in any event extend to assets that had long passed out of the estate. It did at any rate result in the seizure of the disputed land and this brought the present appellants into the affair, for the first and second appellants were then in possession of it by virtue of a transfer made to them by their mother, Zubaida, who herself had received it in 1941 as a provision made on her marriage by her brother Mohamed Ghouse. The third appellant appeared as their guardian ad litem. They applied to the court to have the property released from seizure and their claim was upheld. Thereupon the first respondent started the present proceedings praying that the disputed property should be declared liable to be sold in execution of the money decree which had been made against the estate on December 7, 1951. The action was dismissed by the District Court (G. M. de Silva D.J.) on July 5, 1954, the judge holding that " the plaintiff, having released the " mortgage property, cannot now seek to sell the land seized " which has vested in the third and fourth defendants." This judgment was reversed on appeal by the Supreme Court (Basnayake C.J. and Pulle J.) on December 4, 1957, the judges holding that nothing had occurred to prevent the first respondent from executing her decree against the appellants' property.

1961. March 22, 23, 27, 28. *Walter Jayawardena* and *Dick Taverne* for the appellants.

Sir Frank Soskice Q.C. and *Mervyn Heald* for the first respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Society of Medical Officers of Health* v. *Hope* [1]; *Ladamuttu Pillai* v. *Attorney-General* [2]; *Lewis* v. *Ukka Dureya* [3]; *Moldrich* v. *Cornelis* [4]; *Gilleghan* v. *Minister of Health* [5]; *Silva* v. *Silva* [6]; *Ministry of Health* v. *Simpson* [7]; *Wijesekera* v. *Rawal* [8]; *Ramanathan* v. *Perera* [9]; *Land Commissioner* v. *Pillai* [10]; *Harrison* v. *Kirk* [11]; *Blake* v. *Gale* [12]; *In re Eustace, Lee* v. *McMillan* [13]; *Appuhamy* v. *Edwin.* [14]

May 8. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal from a judgment and decree of the Supreme Court of Ceylon involves two points of law. One is a question of procedure relating to the status of a secretary of a District Court when he is appointed administrator cum testamento annexo under section 520 of the Civil Procedure Code. The other is a question of substantive law as to the equitable defences available to persons claiming through a testamentary devisee when their land is sought to be taken in execution by an unsatisfied creditor of the estate. The circumstances in which these two question arose must first be briefly related. [His Lordship stated the facts set out above and continued:] In the course of the argument before the Board the point was made by the appellants' counsel that these proceedings, which were said to be proceedings under section 247 of the Civil Procedure Code, were not within the range of action covered by that section, having regard to the fact that the property had already passed out of the estate and that if the action was to be treated as a mere pendant to the execution proceedings the appellants found themselves involved in an action in which a monetary decree had already passed, in their absence, against the estate, although they themselves would have desired to challenge the making of the decree itself. This point does not seem to have been raised in the courts in Ceylon and it is not noticed in any of the judgments given there. As the question it raises is essentially one as to the correct procedure under the local rules and their Lordships have no assistance on the point from the judges familiar with the practice, they do not propose to deal with it in this appeal. They will assume, without

[1] [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.
[2] (1957) 59 N.L.R. 313.
[3] (1908) 11 N.L.R. 33.
[4] (1910) 14 N.L.R. 97.
[5] [1932] 1 Ch. 86; 47 T.L.R. 439.
[6] (1907) 10 N.L.R. 234.
[7] [1951] A.C. 251; 66 T.L.R. (Pt. 2) 1015; [1950] 2 All E.R. 1137, H.L.
[8] (1917) 20 N.L.R. 126.
[9] (1929) 31 N.L.R. 304.
[10] [1960] A.C. 854; [1960] 3 W.L.R. 626, P.C.
[11] [1904] A.C. 1, H.L.
[12] (1886) 32 Ch.D. 571, C.A.
[13] [1912] 1 Ch. 561.
[14] (1951) 53 N.L.R. 515.

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deciding, that the first respondent's action is not defective on that account.

But was there ever a real defendant in the action against whom there could pass a monetary decree capable of binding the testator's estate? This is the first main point made by the appellants and it is by no means easy to say what is the correct answer to that question. The decree was obtained in proceedings against a defendant styled "The Secretary of the District Court "of Colombo, as administrator de bonis non of the estate and "effects of Hadjie Ibrahim Bin Ahmed deceased." Now the appellants say that Mr. Palliyaguru was not and could not be that defendant since, although for the time being the secretary of the District Court, he had not received letters of administration to the estate and could not therefore represent it: that under section 520 letters of administration could only issue to a secretary of the District Court as an individual person, and that there was no corporation sole constituted by the office which could be sued under the corporate name as distinct from the individual holders from time to time: and that, consequently, no person representing the estate had ever been made defendant in the action or had been effectively cited to appear in it.

It is necessary first to inquire what is the scheme established by the Civil Procedure Code under its chapter on testamentary actions in order to see how much support it would give to the appellants' argument that the letters can only issue to a secretary in his individual capacity. Section 520 itself says no more than that, when no fit and proper person otherwise appears, the court shall appoint the secretary of the court to be administrator cum testamento annexo. There is nothing said explicitly about successors to the office or the creation of a corporation sole. Section 538 prescribes certain general duties to be performed by (inter alios) all persons appointed administrator, without exception. They must take an oath in the form set out in the First Schedule, file an inventory and valuation of the estate, and enter into a bond with sureties, securing the due administration of the estate, which bond is to be in accordance with Form 90 in the Schedule. By virtue of section 521 the court, when it appoints its secretary as administrator, is precluded from dispensing with the giving of security, as under section 541 it has a limited power to do in other cases.

When reference is made to the forms prescribed in the Schedule it is seen that while Form 87 (Letters of Administration) and Form 88 (Oath) are neutral and would be as consonant with the appointment of a corporation sole as that of an individual, Form 90 (Security Bond) is irreconcilable with a bond entered into by a corporation, since it is expressed to bind the administrator and the sureties in the specified sums, "for which payment "we and each of us bind ourselves, our heirs, executors and

"administrators." Any conclusive argument that is sought to be extracted from the form of the security bond, however, must take account of the fact that it is not merely irreconcilable with the conception of an administrator being a corporation sole: it is also irreconcilable with the idea of the secretary being administrator at all, since the prescribed form requires the bond to be entered into with "the Secretary of the District Court of "(or . . . the Secretary of the District Court for the time being)," and one can hardly suppose that the secretary, whether individual or corporate, was envisaged as offering security by himself to himself. This is only one of several indications that neither the scheme laid down by the relevant sections of the Code nor the prescribed forms have been framed to fit the special situation of a secretary of the court acting as administrator.

If at this stage one follows up the suggestion that the only admissible administrator is a secretary in his individual capacity, the practical consequences become so unworkable that it is virtually impossible to accept it. The first secretary to take the appointment must necessarily remain administrator until his death or the final winding up of the estate, since the Code provides no means by which the court can relieve him, once appointed, and transfer his duties to a new secretary. The only lawful power to recall or revoke a grant (section 536) is not applicable to such a case. Yet it is inevitable that secretaries will retire or be transferred to another district while administrations are still pending, and it is inconceivable that they are intended to remain charged with these duties, undertaken for the original court, after they have ceased to have any official contact with the office or the district.

It was argued for the appellants that the difficulty of this position could be met if section 540, which is styled "Power of "administrator when not limited," were to be read as impliedly sanctioning the appointment of individual secretaries for no longer period than their tenure of office as secretary of the court that appointed them. It was suggested that the opening words "If no limitation is expressed in the order making the grant . . . " could warrant the view that the mere naming of the secretary of the District Court in the grant amounted to a limitation in time for this purpose. But this argument can provide no solution and would in any case create more difficulties than it could solve. First, it is plain that section 540 does not carry the implication suggested but is the obverse of the immediately preceding section 539, styled "Limited probate and administration," a section which does enable the court in certain circumstances, though not circumstances that obtain here, to make limited grants in express terms. Section 540 merely says that, except and so far as there are such express limitations, an executor's or administrator's powers are to endure for his life or until final administration and to extend to the whole of the assets. Secondly, even if an

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administrator, though appointed individually, could drop out of his appointment upon leaving his post as secretary to the court, provisions, which are lacking, would be needed for determining the liability of his sureties and himself on his bond, which is unlimited, and for requiring him to bring in and pass the accounts of his administration up to the date of his retirement.

For these reasons their Lordships think that it is in effect impossible to treat a grant to the secretary of a District Court as if it were a grant to him in his individual capacity. Not much help is to be had from reference to the actual course that administration has taken in this case since no theory that is internally consistent seems to prevail. The first person to receive letters of administration was Mr. Culanthaivalu. They were issued to him in his own name but " as Secretary of the District " Court." He took the oath of office, and entered into a bond acknowledging that he was bound to himself, " Secretary of the " District Court of Colombo or to the Secretary of that court " for the time being," in the sum of Rs. 500, for which payment he bound himself and his heirs, executors and administrators. When he retired from the secretaryship, fresh letters were issued to his successor, Mr. Peiris, on the basis that there was an unadministered estate for him to succeed to as administrator de bonis non: yet there is not to be found in the Code of Civil Procedure power for the court either to discharge an existing administrator or to appoint an administrator de bonis non except upon the death (not retirement) of a sole surviving administrator (section 549). Rightly or wrongly, Mr. Peiris then took a new oath and entered into a new bond, made on this occasion in favour of " N. Sinnetamby, District Judge of Colombo or . . . " the District Judge of Colombo for the time being," but again binding the giver of the bond, his heirs, executors and administrators.

When Mr. Peiris retired in his turn, no new letters were issued to Mr. Palliyaguru, nor did he take an oath or give a bond. The only official action which recognised him as administrator of the estate was an order made on July 7, 1949, in the testamentary proceedings directing him to be substituted for Mr. Peiris.

There is not much that can be said about the course of practice, which very likely follows the practice accepted from time to time, except that it is impossible to treat it as altogether consistent either with the idea that the secretary, when appointed by the court under section 520, is appointed in his individual capacity or with the idea that what is appointed is a corporation sole represented by the holder for the time being of the secretary's office. For, if the former, there was no way of getting rid of Mr. Culanthaivalu, the first holder, and no vacancy to which his successors could be appointed: and if the latter, there was no vacancy at any time and nothing to which either Mr. Peiris or Mr. Palliyaguru required appointment.

The change in procedure on the last occasion was no doubt due to a decision of the Supreme Court given in the same year, 1949, in the case of *Samarasekera* v. *Secretary of the District Court.*[1] In that case the court (Basnayake and Gratiaen JJ.) held that section 520 contemplated the appointment of the secretary of the court as such and not the individual who held the office of the secretary at the time of the appointment. Letters of administration in such cases should, in their view, be addressed to the secretary of the court and not to the current holder by name, and a change of the individuals holding the office would not affect the appointment once made. The sum of their judgment was expressed in their holding that the Civil Procedure Code intended the secretary of the court to possess[2] "all such "attributes of a corporation sole as are necessary for the proper "discharge of his functions qua administrator."

Their Lordships accept this as a correct proposition. Despite the difficulties created by the wording of certain sections and of the prescribed forms, they think that, having regard to the functions to be performed by the secretary of the District Court and the evident intention that his office should carry a continuing responsibility for the property to be administered, it must have been intended that the Code should create the holder of the office a corporation sole for this purpose. Even if their Lordships did not think that this was the preferable conclusion, they would find themselves very reluctant indeed to overrule a decision of this kind which has now stood for 12 years and upon the strength of which many judgments and orders must have been made in the course of testamentary proceedings.

For these reasons the appellants' first argument fails. There was a proper defendant before the court in the mortgage proceedings and Mr. Palliyaguru did not require a grant of letters of administration for himself.

It must, however, be pointed out that the judgment of the Supreme Court in *Samarasekera's* case[3] has not disposed of several difficulties which still attend the reconciliation of the requirements of the Civil Procedure Code with the responsibilities of the secretary of the court as administrator. If it is a corporation sole which is appointed in the first instance, what is the correct form of security to be offered by that corporation? The provision of proper security is of the first importance when the assets of an estate are entrusted to the hands of a stranger. The Supreme Court themselves said in their judgment in that case that Form No. 90 was inappropriate to a secretary administrator: but neither there nor in their judgment in the present case, where they seem to have followed the same principle, did they indicate what should be done to ensure that proper security

[1] (1949) 51 N.L.R. 90.
[2] Ibid. 93.
[3] 51 N.L.R. 90.

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is at all times available. Should the secretary in office when the appointment is made give a bond for the office binding himself and his successors, and, if so, out of what funds, public or private, should the penalty be exacted if there should be devastavit? And, again, is there to be indemnity at the public expense if the corporation sole commits devastavit? It does not seem satisfactory that the estate should be secured by the mere personal bond of the secretary in his individual capacity. And what should be the form of oath appropriate to the corporation sole, and should a new oath be required from each new holder? Their Lordships must earnestly commend these questions to the attention of the authorities in Ceylon, for the present position calls for immediate review and it looks as if it may be necessary to produce new statutory forms and even, possibly, new statutory provisions if a complete scheme is to be provided.

Turning now to the appellants' second ground of appeal, their Lordships are of opinion that the decision of the Supreme Court ought not to stand. It is quite true that as a general rule a secured creditor of an estate is entitled to decline to rely on his security and to claim payment out of the estate as a whole; though it must be remembered that if he does so his action releases the secured property into the general pool of assets and the creditor does not make a side deal, as was done here, with the specific devisees of the land subject to the mortgage with the intention of exempting their property from any contribution at all towards the satisfaction of his debt. It is quite true, too, that an unsatisfied creditor is entitled to follow assets of the estate into the hands of devisees or legatees and those claiming through them for the purpose of obtaining payment: but this right of following is fundamentally an equitable right. As such it is liable to be lost by laches and acquiescence on the part of the creditor or by other conduct which raises an equity against him (see *Ridgway* v *Newstead* [4]), or it may be defeated by a sale by the devisee to a purchaser for value without notice or by a transfer from the devisee to someone who takes in consideration of marriage (see *Dilkes* v. *Broadmead*,[5] *Spackman* v. *Timbrell* [6]). In such cases the marriage consideration is as effective a bar as a purchase for value without notice, and this should be so, since the property is transferred as provision for an alteration of status which is in its nature irrevocable. From this aspect the decision in the case of *Theodoris Fernando* v. *W. L. Roslin Fernando*,[7] the correctness of which was doubted by the Supreme Court, must be regarded as unexceptionable. Nor is the creditor affected to his prejudice by these rules; for, while he cannot follow the property against the purchaser, he can follow the purchase price in the hands of the devisee and, if there has been a transfer

[4] (1860) 2 Giff. 492.
[5] (1860) 2 Giff. 113.
[6] (1837) 8 Sim. 253.
[7] (1902) 2 Browne 277.

in consideration of marriage, he can claim as assets from the transferor the value equivalent to that which has been transferred.

These general principles of equity are in their Lordships' opinion fully applicable to the administration of a deceased's estate in Ceylon (see *Staples* v. *De Saram*,[8] *Gavin* v. *Hadden*[9]). If they are applied to the circumstances of the present case, it must result that the disputed land is not liable to be seized to satisfy the first respondent's decree. The first and second appellants derive title to it through their mother and she took it from her brother in consideration of marriage, "a dowry or marriage "gift absolute and irrevocable," as it is described in his deed of December 21, 1941. The transfer on marriage blocks the first respondent's claim. Even if this was not enough in itself, the defence is strongly reinforced by the other circumstances of the case. The mortgagee stood by while administration was proceeding during all the years until 1949, ostensibly in possession of an ample security and without making any call for payment off of the mortgage moneys. This alone would not be prejudicial; but if, when at length proceedings are taken, the mortgagee deliberately denudes herself of her security, apparently with the intention of favouring the devisees of the land subject to the mortgage at the expense of other devisees, she has only herself to blame if she finds that her rights against other devised property are not so far-reaching as she may have wished to suppose. It is not that in the absence of evidence the court will impute to the first respondent bad faith in the making of the arrangement that she made in the course of the mortgage action; but it is that, if such an arrangement is made, without explanation, at the time and in the circumstances that prevailed here, the creditor's equity to follow assets after they have passed from the hands of the executor may find itslf destroyed by the mere situation that the creditor's own choice has brought about.

For the reasons that have been set out their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the judgment and decree of the District Court of Colombo dated July 5, 1954, dismissing the first respondent's action with costs should be restored, and that the judgment and decree of the Supreme Court dated December 4, 1957, should be reversed, and that in lieu thereof the first respondent should be ordered to pay the appellants' costs of the hearing before that court. The first respondent must also pay the appellants' costs of this appeal.

Solicitors: *Charles Russell & Co.; Lee & Pembertons.*

C. C.

[8] Ramanathan (1863–68) 265.

[9] (1871) 8 Moo.P.C.(N.S.) 90.

[QUEEN'S BENCH DIVISION.]

1961
May 5.

Lord Parker C.J., Salmon and Edmund Davies JJ.

REGINA *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* NARANJAN SINGH.

Fugitive Offender—Court's jurisdiction to discharge—Delay—Charges of dishonest cheating—Arrest of offender ten years after offences committed—Offender living openly in England—Home and new life made in England—Whether "unjust and oppressive" to order return—"Or otherwise"—Whether power to discharge limited to cases where offence trivial or application for return made in bad faith—Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *s.* 10.

On February 9, 1961, the chief metropolitan magistrate made an order under section 5 of the Fugitive Offenders Act, 1881, committing the applicant to Brixton Prison to await return to India on five charges of cheating under article 420 of the Indian Penal Code. The amount involved in the charges was 1,425 rupees, about £112. The alleged offences were committed in India about October, 1951. In April, 1952, the applicant came to this country where he obtained employment and lived openly under his own name. In 1956 he was joined by his wife, who had been living openly in India, and his child, and in the same year he obtained British nationality, surrendering his Indian passport. Meanwhile, depositions were taken in India, but they were not completed until the end of 1956 nor authenticated until 1958. On December 4, 1958, a warrant was issued which was authenticated in India on February 5, 1959, and indorsed in London by the chief metropolitan magistrate on March 3, 1960. The applicant was arrested in London on February 1, 1961. Despite the delays which had occurred in India, there was no suggestion that the Government of India was not sincere in its intention to prosecute.

On an application for a writ of habeas corpus and under section 10 of the Fugitive Offenders Act, 1881,[1] that the applicant be discharged on the ground that in view, inter alia, of the long delay shown by the Indian authorities, it would be unjust and oppressive to order his return to India, the point was taken that the discretion of the court to make an order in favour of an offender under that section was limited to cases where the offence was trivial or the application was not made "in good faith in the interests of justice "or otherwise" not in good faith:—

Held, that, on its true construction, section 10 of the Act of 1881 gave the court a wide discretion to do what in all the circumstances was just, and that, in the circumstances, and since the applicant had made a home and a life for himself in this country, and would by reason of the delay inevitably experience difficulty in defending himself, the delay was of such a nature that it would be unjust and

[1] Fugitive Offenders Act, 1881, s. 10: "Where it is made to appear "to a superior court that by reason "of the trivial nature of the case, "or by reason of the application for "the return of a fugitive not being "made in good faith in the interests "of justice or otherwise, it would, "having regard to . . . all the circum-"stances of the case, be unjust or "oppressive or too severe a punish-"ment to return the fugitive . . . "such court may discharge the fugi-"tive. . . ."

oppressive for him to be returned to India on the charges. The court, therefore, would exercise its discretion under the section and order his discharge.

APPLICATION for a writ of habeas corpus and under section 10 of the Fugitive Offenders Act, 1881.

On February 9, 1961, the chief metropolitan magistrate at Bow Street made an order under section 5 of the Fugitive Offenders Act, 1881, committing the applicant, Naranjan Singh, to Brixton Prison to await return to India on five charges of cheating by dishonest inducement of the delivery of property under article 420 of the Indian Penal Code. The amount involved in the charges was 1,425 rupees, about £112. The alleged offences took place in about October, 1951, in the Province of Jullundur, in the Republic of India. In April, 1952, the applicant left India and came to this country where he obtained employment and lived openly under his own name. In 1956 he was joined by his wife and child, and in the same year he applied for, and obtained, British nationality. On February 1, 1961, he was arrested in London and brought before the chief metropolitan magistrate.

The applicant applied to the court, submitting that, in view of the small amount involved in the charges, the distance to the Republic of India and the long delay in ordering his return shown by the Indian authorities, and in all the circumstances of the case, it would be unjust and oppressive and too severe a punishment to order his return, and asking that in the premises, and by virtue of section 10 of the Fugitive Offenders Act, 1881, the court should issue a writ of habeas corpus that he might be brought before the court and discharged. The application was made ex parte on February 24, 1961, when it was adjourned until February 28 for notices to be served. On February 28, on the application of the Government of India, the hearing was adjourned for two months to enable evidence to be obtained from India.

The facts are fully stated in the judgment of Lord Parker C.J.

Brian Leary for the applicant.
Mervyn Griffith-Jones for the Governor of Brixton Prison.
T. O. Kellock for the Government of India.

The following cases were cited in argument: *In re Henderson* [2]; *Rex* v. *Governor of Brixton Prison, Ex parte Waite* [3]; *Reg.* v. *Governor of Brixton Prison, Ex parte Campbell* [4]; *Reg.* v. *Governor of Brixton Prison, Ex parte Green* [5] and *Rex* v. *Governor of Brixton Prison, Ex parte McCheyne.* [6]

[2] [1950] 1 All E.R. 283, C.A.
[3] (1921) The Times, February 22, D.C.
[4] (1956) The Times, July 12, D.C.
[5] (1954) The Times, December 16, D.C.
[6] [1951] 1 T.L.R. 1155, D.C.

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Lord Parker C.J. In these proceedings Mr. Leary moves on behalf of the applicant, Naranjan Singh, now detained in Her Majesty's Prison at Brixton, for an order of habeas corpus or, alternatively, for an order under section 10 of the Fugitive Offenders Act, 1881. The applicant was committed to Brixton Prison by the chief magistrate on February 9, 1961, he having been satisfied on a warrant and depositions duly authenticated which had been sent over from India that a prima facie case had been made out against the applicant in respect of offences contrary to article 420 of the Indian Penal Code.

The alleged offences in this case were committed about October, 1951, and their nature was that the applicant was the managing director of a company, Public Pictures Ltd., that he got a number of people, up to 28, to deposit sums in rupees as a condition of being taken into employment, and that he in fact used that money without their authority in the purchase of shares in their names in the company, and thereafter dismissed them without paying them any salary. The offences in question are five in number, involving the equivalent in rupees of about £112.

In April, 1952, he came to this country. He says that he knew of no complaint having been made against him, but it is only right to say that it does appear from the depositions that a number of people alleged that they complained to him, and, indeed, some 30 of them did complain also to the Registrar of Joint Stock Companies, sending him a written petition on November 12, 1951. Having come to this country, the applicant obtained employment at Ealing, where he worked for a company for 2½ years, and in March, 1956, he was joined by his wife, whom he had left in India, accompanied by one child. After that they moved to West Bromwich, purchased a house on mortgage and he worked until September, 1960, in a rolled steel factory; the employers in that factory give the applicant a glowing reference, saying that they considered him to be one of the best coloured workers ever to be employed by the firm, and that they were sorry when he left of his own accord. In 1960 he left that job and came south to Southall, in Middlesex, where he obtained work with the British Overseas Airways Corporation. Meanwhile, in 1956, he had surrendered his Indian passport and had applied for and obtained British nationality.

This is the case of a man who, for whatever motive he left India in 1952, has a home and new life which he has made for himself in this country. He has a wife and now three children with him. That is the position from his point of view.

From the point of view of the Indian authorities, it appears that after the Registrar of Joint Stock Companies had drawn the attention of the police to the petition which he had received on November 12, 1951, certain steps were taken. It is only right to say that, in my judgment, everything that was done, making all

allowances for the difficulties involved in India, was dilatory in the extreme. At any rate, the applicant had left the country before anything was done, because the first record is a report from the Superintendent of Police on October 4, 1952. Thereafter, there was a long period of delay until the depositions were taken, apparently in the early part of 1956. It is said that there was difficulty in tracing the witnesses and their addresses, but it is difficult to believe that there was any really serious difficulty when, as I have said, there had been a written petition from these complainants to the Registrar of Joint Stock Companies. However, the depositions having been taken, they were not authenticated until 1958, and it was not until December 4 that a warrant was issued. On February 5, 1959, the signature on the warrant was authenticated, and then there was a delay of yet another year before the application was in fact made to the chief magistrate in London.

Finally, to complete the dates, there was then an adjournment for further authentication until the chief magistrate indorsed the warrant on March 3, 1960, and thereafter almost another year's delay before the applicant was arrested on February 1, 1961.

The Government of India have supplied the court with affidavits seeking to explain the delay, and I should like to say at once that I entirely accept that the work involved inevitably caused some delay, and that the Indian authorities are entirely sincere in the matter, and that they intend to prosecute. At the same time I feel that this was a very simple case and, making allowances for all the difficulties involved, it is almost inconceivable that if due diligence had been exercised the matter could not have been dealt with at a very much earlier stage. But, be that as it may, one thing is clear, and that is that the applicant, apart from the fact that he may have left India originally fearing some action, has done nothing but live perfectly openly under his own name in the circumstances which I have indicated. He is quite well known to the police under his proper name. His wife was living openly in India under her proper name before she came to this country in 1956. She was never questioned. She was never asked for photographs, and again, she has done nothing to conceal the whereabouts of her husband.

Pausing there, I feel that, if the discretion of this court is an unlimited discretion to do what in all the circumstances is just, it would in the particular circumstances of this case be unjust and oppressive for this man at this very late date, having made his home here and having started a new life here, to be returned for trial in India on these charges. Having regard to the delay, one has only to envisage the difficulties he would be in in defending himself. While the courts there would no doubt take due account of the difficulties facing the applicant, it seems to me

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that the delay is of such a nature that this court can properly say that it would be unjust and oppressive for him to be forced to return.

However, Mr. Kellock, for the Government of India, has taken a point which has been, if I may put it, in the offing ever since 1881, but has never as yet been effectively taken, namely, that the powers of this court under section 10 are, on a true construction, very limited. The section reads thus: "Where it "is made to appear to a superior court that by reason of the "trivial nature of the case, or by reason of the application for "the return of a fugitive not being made in good faith in the "interests of justice or otherwise, it would, having regard to "the distance, to the facilities for communication, and to all the "circumstances of the case, be unjust or oppressive or too severe "a punishment to return the fugitive either at all or until the "expiration of a certain period, such court" may exercise its discretion in a certain way.

The rival interpretations of this section concern the meaning in the context of the words "or otherwise." The limited construction, and the one for which Mr. Kellock contends, is that the words "or otherwise" are merely descriptive of the application which is not made in good faith. In other words, he would read it as "Where it is made to appear that by reason of the "application for the return of a fugitive not being made in good "faith either because it is not being made in the interests of "justice or otherwise not in good faith," and he points out that in so far as one is entitled to look at commas in an Act of Parliament, there is no comma, as one would otherwise expect, after the words "interests of justice." That is the limited construction. The wider construction is that one should read it as if there was a comma after the words "interests of justice," and that it would then mean that the court's discretion should be exercised in any other case where it would, having regard to the distance, etc., be unjust and oppressive.

As I have said, this point has been in the offing all these years, and there is no decision on it. What has happened, quite shortly, in the past is that in *In re Waite*,[1] which is only reported in "The "Times" newspaper, the Attorney-General had made a submission favouring what I may call the wide construction. The court made no decision upon it. In a case which followed, *Henderson* v. *The Secretary of State for Home Affairs*,[2] the point was quite plainly before the court, but the intervening Government, which was again the Government of India, conceded for the purposes of that case that the wider construction was right, and the court proceeded on that wider construction, expressly saying that they were making no decision on the point of construction. Since then there have been several cases before this court; in particular, we were

[1] (1921) The Times, February 22. [2] [1950] 1 All E.R. 283.

told that in *Reg.* v. *Governor of Brixton Prison, Ex parte Campbell,*[3] which again is only reported in the "The Times" newspaper, an order was made under section 10, and the court again appear to have come to the conclusion, without argument, that the wide construction was correct. I have not seen "The Times" newspaper report myself, but it is only right to say that it is not clear whether it was the triviality of the alleged offence which determined the decision or merely the matter of delay. At any rate, the court assumed that the wide construction was correct. The same was true in *Reg.* v. *Governor of Brixton Prison, Ex parte McCheyne,*[4] in which the court went so far as to assume [5] that the wide construction had been decided in *Henderson's* case [6] to be correct. In fact, however, the court in *Henderson's* case [6] did expressly reserve the point.

The position, therefore, is that in every case which has so far come before this court, the wide construction has either been conceded by the intervening Government or has been accepted without argument by the court as the proper construction. I am quite satisfied that the wider construction is correct. In the first place—and this is approaching it on a broad basis—one would expect that the court would have a general discretion in all the circumstances of the case to do what is just. If the limited construction is correct, however, this court could only order the release of an applicant under the section on the ground of the triviality of the nature of the offence, or on the basis that the reason for the application for the return of the offender was made in bad faith. It seems to me extraordinary that the powers of this court should be so limited. At any rate it is a consideration to bear in mind if there is any ambiguity of construction. Looking at it as a narrow point of construction, there are two matters which influence me. In the first instance, if the discretion can only be exercised in what I may call the trivial case or a case of bad faith, the words "having regard to the distance, "to the facilities for communication, and to all the circumstances "of the case," would seem to be quite inapt and meaningless. If the court is ordering release on the ground of bad faith, what do the other circumstances matter? What do the distances matter? What do the facilities for communication matter? And similarly, if it is the release of an applicant because of the trivial nature of the offence. Finally, and again as a point of construction, if the limited construction is right, what is the need for the words "in the interests of justice or otherwise" as qualifying good faith? On the limited construction "or otherwise" is merely something being done not in good faith yet in the interests of justice. Again, and it is really the same point, one asks oneself: can one think of a case in which an application is not being made in good faith

[3] (1956) The Times, July 12.
[4] [1951] 1 T.L.R. 1155.
[5] Ibid. 1158.
[6] [1950] 1 All E.R. 283.

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which is not also being made otherwise than in the interests of justice? It seems to me that as a matter of construction the position is plain, and that even if there can be said to be an ambiguity, the obvious purpose of this section would dictate that a wide construction should be given to it. Accordingly, holding as I do that under the section there is a wide discretion in the court, I would, in the circumstances of the present case, come to the conclusion that the applicant ought to be discharged absolutely.

SALMON J. I agree.

EDMUND DAVIES J. I also agree.

Application allowed with costs against the Government of India.

Solicitors: *Victor J. Lissack; Director of Public Prosecutions; T. L. Wilson & Co.*

J. F. L.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1961
May 9.

Lord Parker C.J., Ashworth and Lawton JJ.

REGINA *v.* MORRIS.

Crime—Sentence—Hospital order—Discretion—Diminished responsibility — Evidence that degree of mental incapacity more severe — Arrangement made for admission to local hospital—No evidence of vacancy in special hospital—Sentence of life imprisonment—Whether wrong in principle—Mental Health Act, 1959 (7 *&* 8 *Eliz.* 2, *c.* 72), *s.* 60.

Crime — Homicide — Diminished responsibility — Insanity — Whether prosecution entitled to call evidence of (post, p. 989).

The defendant, who was charged with murder, pleaded diminished responsibility and was convicted of manslaughter. During the trial the judge refused to allow the prosecution to tender rebutting evidence of insanity, but evidence was given by witnesses for the prosecution that the defendant's mental illness might be worse than that spoken to by his own doctors. There was evidence that the defendant could be admitted to a local hospital, but no evidence was given that a place was available for him in a special hospital. The defence applied for a hospital order under section 60 of the Mental Health Act, 1959,[1] in lieu of sentence but

[1] Mental Health Act, 1959, s. 60: "(1) Where a person is convicted before a court of assize or quarter sessions of an offence other than an offence the sentence for which is fixed by law, . . . and the following conditions are satisfied, that is to say—(*a*) the court is satisfied, on the written or oral evidence of two medical practitioners (complying

the judge, passing sentence, said that he was not sure that the defendant's mental health was not worse than that of diminished responsibility and that he was not going to have the responsibility of setting him anywhere near liberty but would pass such a sentence as would involve him being in the hands of the Secretary of State who had power to send him to the right place, and sentenced the defendant to life imprisonment.

On appeal against that sentence on the ground, inter alia, that it was wrong in principle:—

Held, that where punishment as such was not intended and the sole object of a sentence was that a defendant should receive mental treatment and be at large as soon as he could safely be discharged, a proper exercise of the discretion under section 60 required that the powers under that section should be exercised, and that the matter should not be left to be dealt with by the Secretary of State under section 72; but that, in the particular circumstances of the

"with the provisions of section 62 of "this Act)—(i) that the offender is "suffering from mental illness, . . . "and (ii) that the mental disorder is "of a nature or degree which war-"rants the detention of the patient in "a hospital for medical treatment, . . . "and (*b*) the court is of opinion, "having regard to all the circum-"stances including the nature of the "offence and the character and ante-"cedents of the offender, and to the "other available methods of dealing "with him, that the most suitable "method of disposing of the case is "by means of an order under this "section, the court may by order "authorise his admission to and "detention in such hospital as may "be specified in the order. . . . (3) "An order for the admission of an "offender to a hospital . . . shall not "be made under this section unless "the court is satisfied that arrange-"ments have been made for the "admission of the offender to that "hospital in the event of such an "order being made. . . . (6) Where "an order is made under this section, "the court shall not pass sentence of "imprisonment. . . ."

S. 65: "(1) Where a hospital order "is made in respect of an offender ". . . and it appears to the court, "having regard to the nature of the "offence, the antecedents of the "offender and the risk of his com-"mitting further offences if set at "large, that it is necessary for the "protection of the public so to do, "the court may, . . . further order "that the offender shall be subject to "the special restrictions set out in "this section, either without limit of "time or during such period as may be "specified in the order. . . . (3) The "special restrictions . . . are . . . "(*a*) none of the provisions of Part "IV of this Act relating to the dura-"tion, renewal and expiration of "authority for the detention of the "patient shall apply. . . . (*b*) no "application shall be made to a "Mental Health Review Tribunal in "respect of the patient under section "63 of this Act or under any provi-"sions of the said Part IV; (*c*) the "following powers shall be exercisable "only with the consent of the "Secretary of State, . . . (i) power to "grant leave of absence to the patient "under section 39 of this Act; (ii) "power to transfer the patient in "pursuance of regulations under "section 41 of this Act; and (iii) "power to order the discharge of the "patient under section 47 of this "Act; and if leave of absence is "granted . . . the power to recall the "patient . . . shall be vested in the "Secretary of State as well as the "responsible medical officer; . . ."

S. 72: "(1) If in the case of a "person serving a sentence of "imprisonment the Secretary of State "is satisfied, . . . (*a*) that the . . . "person is suffering from mental ill-"ness. . . . and (*b*) that the mental "disorder is of a nature or degree "which warrants the detention of the "patient in a hospital for medical "treatment; the Secretary of State "may, . . . by warrant direct that "that person be removed to and "detained in such hospital . . . as "may be specified in the direction. ". . . (3) A transfer direction with "respect to any person shall have the "like effect as a hospital order made "in his case."

S. 97: "(1) The Minister shall pro-"vide such institutions as appear to "him to be necessary for persons sub-"ject to detention under this Act . . . "who . . . require treatment under "conditions of special security."

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case, the judge having felt that the defendant's mental condition was such that he should not be admitted to a local hospital, and there being no evidence of a vacancy in a special hospital, the judge had properly exercised his discretion and the sentence was not wrong in principle.

Appeal against sentence.

The appellant, Philip Morris, was indicted at Glamorgan Assizes, before Jones J., with the murder of his wife, and on pleading diminished responsibility under section 2 of the Homicide Act, 1957, was convicted of manslaughter.

During the trial two doctors for the defence gave evidence that the defendant was suffering from depression superimposed on a chronic anxiety state, which had substantially impaired his mental responsibility for his act. The judge, taking the view that it was for the defence alone to raise the issue of insanity, refused to allow the prosecution to call evidence in rebuttal to show that the defendant was insane within the M'Naughten Rules, but doctors did give evidence for the prosecution which clearly showed that they thought that the degree of the defendant's mental illness was more than his own doctors had spoken to. After the defendant was convicted, the judge was invited by the defence to make a hospital order under section 60 of the Mental Health Act, 1959, and, if necessary, a restriction order under section 65 of that Act. Evidence was given by the defendant's doctors, who were qualified under the Act to give the necessary evidence, that the defendant needed medical treatment in a hospital and that arrangements had been made to admit him to a local hospital. The judge declined to make a hospital order and, sentencing the defendant, said: "You killed your wife quite "deliberately, but the jury have found, and I agree with their "verdict, on the evidence put before them that at the time "you were suffering from some abnormality of mind which diminished your responsibility for that act, but still it remains a "very serious matter that you killed her. I am not at all sure "that your mental state is not even worse than that, at any "rate, I am not going to have the responsibility of setting you "anywhere near liberty. I am going to pass such a sentence "on you as will involve you being entirely in the hands of the "Secretary of State for Home Affairs, who has complete powers "to send you to the right place. I can only send you to prison, "and maybe prison is not the right place for you, I do not know "the way it will be decided; but the only way I can do that effectively is to pass a sentence, which means you may not be out "altogether, but which is a sentence of imprisonment for life."

The appellant appealed against that sentence on the ground that the sentence was too severe and that in view of the wide powers given to the court by the Mental Health Act, 1959, it was wrong in principle.

Breuan Rees for the appellant. In view of the wide powers conferred on the court by the Mental Health Act, 1959, it is now wrong

in principle to pass a sentence of life imprisonment where the purport of that sentence is to give the Secretary of State powers to deal with the convicted person. There might be cases where the nature of the offence is such that the judge considers that it demands a sentence of imprisonment, but in this case the appellant's condition is susceptible to treatment and the only matter of public importance is his rehabilitation. This sentence means that after his mental disorder is cured he can be returned to prison. The inference from the evidence is that the appellant is not a danger to the public, and the judge could have achieved his object better by making a hospital order under section 60 together with a restriction order under section 65. When the latter order is made, the subject of it is nowhere near his liberty.

Alternatively, in the circumstances, the sentence was too severe.

Sir Reginald Manningham-Buller Q.C., *A.-G.* and *J. R. Cumming-Bruce* as amicus curiae. Section 60 gives a judge a complete discretion and enlarges rather than restricts his powers. But subsection (3) provides that a hospital order may not be made unless the court is satisfied that arrangements have been made for the admission of the offender to the hospital specified in the order. Before making an order the judge, under subsection (1) (*b*), must also be satisfied that to make a hospital order is the most suitable method of disposing of the case; that clearly requires that he should be satisfied that admission to the particular hospital at which arrangements have been made is the most suitable method of dealing with the offender. If, therefore, the judge considered that the appellant should receive treatment under conditions of special security in a special hospital (see section 97) he had no power to make an order specifying the local hospital. The judge clearly considered that the appellant's mental condition was serious and if he was not satisfied that the local hospital was the right place for the appellant he had no alternative but to pass a sentence of imprisonment.

Moreover, the judge might have considered that the nature of the offence was such that it demanded a sentence of imprisonment. Diminished responsibility does not mean that there is no responsibility for the offence. Where a hospital order is made, there is no power to transfer to prison after the mental condition is cured, and even where there is a restriction order the offender may be released at any time by the Secretary of State.

The ruling of the court is sought on the question whether, when there is a plea of diminished responsibility or insanity, it is open to the prosecution to call evidence in rebuttal of that plea to show either that the degree of mental incapacity is different from the degree put forward by the defence. That course was taken by Donovan J. in *Reg.* v. *Bastian*,[2] by Elwes J. in *Reg.* v. *Nott*[3] and by Paull J. in *Reg.* v. *Grant*.[4]

[2] [1958] 1 W.L.R. 413; 42 Cr. App.R. 75; [1958] 1 All E.R. 568.

[3] (1959) 43 Cr.App.R. 8.

[4] [1960] Cr.L.R. 424.

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[Lord Parker C.J. In a recent case before me I was told that that was the course taken in other cases and the trial proceeded on that basis without any argument on the matter.]

Those cases were not brought to the attention of the judge in this case, and it is submitted that he was wrong in refusing to allow the prosecution to call evidence of insanity. The practice has always been that insanity could only be raised by the defence, but since the Homicide Act, 1957, has provided a defence of diminished responsibility it is submitted that once the defence has put mental capacity in issue it is right that the prosecution should be able to contest the degree of incapacity.

[Lawton J. There is a serious practical difficulty. In a case where a defendant denies that he committed the act alleged but pleads that if he did he was suffering from diminished responsibility, and the prosecution prove that he was guilty but insane, the defendant is deprived of his right of appeal against the finding that he committed the act.]

That is a serious consequence but it is not so serious as it would be for a jury to return a verdict of diminished responsibility—partial insanity—when in fact the defendant is insane. The court is under a duty to arrive at the truth. By a plea of diminished responsibility or insanity the defence voluntarily raises the issue of mental capacity. Once it is in issue the court cannot prohibit an inquiry into the nature of the defendant's mental capacity, but must seek to arrive at the right verdict on the facts.

[Lord Parker C.J. This point is only on the borderline of this case. A binding decision of this court could only arise where, on a plea of insanity, the jury find diminished responsibility. It might therefore be better if we said nothing about it.]

It was thought desirable to bring the latter to the attention of the court so that uniformity of practice might be achieved.

Rees replied.

Lord Parker C.J. The appellant was indicted at the Glamorgan Assizes for the murder of his wife, a lady 72 years of age. He was convicted of manslaughter on a plea of diminished responsibility, and was sentenced by Jones J. to life imprisonment. He now appeals against that sentence by leave of the court, the question being whether that sentence was wrong in principle having regard to the court's powers under the Mental Health Act, 1959.

So far as the facts are concerned, it is sufficient to say that this unfortunate husband killed his wife, who had been seriously ill. In many ways it could be classed as a mercy killing. The unchallenged evidence, so far as the defence doctors were concerned, was that the appellant was suffering from depression superimposed on a chronic anxiety state which had substantially impaired his mental responsibility. They gave evidence—and they were doctors who came within the definition of doctors

qualified to speak on these matters under the Mental Health Act, 1959—that he required mental treatment, and evidence was given that a vacancy was available in a local Welsh hospital. The judge, however, despite that being pressed upon him, sentenced the prisoner to life imprisonment, saying: "I am not at all sure that "your mental state is not even worse than that, at any rate, I "am not going to have the responsibility of setting you anywhere "near liberty. I am going to pass such a sentence on you as will "involve you being entirely in the hands of the Secretary of "State for Home Affairs, who has complete powers to send you "to the right place."

It is agreed that under section 72 of the Mental Health Act, 1959, the Secretary of State has ample powers, but the argument is that, having regard to the court's powers under section 60, the court in its discretion ought to have dealt with the appellant under that section. So far as it is material, the section provides: "Where . . . (*a*) the court is satisfied, on the written or oral "evidence of two medical practitioners (complying with the "provisions of section 62 of this Act)—(i) that the offender is "suffering from mental illness . . . and (ii) that the mental "disorder is of a nature or degree which warrants the detention "of the patient in a hospital for medical treatment, . . . and "(*b*) the court is of opinion"—and this is where the discretion of the court lies—"having regard to all the circumstances "including the nature of the offence and the character and ante-"cedents of the offender, and to the other available methods of "dealing with him, that the most suitable method of disposing "of the case is by means of an order under this section, the "court may by order authorise his admission to and detention in "such hospital as may be specified in the order." By section 65 the court has power to make at the same time what is called a restriction order which will restrict the discharge of the prisoner from hospital for such period as is stated in the restriction order except with the consent of the Secretary of State.

It seems to this court that, although the discretion there laid down is very wide indeed, the basic principle must be that in the ordinary case where punishment as such is not intended, and where the sole object of the sentence is that a man should receive mental treatment and be at large as soon as he can safely be discharged, a proper exercise of the discretion demands that steps should be taken to exercise the powers under section 60, and that the matter should not be left to be dealt with by the Secretary of State under section 72. That, as it seems to the court, is the general principle. Of course there may be cases where, although there is a substantial impairment of responsibility, the prisoner is shown on the particular facts of the case nevertheless to have some responsibility for the act he has done, for which he must be punished, and in such a case, although as the court reads the sentence imposed by the judge this was not such a case, it

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would be proper to give imprisonment allowing the Secretary of State to exercise his powers under section 72 in order that any necessary mental treatment should be given. Prima facie, therefore, it looks as if, as Mr. Rees has contended, this sentence was wrong in principle, in that it seems to this court that the judge was not intending to impose punishment. But what happened in this case was that the Crown sought to call rebutting evidence in regard to diminished responsibility, the form of the rebuttal being that the doctors for the Crown were going to say that the appellant was not merely suffering from diminished responsibility but was insane within the M'Naughten Rules. However, unlike the course taken by some judges, this judge in fact refused to allow that issue of insanity under the M'Naughten Rules to be raised. Nevertheless, the doctors for the Crown did give evidence which showed that they clearly thought that the degree of mental trouble from which the appellant suffered was a great deal more than that to which his own doctors had spoken. It seems to the court that the anxiety of the judge was really that he felt that the mental condition of the appellant might be far worse than that spoken to by his doctors, and that he ought to be treated in a special hospital, what might be called a secure hospital, where very special steps are taken to see that the inmate could not get out and could not be at large. There are special hospitals within the meaning of the Act which are qualified for that purpose. We have been told that Moss Side, Rampton and Broadmoor are special hospitals, but the only evidence before the judge was that there was a vacancy in this local Welsh hospital, and he was clearly not satisfied that that local Welsh hospital was secure enough to enable him to take the risk of making a hospital order naming that hospital. Accordingly, having had no evidence of a vacancy in a special hospital, it seems to this court that it was a perfectly proper exercise of the judge's discretion in the special circumstances of this case to say: "Although I do not intend this as punishment, "I am not going to take the responsibility of putting this man in "the local Welsh hospital where he can become at large, and "I think it is better to leave it entirely to the Secretary of State." The court feels that there is no ground for interfering with the exercise of the judge's discretion. It certainly is not wrong in principle on the special facts of this case and, accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Treasury Solicitor.*

J. F. L.

[PROBATE, ETC., DIVISION.]

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July 10, 11, 19; *Aug.* 26; *Oct.* 24, 28.

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Husband and Wife—Nullity—Bigamy—Implied recognition of marriage by husband—Whether husband estopped from alleging marriage to be bigamous.

Estoppel—Per rem judicatam—Husband and wife—Marriage—Validity—Bigamous marriage—Implied recognition by husband before justices—Nullity petition by him.

Estoppel—Conduct, by—Husband and wife—Maintenance proceedings on footing marriage valid—Both parties aware that marriage void—No estoppel against nullity petitions.

The husband, who had previously married in Canada in 1937, went through a ceremony of marriage with the wife in England in 1945, both parties being aware that the ceremony was probably bigamous. In 1957 the husband left the wife and in proceedings before the justices admitted having deserted her. A maintenance order was made against him. In 1959 the husband established that his lawful wife was still alive in 1958, but the justices refused to revoke the maintenance order on the ground that, having admitted his desertion, and so, by implication, the validity of the marriage, the husband was estopped from alleging that the marriage ceremony was bigamous and void.

The husband then petitioned for a decree of nullity on the ground of bigamy. The wife, by her answer, sought the same relief or, in the alternative, a divorce on the grounds of adultery and desertion:—

Held, (1) that the doctrine of estoppel did not preclude a party to a bigamous ceremony of marriage from alleging it to be null and void even though he had previously asserted its validity in judicial proceedings.

Miles v. *Chilton* (*orse. Miles*) (1849) 1 Rob.Eccl. 684 and *Andrews* v. *Ross* (1888) 14 P.D. 15 applied.

(2) That since, on the facts of the case, an estoppel per rem judicatam could not arise from the decision of the justices which was not binding on the High Court and an estoppel in pais could not arise as both parties had been aware of the position, each party was entitled to a decree of nullity.

PETITION for a decree of nullity.

In 1937 the husband married a Miss Tapley in Canada and in December, 1945, he went through a ceremony of marriage with the wife in England, although both parties were aware that the ceremony was probably bigamous. In 1957 the husband deserted the wife and, at the hearing of a complaint issued against him by the wife before the Luton justices, admitted the desertion, and a maintenance order was made against him. The husband later fell into arrears of payments under the order and then sought to question the validity of the ceremony of marriage. On inquiry it was established that the lawful wife was still alive in July, 1958, and the husband accordingly applied to the justices for a revocation of the order on the ground that it presupposed that the marriage to the wife was valid, whereas it was bigamous and void ipso

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jure. On May 26, 1959, the justices dismissed the husband's complaint on the ground that, having admitted desertion and so, by implication, the validity of the marriage, he was estopped from alleging it to be void. The husband then filed a petition in the High Court seeking a decree of nullity. The wife, by her answer, pleaded that the husband, by his admission of desertion, was estopped from alleging that the marriage was null and void. In the alternative, she sought a decree of nullity on the ground of the admitted bigamy, or if the marriage was held to be valid, a decree of divorce on the ground of her husband's adultery and desertion.

F. R. N. H. Massey for the husband.
N. R. Blaker for the wife.
Nigel Curtis-Raleigh for the Queen's Proctor.

In addition to the cases referred to in the judgment, the following cases were cited in argument: *G.* v. *M.**; *Society of Medical Officers of Health* v. *Hope.*†

Phillimore J. stated the facts and continued: The question of law raised is whether I should refuse a decree of nullity to the husband in this case on the ground that, although the marriage was admittedly bigamous and therefore void ab initio, he is estopped from so alleging.

There is a line of authority which suggests that the doctrine of estoppel may prevent a court from declaring a bigamous marriage null and void. The first of those cases is *Wilkins* v. *Wilkins.*[1] A wife petitioner who had married the respondent husband in 1865 petitioned the court in 1892 for a judicial separation on the ground of his adultery. He, by his answer, denied the adultery and alleged that the marriage was bigamous and so null and void on the ground that a man the wife had married in 1854 was still living at the date of the marriage in 1865. The suit was heard by a jury, who found on the evidence that the husband had committed adultery, and that the wife's first husband had died before her marriage in 1865. She accordingly obtained a decree. Not long afterwards the first husband returned to England and the husband thereupon filed a petition for a decree of nullity. The wife set up the verdict of the jury as constituting an estoppel per rem judicatam. The case came before Gorell Barnes J., who indicated that he felt a difficulty in granting a decree in face of the previous verdict of the jury, and, without deciding the point, adjourned the case for an application by the husband to the Court of Appeal for a new trial of the original suit. The report covers only this application, which was granted on terms. The judgment

* (1885) 10 App.Cas. 171; 1 T.L.R. 326, H.L.

† [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.

[1] [1896] P. 108; 12 T.L.R. 212, C.A.

of Lopes L.J.[2] deals solely with the question whether it was right under the rules to grant a new trial and the terms to be imposed, but that of Lindley L.J.[3] refers to the difficulty created by the verdict and decree in the first suit, whilst Kay L.J.[4] deals briefly with the point of estoppel. He says[4]: "It is said that "the applicant is estopped by the former verdict and decree from "proving this fact. But, as evidence is now forthcoming which "could not by the exercise of reasonable diligence have been "obtained at the first trial, there must be some mode of getting "over an estoppel arising from a verdict which was obtained "under a misapprehension of the real facts. In my opinion we "have jurisdiction to enlarge the time for moving for a new trial "of the first suit, and I am also clearly of opinion that the case "is one in which the jurisdiction ought to be exercised."

I do not think that Kay L.J. was committing himself to the view that the plea of estoppel was good, any more than was Lindley L.J.[5] in speaking of the difficulty and a new trial as the proper mode of getting over it. The report does not suggest that any authority on the question of estoppel was cited to the Court of Appeal, and in the absence of any report of the hearing before Gorell Barnes J., I do not know whether any authority was cited to him. The Court of Appeal granted a new trial and by consent ordered that the verdict in the first suit and the decree of judicial separation be set aside. On a subsequent application Gorell Barnes J. granted a decree of nullity. Whilst the course taken was eminently sensible and practical, this case, in the absence of any decision on the point, provides somewhat slender support for the contention that estoppel can prevent the court from granting a decree of nullity where a marriage is shown to be bigamous.

The second case, *Woodland* v. *Woodland* (*orse. Belin*),[6] is in a different category. The husband and wife married in 1914 at a time when the wife's previous marriage had not been validly dissolved. In 1921 she brought a petition for restitution of conjugal rights, which the husband did not defend, with the result that she obtained a decree, the wording of which, being in the usual form, contained an express finding that the parties were husband and wife. In 1928, the husband having petitioned for a decree of nullity, the case came before Hill J., who adjourned it for argument on the question whether the decree of restitution did not constitute an estoppel. After hearing the argument the judge dealt with the general principles of estoppel and concluded[7]: " . . . I am unable to find that there is anything in the "law peculiar to this division which renders the general law of "estoppel inapplicable to this case." He then proceeded to refer to the terms of the decree of restitution and to the case of *Wilkins*

[2] [1896] P. 108, 113.
[3] Ibid. 112.
[4] Ibid. 114.
[5] Ibid. 112.
[6] [1928] P. 169; 44 T.L.R. 495.
[7] [1928] P. 169, 172.

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v. *Wilkins*,[8] describing the observations of Kay L.J.[9] as a clear recognition of the estoppel raised by the decree of judicial separation in that case. Hill J. then proceeded to dismiss the petition. This is a clear decision in favour of estoppel per rem judicatam and the facts are close to those before me in the present case. I confess, however, that I find it impossible to concur in Hill J.'s conclusion[10] that there is nothing "peculiar "to this division which renders the general law of estoppel in-"applicable to this case." I also think that in treating Kay L.J.'s[11] observations as a clear expression of recognition of the estoppel he was going beyond what Kay L.J. intended.

Finally I turn to *Bullock* v. *Bullock*,[12] a decision of Lord Merriman P. and Collingwood J., sitting in the Divisional Court. In that case the husband and wife married in 1944. The wife had previously married in 1921, but at the time of her remarriage had not heard of her former husband for many years. At the time of this remarriage she informed the husband of this and of her history. In 1959 the wife sought an order from the justices on the ground of her second husband's desertion, he contesting the matter on the ground that their marriage in 1944 was bigamous—a thoroughly unmeritorious defence in the light of his knowledge at the time of their marriage. The justices found, on the facts, that the first husband must be presumed to have died before 1944, and that the marriage was, accordingly, not bigamous and made an order in favour of the wife. This order was upheld by the Divisional Court on the facts, but in the course of his judgment[13] Lord Merriman P. dealt at some length with the possibility of applying the doctrine of estoppel in the light of the husband's knowledge of the facts at the time he entered into the marriage. He made it clear[14] that he was not expressing any final view on the position, and expressly founded his decision, as did Collingwood J.,[15] on the finding of fact made by the justices. However, his observations on the subject of estoppel were concurred in by Collingwood J., and although not binding upon me are entitled to the greatest respect, so much so that I thought it right to ask the Queen's Proctor for his assistance in this case. In the course of his judgment[16] the President reviewed the cases of *Wilkins* v. *Wilkins*[17] and *Woodland* v. *Woodland*[18] and the decision of Dr. Lushington in *Miles* v. *Chilton*.[19] He expressed the view that the report in *Wilkins* v. *Wilkins*[20] makes it plain that[21] " . . . unless this new trial had been "ordered, so that the verdict and judgment could be set aside,

[8] [1896] P. 108.
[9] Ibid. 114.
[10] [1928] P. 169, 172.
[11] [1896] P. 108, 114.
[12] [1960] 1 W.L.R. 975; [1960] 2 All E.R. 307.
[13] [1960] 1 W.L.R. 975, 976.
[14] Ibid. 980.
[15] Ibid. 981.
[16] Ibid. 976.
[17] [1896] P. 108.
[18] [1928] P. 169.
[19] (1849) 1 Rob.Eccl. 684.
[20] [1896] P. 108.
[21] [1960] 1 W.L.R. 975, 978.

"the husband would have been estopped from denying the "validity of the marriage," and concluded that[22] " . . . it is not "universally true, certainly as was assumed in *Miles* v. "*Chilton* (*orse. Miles*),[23] that merely because a bigamous marriage "is involved that prevents an estoppel from operating." He also indicated[24] that he was not convinced that an estoppel in pais as opposed to an estoppel per rem judicatam, which was the basis of *Wilkins* v. *Wilkins*,[25] "cannot operate in such a case."

It is well established that a bigamous marriage is void ipso jure or void ab initio, whichever phrase is to be preferred. Inasmuch as it is void it is, of its very nature, incapable of being converted into a valid marriage, as can happen in the case of a marriage which is merely voidable as opposed to void. I am content to adopt the words of Lord Greene M.R. in *De Reneville* v. *De Reneville*,[26] who put it thus: "a void marriage is one that will "be regarded by every court" (I stress the word "every") "in "any case in which the existence of the marriage is in issue "as never having taken place and can be so treated by both "parties to it without the necessity of any decree annulling it." It seems to me that it would be contrary to all principle if a ceremony, which is by definition null and void, could be converted into something valid and binding and capable of conferring status by the act or inaction of a party to it. It would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth, namely, that a marriage is bigamous and so correcting the status of parties to it and of their dependants merely because one or both of them had chosen to assert its validity or because one of them had failed to dispute or had concurred in the assertion of its validity by the other.

This court deals not merely with disputes between parties but with status. Marriage is not an ordinary contract—it is an institution which confers status on the parties to it and upon the children that issue from it, as Lord Penzance pointed out in *Mordaunt* v. *Mordaunt*.[27] It is an old maxim that estoppels are odious because they tend to shut out the truth—see Halsbury's Laws of England, 3rd ed., volume 15, p. 203—and it is well settled that they cannot override the law of the land; see Phipson on Evidence, 9th edition, page 705. If the law declares a bigamous marriage void and criminal, is this court nevertheless to treat it as valid and refuse to declare the truth by reason of the conduct, however unmeritorious, of one or both of the parties to it? The consequences to which this doctrine might lead are surely remarkable. If this court recognises the plea of estoppel it leaves one of the parties to it with two husbands, regarded as

[22] [1960] 1 W.L.R. 975, 979.
[23] 1 Rob. Eccl. 684.
[24] [1960] 1 W.L.R. 975, 979.
[25] [1896] P. 108.
[26] [1948] P. 100, 111; 64 T.L.R. 82, 85; [1948] 1 All E.R. 56, 60.
[27] (1870) L.R. 2 P. & D. 109, 126.

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such by law, or two wives as the case may be—a state of polygamy or of polyandry, both of which are foreign to the law of England. Suppose that in such a case the bigamous spouse is prosecuted and convicted and the bigamy declared, he or she would nevertheless remain legally married in the eyes of the matrimonial court. Suppose there has been a child of the bigamous union, is that child in the eyes of the law the offspring of a valid or bigamous marriage? Or suppose that such a child or any other party interested comes to this court for a declaration that the marriage is bigamous. In that case no estoppel would arise owing to the difference in parties and this court would declare the nullity which it had refused to declare at the suit of a party to the illegal union.

It may be said, what is the court to do in a case such as *Wilkins* v. *Wilkins*,[28] when after a fair trial a false decision has been reached? I think the short answer is that it must declare the truth, now that the truth is known, and then correct the error, just as it has to do if, for example, judgment is obtained against a party that does not exist. In *Thompson* v. *Thompson*,[29] the Court of Appeal considered the whole question of estoppel in relation to proceedings for divorce and concluded that estoppel cannot bind the court so as to fetter its statutory duty under section 4 of the Matrimonial Causes Act, 1950, "to enquire into "the facts alleged." This duty, in its present wording, derives from the corresponding section in the Act of 1937, when the wording of section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, which in turn was derived from section 25 of the Matrimonial Causes Act, 1857, was altered. Prior to 1937 the court was required to be satisfied as to the facts alleged.

Counsel for the Queen's Proctor sought to argue that the change in wording in 1937 imposed a duty on the court which did not exist when the cases of *Woodland* v. *Woodland*[30] and *Wilkins* v. *Wilkins*[31] were decided. He also suggested that although section 4 of the Act of 1950 refers only to a petition for divorce as opposed to nullity, the duty arises in the present case since the form of the answer involves both nullity and divorce. For myself, I would prefer to rest my decision on broader grounds. It was always the practice of the ecclesiastical court to inquire into the facts, and that practice, in the absence of statutory definition or alteration, remains applicable in cases of nullity by reason of the provisions of section 32 of the Supreme Court of Judicature (Consolidation Act, 1925.

The case of *Miles* v. *Chilton* (*orse. Miles*)[32] affords, I think, compelling authority. In that case the husband sought a decree of nullity alleging bigamy on the part of his wife. She, by her answer, pleaded inter alia that he had known all the facts and,

[28] [1896] P. 108.
[29] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161, C.A.
[30] [1896] P. 108.
[31] [1928] P. 169.
[32] 1 Rob.Eccl. 684.

knowing them, had induced her to marry him, telling her that she had been lawfully divorced in proceedings which had been instituted by the first husband in collusion with the petitioner. Dr. Lushington, in his judgment,[33] rejected the plea in the wife's answer. He referred to the general principle of estoppel and to the absence of authority for their application to marriage, which he said[34] "is more than a civil contract." It is plain from his judgment that he had considered all the available authorities and, having done so, had failed to find any case in which a previous averment that a marriage was valid had been held to preclude the petitioner, who had made it, from subsequently asserting the contrary and obtaining a decree of nullity.

This case was followed in *Andrews* v. *Ross*.[35] I think the judgment of Butt J. puts it very well.[36] "The facts of this case "are very short. The petitioner was the sister of the first wife "of the respondent, who died shortly after marriage. The peti- "tioner was present at the marriage of her sister to the respon- "dent, and was, therefore, perfectly well aware of whatever "impropriety or illegality there may have been in the marriage. "She chose to go through the ceremony of marriage with a know- "ledge of all the circumstances. In that state of things, and in "accordance with all the principles of law administered in other "courts, she would not be allowed to sue for a declaration of "nullity of marriage. In other words she would not be allowed to "get rid of any obligation that she had entered into with her eyes "open. But the authorities cited, and especially the authority of "*Miles* v. *Chilton*,[37] show that the Ecclesiastical Courts have "applied a different rule, and that the principles prevailing in "regard to contract of marriage differ from those prevailing in all "other contracts known to the law. It is not necessary that I "should go into the cases, suffice it to say that the authorities "show that the Ecclesiastical Courts would pronounce this mar- "riage null and void under the circumstances to which I have "referred. By section 22 of the Matrimonial Causes Act of 1857 "it is provided that in all suits and proceedings other than "proceedings to dissolve any marriage, the court shall pro- "ceed to act and give relief on principles and rules as "nearly as may be conformable to the principles and rules "on which the Ecclesiastical Courts have heretofore acted. "By them I am bound. Therefore I consider myself called upon "to declare this marriage null and void, but I shall refuse the "petitioner her costs." I agree with the submission of counsel for the Queen's Proctor that if I have to choose between the two lines of authority that led by *Miles* v. *Chilton* (*orse. Miles*)[37] is to be preferred.

Apart, however, from these considerations, I do not see

[33] 1 Rob.Ecc. 684, 692.
[34] Ibid. 694.
[35] (1888) 14 P.D. 15.
[36] Ibid. 16.
[37] 1 Rob.Eccl. 684.

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how the doctrine of estoppel can apply in the present case. In so far as there is any question of estoppel per rem judicatam it can only arise from the decision of the justices, which is not binding upon this court. If it is put as an estoppel in pais I think the short answer is that both these people knew the position. The wife went before the justices and asserted by implication the validity of her marriage because she wanted maintenance. The husband submitted to an order, thus by implication conceding the validity of the marriage because he did not want to be prosecuted for bigamy. I am content to adopt the words of Langton J. in *Square* v. *Square* (*orse. Bewicke*) [38]: "If two people with the "same source of information assert the same truth, or agree to "assert the same falsehood at the same time, I cannot see how "either can be estopped as against the other from asserting differ-"ently at a later time." For these reasons I have thought it right to grant both parties a decree of nullity.

Order accordingly.

Solicitors: *F. W. P. Lupton, Esq., The Law Society, Divorce Department; John Q. Clayton & Co., Bedford; Queen's Proctor.*

E. J.

[38] [1935] P. 120, 126.

[CHANCERY DIVISION.]

1961 *April* 18, 19, 20, 21, 24, 25, 26, 27; *May* 2.

Pennycuick J.

A. ROBERTS & CO. LTD. AND ANOTHER *v.* LEICESTERSHIRE COUNTY COUNCIL.

[1958 A. No. 2162.]

Contract—Rectification—Mistaken belief that particular term included—Execution of contract by other party knowing of first party's mistake—Whether first party entitled to rectification.

Estoppel—Conduct, by—Contract—Mistaken belief of one party that term included—Execution by other party with knowledge thereof—Rectification.

On January 30, 1954, in answer to an advertisement by the county council, a company submitted a tender to erect a school for £165,910 in which the period for completion of the works was left blank. On February 5, a sub-committee of the education committee of the council resolved to accept the company's tender subject to negotiation of a reduction in price and, on February 22, C., one of the council's officers, so informed the company. On March 8, the company submitted a revised tender at a price of £138,399 9s. 3d. The revised tender specified the period for completion of the works as 78 weeks from instructions to proceed with the works. After the receipt of that tender C. and S., another of the council's officers, decided that the period for completion to be inserted in the contract

should not be 18 months as stated in the revised tender but 30 months. S. then instructed T., another officer of the council, that the period for completion was to be 30 months and T. instructed the clerk to the council to prepare the written contract on that footing.

On March 13, T. wrote to the company informing it that the committee had accepted its tender of £138,399 9s. 3d. enclosing an official order asking the company to execute the work in accordance with the tender of March 8 at £138,399 9s. 3d. The contract was sent to the company on March 17 and specified the date for possession as March 25, 1954, and the date for completion as September 30, 1956. None of the officers of the council called the attention of the company to the fact that the period for completion inserted in the contract differed by a year from that specified in the revised tender. There was a direct relationship between the period for completion and the price and had the company made the revised tender on the basis of a 30-month rather than an 18-month period the price quoted therein would have been higher. The company's seal was affixed to the contract on or about March 24 in the presence of two directors and the secretary of the company, all of whom, at all material times, believed that the period for completion was 18 months. The contract was returned to the council on March 25.

On March 30, there was a meeting between officers of the council, including S., and of the company at which a period of 18 months was mentioned. On April 5, there was a further meeting at which one of the officers of the company produced a progress schedule showing a period for the completion of the works of 72 weeks and S. saw that document. The council executed the contract on April 12.

In February, 1955, the directors of the company learned that the council was working on the basis of a 30-month period for completion and wrote to the council asking them to arrange for the date of completion to be corrected to September 30, 1955, but the council declined to do so. The company had difficulties with the sub-contractors nominated by the council and did not complete the work until early in 1956. In an action by the company claiming, inter alia, rectification of the contract by inserting September 30, 1955, for September 30, 1956, as the date for completion:—

Held, (1) that, on the evidence, the council and the company were not at one as to the date for completion to be inserted in the contract so that the company was not entitled to rectification on the ground that the 30-month period for completion was inserted in the contract by a common mistake;

(2) That a party was entitled to rectification of a contract if he proved beyond reasonable doubt that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed that term to be included; that the facts raised beyond reasonable doubt the inference that, by the end of the meeting of April 5, S., whose knowledge should for this purpose be treated as the knowledge of the council, knew that the company believed the period for completion under the contract to be 18 months; and that, therefore, the company was entitled to rectification of the contract as claimed.

Action.

The following statement of facts is taken from the judgment of Pennycuick J. The second plaintiff, A. Roberts & Co. (Holdings) Ltd., at all relevant times carried on the business of building contractors under the name now borne by the first plaintiff, A.

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Roberts & Co. Ltd. As the result of a reconstruction in 1956, it became a holding company with its present name and the first plaintiff was incorporated as a trading company to take over its business. The second plaintiff (hereinafter called "the company") was the party concerned in all the proceedings to which the action related. On December 23, 1953, the Leicestershire County Council published an advertisement for tenders for the erection of a school to be known as the Hinckley Burbage Secondary Modern School. It was important to the council that work on the school should begin before March 31, 1954, since otherwise it would not qualify for a grant for the year 1953–54 from the Ministry of Education. On January 30, 1954, the company put in a tender in the following terms: "Leicester County Council. "Hinckley Burbage Secondary Modern School—Erection. Form "of Tender. To the Leicester County Council. We the under-"signed do hereby tender and undertake to carry out the above-"mentioned works in accordance with the conditions of con-"tract, drawing and bills of quantities and to the satisfaction of "the county architect, for the sum of (in words) one hundred and "sixty-five thousand nine hundred and ten pounds only. Amount "of tender £165,910 0s. 0d. We agree to maintain in complete "repair the whole of the new works executed for a period of six "months after the certified date of completion. If this tender "is accepted we agree to enter into an agreement for the due "performance of the works, and to complete with works within "—— of the date of instructions to proceed. As witness our hand "this thirtieth day of January 1954." The tender was signed "E. B. Cruse, technical director. A. Roberts & Co. Ltd." The period within which the company agreed to complete the works was left blank.

On February 5 the tenders sub-committee of the education committee of the council resolved that the company's tender be accepted subject to reduction being negotiated to bring the cost within the figure authorised by the Ministry. On the same date one Collins, the county architect, wrote to the company as follows: "Hinckley Burbage Secondary Modern School. I have "to inform you that your tender for the erection of the above-"named school is among the low ones receiving consideration. "I enclose copy of the bill of quantities and shall be glad if you "will price this in and let me have it back again by Monday, "February 15, 1954." On February 9 he wrote to the company "With reference to my letter of February 5, 1954, I shall be "grateful if when you forward the completed bill of quantities "you will give me a list of recent contracts which you have "carried out and the extent of these." On February 12 the company replied complying with these requests.

On February 22 Collins wrote to the company: "I have to "inform you that the committee has recommended for accep-"tance your tender for the erection of the above-named school, "subject to the tender being reduced by the adjustment of P.C.'s

"and the omission of certain items, by £28,000 approximately, "and to the approval of the Ministry of Education. It is hoped "that this approval will be received within the next fourteen "days. In the meantime would it be possible for you to make "preliminary arrangements for the contract guarantee bond in "a sum of 10 per cent. of the amount of contract, and let me "have a letter from your guarantors that they will be prepared "to act as surety and that there will be no delay when the con-"tract documents are forwarded for completion. This informa-"tion is required to ensure that the work is started before March "31, 1954." The company obtained an assurance from its bank that the bank would be prepared to join in a performance bond and so informed Collins.

On March 8, 1954, the company sent to the council a revised tender in which the figure of £138,399 9s. 3d. was substituted for the figure of £165,910 0s. 0d. The revised form of tender contained a further important departure from the original tender in that it proceeded to specify the time within which the company agreed to complete the works, namely, within 78 weeks of the date of instructions to proceed. A day or two after receipt of that tender one Thornton, the progress officer in the architect's department of the council, asked one Smith, the assistant county architect for the education section, who, under Collins, had the handling of the matter, whether the date for completion under the contract should or should not be 78 weeks, i.e., the period mentioned in the revised tender as the period from the date of instructions to proceed to the date of completion.

As the result of that question Smith had a discussion with Collins at which they decided that the period for completion to be inserted in the contract should be not 18 months but a whole year longer, namely, 30 months. The date was altered for the benefit of the council and not that of the company. There was a direct relationship between price and contract period, and if the company had made its tender on the basis of a 30-month period the price would have been higher. Collins and Smith deposed to the deliberate selection of the 30-month period: Thornton deposed that he was instructed by Smith that the period was to be 30 months, and His Lordship accepted the evidence of Collins, Smith and Thornton on this point.

At that stage Collins personally dropped out of the picture, leaving the matter in the hands of Smith. It was accepted by the council that Smith acted throughout with the authority of Collins. Smith in turn gave instructions to Thornton to take the next steps in the matter. On March 11 Thornton sent a memorandum over the signature of Collins to the clerk to the council to the following effect: "Memorandum from county architect to the "clerk of the county council. March 11, 1954. Hinckley Bur-"bage Secondary Modern School. I shall be grateful if you will "arrange for the preparation of the contract documents for the "erection of the above-named school. Particulars you require are

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"as follows . . . (c) Amount of tender: £138,399 9s. 3d.; (d) "Amount of bond: £13,839; (e) Name, address and status of "contractors: A. Roberts and Co. Ltd., 79, Eccleston Square, "Victoria, London, S.W.1; (f) Date for possession: March 25, "1954; (g) Date for completion: September 30, 1956."

On March 13, Thornton, again over the signature of Collins, wrote to the company in the following terms: "Dear Sirs, "Hinckley Burbage Secondary Modern School. I have to in-"form you that the committee has accepted your tender amount-"ing to £138,399 9s. 3d. for the erection of the above-named "school. The official order No. CA/A.2623 is enclosed. Work-"ing drawings will be forwarded to you in due course. The "contract documents will be sent by the clerk of the county "council within the new few days. I am inserting in the contract "a provisional starting date of March 25, 1954. Will you kindly "note that the work must not be started until the contract "documents have been completed and returned to the clerk. "When the contract documents are received I shall be glad if "you will deal with these as quickly as possible as it is impera-"tive that the work be commenced as near as possible to the "date given in the contract and in any case not later than March "31, 1954. I shall also be glad if you will endeavour to have the "contract guarantee bond completed as expeditiously as possible. "When you are in a position actually to commence the work, "will you kindly inform me by letter when I will arrange for my "representative to meet you on the site." With that letter was included an official order addressed to the company containing the following terms: "Please execute the work stated below, "in accordance with your tender of 8/3/54 @ £138,399 9s. 3d. "The whole of the work to be done in a thoroughly workman-"like manner and to my entire satisfaction. The enclosed "postcard(s) are to be sent to me on commencement and/or com-"pletion of the work. All goods to be dispatched to: Burbage "Secondary Modern School. Erection as per plans and bills of "quantities. See letter attached."

None of the officers of the council at any time called the attention of the company to the fact that the period for completion to be included in the contract differed by a whole year from the period specified in the tender. Neither Smith nor Thornton considered that he was under any obligation to call the attention of the company to that change in the date for completion under the contract. Collins admitted in evidence that it would have been been better to do so, as did one Hirst, then an assistant architect to the council.

On March 17, 1954, the clerk to the council wrote to the company enclosing a form of contract in respect of the proposed work. That document, which was the document sought to be rectified in the action, was, so far as material, in the following terms: "Articles of agreement made . . . the 12th day of April, 1954, be-"tween the Leicester County Council . . . (hereinafter called 'the

"'employer' of the one part and A. Roberts and Co. Ltd. . . . "(hereinafter called 'the contractor') of the other part. Whereas the employer is desirous of erecting a secondary modern "school (hereinafter called 'the works') at Burbage, Hinckley, "in the county of Leicester and has caused drawings and bills "of quantities showing and describing the work to be done to be "prepared by or under the direction of Tom Anderson Collins, "A.R.I.B.A. . . . (hereinafter referred to as 'the architect') And "whereas the said drawings numbered one to fourteen inclusive "(hereinafter referred to as 'the contract drawings') and the said "bills of quantities have been signed by or on behalf of the "parties hereto: Now it is hereby agreed as follows: 1. For the "consideration hereinafter mentioned the contractor will upon "and subject to the conditions annexed hereto execute and complete the works shown upon the said drawings and described "by or referred to in the said bills of quantities and conditions. "2. The employer will pay to the contractor the sum of "£138,399 9s. 3d. (hereinafter referred to as 'the contract sum') "or such other sum as shall become payable hereunder at the "times and in the manner specified in the said conditions. "3. The term 'the architect' in the said conditions shall mean the "said Tom Anderson Collins."

There followed 27 conditions which were in a common form and an appendix by reference to certain of the conditions which included the words: "Date for possession: March 25, 1954. Date "for completion: September 30, 1956."

On or about March 24 the common seal of the company was affixed to this document in the presence of Frank Johnson and E. B. Cruse, as directors, and A. D. Munrow, as secretary, of the company. At all relevant times, including the date when the seal was so affixed, the two directors and the secretary were under the belief that the period for completion specified in the contract was 18 months. Munrow failed to notice that the date specified was 1956 and not 1955, and the directors did not at this stage read the contract. None of the three officers of the company discovered until a much later time the date in fact specified in the contract.

The contract was returned by the company to the council on March 25, but the council did not execute the contract for over a fortnight. Before such execution two important meetings took place. On March 30 there met first at the council's architect's office and later on the building site Smith, Hirst, Cruse, Mottram (then area control manager of the company) and one Corby (then area manager of the company). A number of matters concerning the building project were discussed, including the preparation of a progress schedule for the erection of the building. Cruse mentioned an 18-month period, but was probably referring to the period in which the company hoped to complete rather than to the period for completion mentioned in the contract. Corby said

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he intended to finish the work in 18 months. Smith warned Corby that he did not think the company would be able to complete in 18 months.

On April 1 Corby wrote to the county architect a letter opening with the following paragraphs: "We confirm the meeting at "your office and on site on March 30, between Mr. Smith and "Mr. Hirst, Mr. E. B. Cruse (technical director), Mr. Mottram "and the writer. We take this opportunity of thanking you for "the courteous reception accorded to our representatives, and "record the following points discussed: 1. Progress schedule. "We are to prepare a draft progress schedule for the work, to be "the basis of a further meeting to be arranged later this week by "telephone, for Monday, next, April 5. 2. Nominated sub-con-"tractors. You will give us as far as possible on Monday next, "a list as complete as possible of the nominated sub-contractors "you desire to appoint, in order that we may arrange a co-"ordinated programme with them."

On April 5 there met at the council's architect's office Smith, Hirst, Mottram and Corby, together with two representatives of Gleeds and Partners, the quantity surveyors nominated by the council's architect. At that meeting there was a further discussion as to the programme for the execution of the works. Mottram produced a progress schedule prepared by him then in draft form and subsequently printed in the form of a document. That document showed a period of 72 weeks for the completion of the works. Mottram testified positively that Smith saw that document at this meeting and said that Smith and Hirst themselves mentioned 72 weeks. Corby testified to the same effect rather more cautiously. Their evidence was borne out by that given on commission by Hirst. The two representatives of Gleeds did not remember seeing a progress schedule. Smith denied that he saw the progress schedule on this occasion. His Lordship held that the letter dated April 1 and the inherent probabilities strongly indicated that a progress schedule would be produced on April 5, and was satisfied that Smith's recollection on this point was at fault, and that Smith saw the progress schedule at this meeting. In the course of the discussion Mottram and perhaps also Corby made it clear that the company intended to complete within the 72 weeks. Hirst also said: "What was clear to me "was the fact that they were going to get the job done in 18 months." The discussion was largely concerned with the sub-contractors whose work had to be fitted in with that of the company, and timing was a matter of major concern.

On April 12 the council executed the contract. Work on the building then began. One Lucking, a surveyor employed by the company, prepared applications for interim monthly certificates under the contract and submitted those to one of Gleeds' representatives who informed Lucking that the period for completion under the contract was 30 months, and upon that information he prepared

the first two certificates accordingly. He was then informed by someone in the company's office that the period for completion under the contract was 18 months. He prepared all subsequent certificates on this basis. The company encountered various difficulties with the sub-contractors nominated by the council, and in the event was unable to complete the work till a date early in 1956.

In February, 1955, the directors of the company learned that the council was working a 30-month period for completion, and on February 28 Corby wrote to the council's architect as follows: "We are very concerned to discover that there would appear to "be a clerical error on the form of contract for the above, in "that the date for completion is given as September 30, 1956, "instead of September 30, 1955, which is the correct date. You "will find that our tender dated March 8, 1954, undertook the "completion of the works within 78 weeks of the date of instruc-"tions to proceed. We received your Official Order No. "C.A./A.2623 dated March 12, 1954, instructing us to execute "the works in accordance with our tender, under cover of a letter "dated March 13, 1954, wherein it stated that it is imperative "that the work be commenced as near as possible to March 25, "1954., and in any case not later than March 31, 1954. In all "these circumstances we shall, therefore, be glad if you will kindly "arrange for the date on the contract documents to be corrected "and initialled by the parties."

A meeting was held on March 2 between the representatives of the council and of the company and certain others. Collins made a note of this meeting, and on March 9 wrote to the company as follows: "With reference to your letter of February 28, "I cannot see that any useful purpose would be served by alter-"ing the contract date at this juncture. There is no objection to "your completing the work much earlier than the date stipulated. "For your information, I enclose a note of our conference on "March 2, when the above question, inter alia, was discussed."

In November, 1958, the first plaintiff commenced an action against the council claiming rectification of the contract by the insertion therein of September 30, 1955, in place of September 30, 1956, for the date for completion, damages for breach of contract, alternatively £15,437 2s. 10d. being money due to the company in accordance with the terms of the contract and costs. On April 18, 1961, the case came before Pennycuick J. on the issue of rectification only when leave was given to the first plaintiff to add the company as a plaintiff.

J. Stuart Daniel Q.C. and *A. J. Butcher* for the plaintiffs.

J. L. Arnold Q.C. and *D. A. Thomas* for the council.

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The following cases not referred to in the judgment were cited in argument: *Blay* v. *Pollard and Morris* [1]; *Firth* v. *Staines*.[2]

Cur. adv. vult.

May 2. PENNYCUICK J. stated the facts substantially as set out above observing that the letter from Smith to the company dated March 13, 1954, and the official order enclosed therewith were well calculated to divert the attention of the company from the fact that the period for completion in the contract differed by a whole year from the period specified in the revised tender and continued: The company claims rectification of the contract upon two alternative grounds, namely: (1) that it was the common intention of the parties that the contract should include a period for completion of 18 months and the period of 30 months was inserted under common mistake; and (2) that the council cannot be heard to say that it was not mistaken as to the date for completion since when it executed the contract it well knew that the company was mistaken as to the date for completion included in the contract, yet stood by and took no step to draw the company's attention to its mistake. The second ground is formulated in full in the reply delivered by the company in this action.

Upon the facts as I have stated them it is clear that the council and the company were not at one upon the length of the period for completion intended by them respectively to be inserted in the contract, and, accordingly, the company is not entitled to rectification upon the first ground relied upon by it.

The second ground rests upon the principle that a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included. Mr. Arnold for the council formulated the principle in slightly different terms, as follows, viz., the plaintiff must show that his intention was that the term sought to be introduced by rectification should be included in the contract and (so far as now relevant) that the omission of the term was occasioned by the dishonest conduct of the defendant in acceptance of the formation of the contract without the term in the knowledge that the plaintiff thought the term was included. Mr. Arnold thus introduces into his formulation of the principle the word "dishonest," but he accepts that such conduct by the defendant in his formulation is of its nature dishonest, so that the word "dishonest" appears to carry the matter no further. I do not think that there is any substantial disagreement as to the scope of the principle.

The principle is stated in Snell on Equity, 25th ed. (1960) p. 569, as follows: "By what appears to be a species of equitable

[1] [1930] 1 K.B. 628, C.A.

[2] [1897] 2 Q.B. 70; 13 T.L.R. 394.

"estoppel, if one party to a transaction knows that the instru-"ment contains a mistake in his favour but does nothing to "correct it, he (and those claiming under him) will be precluded "from resisting rectification on the ground that the mistake is "unilateral and not common."

The exact basis of the principle appears to be in some doubt. If the principle is correctly rested upon estoppel it seems to me that it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendants in such circumstances. If, on the other hand, the principle is rested on fraud, obviously dishonesty must be established. It is well established that a party claiming rectification must prove his facts beyond reasonable doubt, and I think this high standard of proof must equally apply where the claim is based on the principle indicated above.

I have been referred to two recent decisions on rectification in the Court of Appeal, namely, *George Cohen, Sons & Co. Ltd.* v. *Docks and Inland Waterways Executive* [1] and *North Thames Gas Board* v. *Sunbury-upon-Thames Urban District Council.*[2] In the former of these cases the court was concerned primarily, and in the second exclusively, with the question whether on the particular facts there had been such common mistake as to warrant rectification on the primary ground, a question which was answered in the affirmative in the former and in the negative in the latter case. In the former case there was also some discussion upon an alternative ground for rectification germane to the second ground relied upon here, and there was considerable argument before me as to the exact scope of what was said upon this alternative ground.

I have also been referred to a number of other cases in this connection, including *Smith* v. *Hughes* [3] and *Whiteley* v. *Delaney.*[4] For the purpose of the case before me it will be sufficient to rely upon the principle set out above. Nothing in the cases cited throws any doubt upon this principle, and I do not think that I could usefully go further into the law.

Almost at the end of the trial, during his speech in reply, Mr. Daniel for the company, asked for leave to amend the reply by including certain alternative claims based on a representation alleged to have been contained in the order form dated March 12 and the letter dated March 13. I did not think it right to allow at that stage these amendments, which involved issues of fact and one of which alleged fraud.

Returning to the facts of the present case, the company, as I have held, believed that the 18-month period of completion was included in the contract. The question then is: did the council, when it concluded the contract with the 30-month period, do so in the knowledge that the company believed the 18-month period

[1] (1950) 84 Ll.L.R. 97, C.A.
[2] (Unreported), June 14, 1955, Court of Appeal.
[3] (1871) 6 Q.B. 597, D.C.
[4] [1914] A.C. 132, H.L.

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Pennycuick J.

was included in it? Mr. Arnold accepts that for this purpose the knowledge of the council's officers should be treated as the knowledge of the council. He also accepts that the relevant officers are Collins and Smith, and that the county clerk, who drew the contract on their instructions as transmitted by Thornton, may be left out of account.

I do not think that, on the evidence, either of the officers concerned, that is Collins and Smith, could properly be held to have had knowledge of the company's belief in the 18-month period during the interval between the dispatch on March 17 of the contract specifying the 30-month period and the meeting on March 30. The point then narrows itself to the knowledge of Smith as the result of the meetings held on March 30 and April 5. Do the facts raise beyond reasonable doubt the inference that by the end of the latter meeting Smith knew that the company was under the belief that the period of completion under the contract was 18 months?

I proceed to summarise the facts relevant to the state of Smith's knowledge by the end of the meeting on April 5: (1) He knew that under the revised tender the company had agreed to complete the works within 78 weeks of instructions to proceed; (2) as an experienced architect he must have appreciated that the price under the tender was related to the period for completion, and that if the period had been longer the price would probably have been higher; (3) he had discussed the period for completion with Collins and on the latter's instructions had, through Thornton, instructed the council's clerk to include in the contract 30 months as the period for completion; (4) he had taken no steps to call the attention of the company to the inclusion of 30 months as the period for completion instead of 18 months; (5) he had been told by Cruse and Corby on March 30 that the company aimed to get the work finished in 18 months, and had told Corby he did not think this would be possible; (6) he had been shown by Mottram on April 5 the progress schedule showing a period of 72 weeks for completion of the work, and had been assured by Mottram, and perhaps also by Corby, that the company intended to complete in that time; (7) as an experienced architect, he could not fail to appreciate that 72 weeks for completion in the progress schedule was appropriate to an 18-month period for completion under the contract, and inappropriate to a 30-month period for completion under the contract; (8) Mottram and Corby made no comment on what, if they believed the period for completion under the contract to be 30 months, must have seemed to them a startling anomaly.

In my judgment, these facts raise beyond reasonable doubt the inference that Smith did know at latest by the end of the meeting on April 5 that the company believed the period for completion under the contract to be 18 months. Only if he was unusually stupid or unusually heedless could he have failed to understand the company's state of mind at least by the end of

this meeting. I am satisfied he was neither stupid nor heedless, and it seems to me he did realise the company's mistake. It is contended that it would be inconceivable for an official of Smith's position, if he did realise the company's mistake, to stand by without bringing it to the company's notice; but after hearing Smith's evidence, and in particular his views upon the propriety of inserting a new date for completion in the contract without communication with the company, I am unable to attribute any weight to this argument.

It is also contended that Smith had no motive for acting as he did. No one suggests that he had any corrupt personal motive, but, as a loyal officer of the council he must have recognised that it would be extremely inconvenient if the contract were to go off, bearing in mind that work under it must begin by the end of March, 1954, in order to qualify for the Ministry grant.

As I have said, this issue appears to me to depend upon the state of Smith's knowledge, and I do not feel myself concerned either to criticise or to excuse his conduct.

I propose, accordingly, to order that the contract be rectified by the insertion of September 30, 1955, in place of September 30, 1956, as the date for completion.

Order accordingly.
Defendant to pay the plaintiffs' costs of this issue.

Solicitors: *Sydney Redfern & Co.; Kingsford, Dorman & Co. for John A. Chatterton, Leicester.*

V. A. M.

[QUEEN'S BENCH DIVISION.]

McCULLIE *v.* BUTLER.

[1955, M. No. 185.]

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May 10.

Diplock J., sitting with two assessors,

Legal Aid—Costs—Taxation—Negotiations with insurers—Whether costs of abortive negotiations recoverable out of fund—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51).

Legal Aid—Costs—Taxation—Scottish solicitors—Instructions taken from legally-aided plaintiff in Scotland—Whether "solicitor" acting as "agent" — Whether charges paid to Scottish solicitors taxable as disbursements—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *Sch.* 3, *para.* 2 (3).

In 1952, a legally-aided infant plaintiff sustained personal injuries on the defendant's farm. An action was begun in the High Court in England against the defendant for damages in respect of

[Reported by Miss J. A. Buttery, Barrister-at-Law.]

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the injuries, but by the time the action was brought and the legal aid certificate issued the plaintiff and her family had moved to Scotland, so that it became necessary to take instructions from them there. The action was heard in London by Donovan J., who gave judgment for the defendant, and on appeal to the Court of Appeal his judgment was upheld.

On taxation of the plaintiff's solicitors' bill of costs, the taxing master, inter alia, disallowed five items concerning abortive negotiations between the plaintiff's solicitors and the defendant's insurers on the ground that the latter were not parties to the action. He further disallowed any items in respect of the Scottish solicitors' bill of costs but made some allowance in respect of the disbursements he regarded as properly incurred for services under the heading "Instructions for Brief." The plaintiff's solicitors brought in objections which were overruled by the taxing master.

On a summons for a review of the taxation:—

Held, (1) that the five items concerning the negotiations were properly recoverable out of the legal aid fund, for such negotiations often led to a settlement of the action and the avoidance of the incurrence of costs.

(2) That, for the purposes of the Legal Aid and Advice Act, 1949, Scottish solicitors were in no different position from other foreign lawyers or professional or ordinary agents for the purpose of preparing litigation in this country, and were not solicitors within the meaning of that expression in the Act of 1949, so that paragraph 2 (3) of the Third Schedule thereto [1] had no application to them. Accordingly, the charges incurred by and paid to the Scottish solicitors were properly taxable as disbursements in the ordinary course, and should not have been included under the heading "Instructions for Brief," and the amount to be allowed for these disbursements was the proper rate of charge in Scotland for the performance of the necessary services through the agents employed.

(3) That the plaintiff's solicitors were entitled to recover their costs of bringing in the objections.

Sutton v. *Sears* [1960] 1 Q.B. 97; [1959] 3 W.L.R. 791; [1959] 3 All E.R. 545 followed.

Rolph v. *Marston Valley Brick Co. Ltd.* [1956] 2 Q.B. 18; [1956] 2 W.L.R. 929; [1956] 2 All E.R. 50 not followed.

Summons.

In 1952, the plaintiff, Maureen Betty McCullie, an infant aged some two years, sustained personal injuries through contact with some machinery on the farm of the defendant, Peter Butler. Through her father as next friend she began an action in the High Court in England and a legal aid certificate was issued to her. Shortly after the accident the plaintiff and her family moved to Scotland and it became necessary to take further instructions from them there through Scottish solicitors. Throughout the proceedings which followed all the parties were under the impression that the Scottish solicitors were the principals of whom the plaintiff's English solicitors, a Farnham firm,

[1] Legal Aid and Advice Act, 1949, Sch. 3, para. 2 (3): "Where a "solicitor has acted as agent for an- "other, the sums allowed under the "foregoing provisions of this para- "graph shall be the aggregate amount "allowed them, but may be divided "between them as they may agree."

were the agents, which was the reversal of the true situation. The action was heard in London by Donovan J. who gave judgment for the defendant, and on appeal to the Court of Appeal his judgment was upheld. On taxation of the plaintiff's solicitors' bill of costs the taxing master, inter alia, disallowed five items in respect of abortive negotiations between the plaintiff's solicitors and the defendant's insurers on the grounds that the latter were not parties to the action. He also disallowed any items in respect of the Scottish solicitors' bill of costs but made some allowance in respect of the disbursements he regarded as properly incurred for services under the deading "Instructions for Brief." The plaintiff's solicitors' objections to these disallowances were overruled by the taxing master, and they now applied by way of summons for a review of the taxation by a judge in chambers.

The summons was adjourned into open court for judgment.

E. P. Wallis-Jones for the plaintiff.

Brian Neill for the solicitor appointed by the Lord Chancellor to intervene on behalf of the legal aid fund.

Diplock J. This is a review of taxation of the costs, under the Legal Aid and Advice Act, 1949, of the plaintiff's solicitors in an action brought in the High Court in England. As the review raises two questions of some general importance I have, with the consent, and indeed at the request, of counsel, adjourned into open court for the purposes of giving my judgment.

It is necessary by way of introduction to say a word or two about the nature of the action. The infant plaintiff sustained personal injuries in Hampshire, in 1952, when she was a child of some two and a half years. By the time the action was brought and the legal aid certificate issued to the applicants in this review, who are solicitors carrying on their profession in Farnham, the infant plaintiff and her parents had moved to Scotland, and, accordingly, it was necessary that instructions should be taken from her, and particularly from her parents, in that country. The action was heard in London before Donovan J., who gave judgment for the defendant, and there followed an appeal to the Court of Appeal in London which upheld the judgment of Donovan J. dismissing the action.

The first matter with which I am concerned relates to the five items in the bill of costs dealing with negotiations, which proved to be abortive, which took place between the plaintiff's solicitors and the insurers of the defendant. The taxing master in the taxation which took place in the summer of 1960 disallowed those costs on the grounds that the defendant's insurers were not parties to the action. In an earlier case which I decided in chambers in December last year, *Wylie* v. *Bartlett*,[1] I held that the costs of such negotiations are properly recoverable out of the

[1] (1960) unreported.

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fund under the Legal Aid and Advice Act, 1949. It seems to me that such negotiations are invaluable not only in the interests of the client but also in the interests of the legal aid fund, for, as everyone knows, in a number of cases the result of such negotiations is a settlement of the action and the avoidance of the incurring of costs. I, accordingly, following my decision in chambers in *Wylie* v. *Bartlett*, hold that the costs of these negotiations are properly recoverable. No question arises, as to their quantum, and I therefore allow the objections in respect of those items.

The next matter, which raises a question of principle, relates to the services performed by the firm of solicitors in Scotland, Miller and Mackay. As I have said, at the time the action began the plaintiff and her parents were resident in Scotland and it therefore became necessary and proper for the applicants to instruct agents in Scotland to interview the plaintiff, her parents and other witnesses, and to assist in taking instructions and the like. I think it is desirable that I should state what the position of Scottish law agents is when they are employed for the purposes of performing services in Scotland in relation to litigation which takes place in London and Wales. Scottish solicitors are, for the purposes of the Legal Aid and Advice Act, 1949, in no different position from other foreign lawyers or from other foreign professional or ordinary agents who are employed for the purpose of preparing litigation in this country. They are not solicitors within the meaning of that expression in the Act of 1949, which relates only to legal aid and advice in England and Wales. Accordingly, paragraph 2 (3) of the Third Schedule to that Act, which provides: "Where a solicitor has acted as agent for another, "the sums allowed under the foregoing provisions of this para-"graph shall be the aggregate amount allowed them, but may "be divided between them as they may agree," has no application to Scottish solicitors or to any other foreign lawyer. It relates only to the ordinary agency between solicitors of the Supreme Court of England. It follows, therefore, that a Scottish solicitor, employed in the circumstances in which the Scottish solicitors were employed in this case, must be treated, for the purposes of taxation, simply as a foreign agent, and the charges incurred by him and paid to him are charges properly taxable as disbursements in the ordinary course. It may be that in many cases it does not have much practical consequence whether they are in fact put into the item of "Instructions for Brief," or into the detailed particulars of disbursements, but in the case where there is taxation under the Legal Aid and Advice Act, the items "Instructions for Brief" are subject to a reduction of 15 per cent. and it is obviously desirable, therefore, that they should be properly charged as disbursements where they would not be subject to that result. I should add that, just as in the case of other foreign lawyers, the proper amount to be allowed for disbursements is the proper rate of charge in the country concerned,

in this case Scotland, for the necessary services the agent employed To avoid any difficulty for the taxing master in making up his mind on what the proper rate of charge for services is, it seems to me to be very desirable that when an item of this kind is included in the bill of costs there should be a detailed statement of the circumstances which required the services of the foreign lawyer or, in this case, the Scottish solicitor, and that there should be a detailed charge for the individual items. In the present case the master disallowed any claim for disbursements in respect of the bill of costs of the Scottish solicitors, which amounted to £176 7s. 3d., but he made some allowance in respect of the disbursements which he regarded as properly incurred in respect of services under the item of "Instructions for Brief," which he allowed at 200 guineas. As I have said, I think that is not the correct way of dealing with an item of this kind, that it should be dealt with as disbursements.

As regards quantum, the position is a little complicated by the fact that the Scottish solicitors, and, indeed, the applicants in this case, apparently regarded their position as being the principals, of whom the applicants were the agent, which is a complete reversal of the true situation. Accordingly, they rendered their bill to the next friend of the plaintiff, and on reading their bill it is quite apparent that they were putting in an ordinary bill as if they were the solicitors having conduct of the action and not acting merely as agents for the applicants for the services required to be done by the professional agent in Scotland. I might illustrate that by referring to one or two items. In one minor item they charge for "Writing you"—that is to say, the father of the infant plaintiff—"we have now had a "report from our Farnham correspondents on what took place "at the trial and as to the point of law in doubt, and suggesting "that it might be a nice gesture of you and Mrs. McCullie to "write a short note of appreciation to the counsel." Quite plainly, that is an item (charged at 7s. 6d.) which is not recoverable as a proper disbursement to the Scottish solicitors. Then there is another item, a large item, at the end, corresponding to an item "In-"structions for Brief," in which they claim "For very considerable "time expended in the study and consideration of the issue and "matters which arise from time to time, and the evidence of fact, "medical evidence and the law involved," a law which so far as they were concerned was foreign law. It is quite evident, therefore, that there are a number of items in that account which are quite inappropriate to the proper position of the Scottish solicitors in this case, namely, as professional agents doing in Scotland on the instructions of the English solicitors those things which were reasonable and necessary to be done in Scotland for the preparation of the case. Having looked at the very detailed items in the bill with the great assistance of the assessors who have been sitting with me, I have come to the conclusion that a proper figure for their charges, that is to say, limited to the services

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which it was reasonable and necessary for them to perform as agents in Scotland for the applicants, is 100 guineas. I propose, therefore, allowing as part of the disbursements in respect of the accounts of Miller and Mackay, the sum of £105. That makes it necessary to reconsider the item "Instructions for Brief" which the master allowed at 200 guineas on the basis that he excluded the charges in respect of the disbursements for services performed by Miller and Mackay. Having regard to the lengthy nature and gravity of the case, I think the proper figure for "Instructions to "Brief," now that Miller and Mackay's services are dealt with by a separate item, to which I have referred, is 175 guineas.

There remain three small items which may be considered together, namely, the expense for fees and attendance at the trial in London by the partner of the applicants. The general rule as to the right of the country solicitors to charge for personal attendance in London at a trial in London is that it is only allowed in very special cases. The question is, is this one of the matters which should be allowed as acceptable in this particular case? My own view is that this is very much a border-line case, but I have been informed that leading counsel advised that the country solicitor should be present at the trial. In the light of that, it seems to me to be proper in the case of a legal aid taxation to allow that fee. However, there is another related item, and that is the attendances on the defendant's solicitors in London by the partner of the country solicitors. The master allowed that on the basis of attendance by the London agents and I see no reason to interfere with that discretion of the master, as no reason has been advanced why that could not quite reasonably and properly have been done by the London agents.

The last item with which I have to deal is a small item of £6 for drawing the bill of costs and copy for taxation which the master allowed at £2. I think that the master must have meant £4 and not £2, and I propose to allow that objection up to the amount of £4. The matter arose in this way. The £6 represents the costs of drawing not only the applicants' own bill of costs but the bill of costs of the Scottish solicitors. Again I think that arises out of a misconception as to the position of the Scottish solicitors to which I have already referred. It seems to me quite plain that the persons entitled to charge for drawing up their bill, if they are entitled to charge at all, must be the Scottish solicitors themselves. They would be entitled to recover that against the English solicitors who themselves, if it is a proper charge, can recover it as a disbursement. No charge was made by the Scottish solicitors for that, and in so far as the applicants claim the costs of drawing up the Scottish solicitors' bill of costs that cannot be allowed.

There is one final matter which arises on this review. The

master refused the applicants their costs of bringing in the objections. Those objections were brought in under the old procedure, which has since been amended by the Legal Aid (General) Regulations, 1960, reg. 20 (4) (*b*) (ii), and there is a conflict of authority in courts of first instance as to whether or not these costs are allowable. In *Rolph* v. *Marston Valley Brick Co. Ltd.*[2] Devlin J. came to the conclusion that he had no jurisdiction to allow them, but in *Sutton* v. *Sears*[3] McNair J., after considering the reasoning of Devlin J., came to the contrary conclusion. I have to choose which I prefer in this difference of opinion among my brethren. I prefer the reasoning of McNair J. that this particular item of costs is allowable and should be allowed. I am comforted in reaching my choice between the rival views of two judges, for whose opinion I have the highest respect, by the fact that the rule has now been altered, and that this probably will be the last occasion on which this point can arise.

The next matter I can deal with very shortly, and that is the objection in relation to the taxation of the Appeal Court bill of costs. There are only three items. The first item claimed for is: "Fee in relation to attendance and correspondence, etc." at 20 guineas. The master allowed 1 guinea on the ground "A "general instructions item was not allowed under Appendix N on "appeal, unless further evidence was called." It seems to me the master rightly approached the question of general instructions, and, accordingly, I do not propose to alter his decision on that.

The other two items relate again to the Scottish solicitors. There is a claim for £10 1s., being the costs of the Scottish solicitors in relation to the appeal. Mr. Wallis-Jones concedes that the earlier items in that were incurred before the certificate and cannot be recovered. So far as the other items are concerned, they seem to me to be items which are not allowable because they were not reasonably necessary for the appeal. Indeed, one of them is: "Writing to Mr. McCullie reporting the result of the "appeal and sending a full report with endorsement on counsel's "brief." All the items in that bill ought to have been done and could have been done by the applicants themselves, and there was no need to employ the Scottish agents for that purpose. Therefore, I allow nothing in respect of that. The third item which is related to it, is 2 guineas for a letter to Miller and Mackay reporting the result of the appeal. That is not a proper item.

Consequently, I allow the appeal to the extent that I have indicated as regards the costs of the action, and disallow the objections in the taxation on the appeal.

This review comes under the new rules. I think that the applicants are entitled to their costs whatever I say, because they

[2] [1956] 2 Q.B. 18; [1956] 2 W.L.R. 929; [1956] 2 All E.R. 50.

[3] [1960] 2 Q.B. 97; [1959] 3 W.L.R. 791; [1959] 3 All E.R. 545.

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have been authorised properly under the rules to apply for this review. If they are not entitled to them whatever I say, I say that they can have them.

Order accordingly.

Solicitors: *Graham Page & Co. for Potter, Crundwell & Bridge, Farnham; Mr. J. D. Haslam and Joynson-Hicks & Co.*

[CHANCERY DIVISION.]

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April 13, 14, 17, 18, 19, 20, 24; *May* 4.

Wilberforce J.

MARTEN AND ANOTHER *v.* FLIGHT REFUELLING LTD. AND ANOTHER.

[1959 M. No. 798.]

Restrictive Covenant—Enforceability—Covenant not to use land for non-agricultural purposes — Sale of part of agricultural estate — Land benefited not identified in conveyance—Whether vendor entitled to benefit of covenant—Whether land burdened by covenant.

Compulsory Purchase—Restrictive covenant—Defence—Compulsory purchase by Air Ministry of agricultural land used as aerodrome—Land subject to covenant not to use for non-agricultural purpose—Registered land charge—Occupation by commercial firm under licence—Land used partly for defence and partly for commercial activities—Whether Ministry bound by covenant—Whether commercial activities of firm precluded—Defence Act, 1842 (5 *&* 6 *Vict. c.* 94)—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 198 (1).

Compulsory Purchase—Meaning—Whether "purchase" or "sale"—Restrictive covenant—"Sale" of land benefited—Whether including compulsory purchase.

"Sale"—Restrictive covenant—Compulsory purchase.

In July, 1942, the Air Ministry requisitioned under regulation 51 of the Defence (General) Regulations, 1939, some 200 acres of a farm of 562 acres forming part of a large agricultural estate for use as an aerodrome. By a conveyance dated March 25, 1943, the special executors of the deceased tenant for life of the estate conveyed the farm to the sitting tenant who had been in occupation since 1920. By clause 2 of the conveyance the purchaser covenanted with the vendors and their successors in title that no part of the land conveyed nor any building thereon should thereafter be used for any purposes other than agricultural purposes without the previous written consent of the vendors or their agent, provided that if the vendors should sell all or any part of the land immediately adjoining or adjacent to the land conveyed free from any restriction or user or permitting it to be used for non-agricultural purposes, or should agree with the town or country planning authorities that adjoining land might be used for non-agricultural purposes, the purchaser should be free to use or sell the land conveyed free from any restriction or subject to the same conditions as those imposed by the vendor or agreed with the planning authorities. That covenant was registered in April, 1943, as a land charge class D. (ii).

In 1947 the Air Ministry let into occupation of the aerodrome a commercial company, giving it rights over the aerodrome in the nature of a tenancy for which the company paid a substantial rent; at the material times the activities of that company consisted of maintaining the air field and its facilities, the design and development of flight refuelling equipment and the fitting of that equipment to R.A.F. aircraft; work on a certain type of aircraft for the Air Minister, and miscellaneous industrial and commercial activities, there being evidence that the company desired to extend the latter activities.

The daughter of the deceased tenant for life attained 21 years on September 12, 1950, when she disentailed the estate and the executors assented to its vesting in her in fee simple, the assent containing no reference to the covenant. On July 1, 1958, acting under the Defence Acts, 1842 to 1935, the Air Ministry compulsorily purchased the greater part of the requisitioned land subject to the covenant, and on January 11, 1961, part of the estate adjoining the requisitioned land free from any restriction.

The daughter and executors of the deceased tenant for life brought an action against the company and the Air Ministry for declarations that the benefit of the covenant was vested in the daughter or, alternatively, in herself and the executors, that the company and the Ministry held the requisitioned land subject to the covenant, that the covenant forbade the user of the land by them for any but agricultural purposes without the previous written consent of the plaintiffs, and that the user of the land by the company as an aerodrome and industrial undertaking was in breach of the covenant, and an injunction restraining the company from causing the requisitioned land to be used in breach of the covenant. The plaintiffs conceded that the use and maintenance of the aerodrome for the defence of the realm or the service of the Royal Air Force could not be interfered with:—

Held, (1) that since it could be shown with reasonable certainty having regard to the circumstances surrounding the conveyance of March 25, 1943, and taking a broad and reasonable view of the proof of the identity of the estate, that the covenant was taken for the benefit of the land of the vendors, being the estate as a single agricultural unit, it was immaterial that the conveyance did not "annex" or identify the land to be benefited by the covenant; that the agricultural estate as a whole was capable of being benefited by the covenant; that the plaintiffs together represented the whole legal and equitable interest in the covenant; and that, therefore, the plaintiffs were entitled to a declaration that they were entitled to the benefit of the covenant (post, pp. 1025, 1028, 1032).

In re Union of London and Smith's Bank Ltd's Conveyance, Miles v. *Easter* [1933] Ch. 611, C.A.; *Lord Northbourne* v. *Johnston & Son* [1922] 2 Ch. 309 applied.

Newton Abbot Co-operative Society Ltd. v. *Williamson and Treadgold Ltd.* [1952] Ch. 286; [1952] 1 T.L.R. 283; [1952] 1 All E.R. 279 considered.

(2) That the Air Ministry was a purchaser for value, who under section 198 (1) of the Law of Property Act, 1925, took with notice of the covenant, and, therefore, notwithstanding that it had taken the land under compulsory powers, took subject to the covenant; that the compulsory sale in 1961 of the adjoining land was not a "sale" within the meaning of the proviso to the covenant; and that, accordingly, the plaintiffs were entitled to a declaration that the covenant burdened the land (post, p. 1035).

Dictum of Chitty L.J. in *Manchester, Sheffield and Lincolnshire*

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Railway Co. v. *Anderson* [1898] 2 Ch. 394, 404; 14 T.L.R. 489, C.A.; and *Bailey* v. *de Crespigny* (1869) L.R. 4 Q.B. 180 applied.

(3) That the court could not interfere with the user by the Air Ministry of the land as an aerodrome or for any of the statutory purposes for which it had been acquired, or with any such work done by the company on behalf of the Ministry, but that, as there was a definite threat that the purely industrial activities of the company would be extended, the plaintiffs were entitled to an injunction in respect of those activities (post, p. 1041).

Hawley v. *Steele* (1877) 6 Ch.D. 521 applied.

Action.

The first plaintiff, Mrs. Mary Anna Sibell Elizabeth Marten, who was born on September 12, 1929, was the estate owner in fee simple absolute in possession of the Crichel estate, a large agricultural estate in Dorset of about 7,500 acres, which had for many years been in the ownership of her family. On the western side of the estate and forming part of it was a farm, Crook Farm, of some 562 acres, which since 1920 had been farmed by one Donald Richard Harding.

In July, 1942, the Air Ministry, the second defendant, requisitioned under regulation 51 of the Defence (General) Regulations, 1939, some 200 acres of the farm (the "blue land") and took steps to establish an aerodrome there.

On March 25, 1943, the second plaintiffs, Hoares Trustees, the then estate owners in fee simple in possession of the estate as the special executors of the late Napier George Henry Baron Alington, the former tenant for life and the father of Mrs. Marten, conveyed Crook Farm to Harding. At that time Mrs. Marten, as an infant, was the equitable owner with an interest in tail male. The conveyance recited a vesting deed dated November 26, 1928, made between Lord Alington of the first part, Lady Mary Sibell Ashley-Cooper of the second part, and trustees of the third part, in which it was declared that the property subject to the conveyance was vested, together with other property, in Lord Alington in fee simple on the trusts of the settlement of 1928.

Clause 1 of the vesting deed conveyed the property to Harding, and clause 2, so far as is material, provided: "The purchaser "hereby covenants with the vendor and its successors in title "(1) that no part of the land hereby conveyed nor any building "or erection thereon shall at any time hereafter be used for any "purpose other than agricultural purposes without the previous "written consent of the vendor or its agent provided always that "if the vendor should sell all or any part of its land immediately "adjoining or adjacent to the land hereby conveyed either free "from any restriction as to user or on terms permitting the same "to be used for any purpose other than agricultural purposes or "if the vendor should agree with the town or country planning "authorities that all or any part of the land immediately adjoin-"ing the land hereby conveyed may be used for purposes other

"than agricultural purposes the purchaser shall be at liberty to "use or sell all or any part of the land hereby conveyed either "free from any restriction as to user or subject to the same "conditions as to user as those imposed by the vendor on such "sale or agreed with the town or country planning authorities "as the case may be. . . ."

The covenant was duly registered against the land under section 10 (1) of the Land Charges Act, 1925, as a land charge Class D. (ii).

In 1947 the Air Ministry, who had remained in possession of the blue land, permitted the first defendants, Flight Refuelling Ltd., a commercial undertaking formed to develop methods of refuelling aircraft in flight, to occupy the aerodrome, and that company entered into occupation having rights in the nature of a tenancy and paying a substantial rent. Mrs. Marten attained her majority on September 12, 1950, whereupon she disentailed the Crichel estate and became its absolute owner. On September 18, 1950, Hoare Trustees assented to the vesting in her of the estate in fee simple, the assent containing no reference to the purchasers' covenant in the vesting deed of March 25, 1943.

In or about 1954 the Air Ministry decided to purchase the blue land and in April, 1955, acting under the Defence Acts, 1842–1935, served on Harding's executors a notice to treat in respect of the greater part of it. On July 1, 1958, that portion of the blue land was conveyed by Harding's executors to the Air Ministry, the conveyance being expressed to be subject to the restrictive covenant so far as it was valid, subsisting and capable of being enforced. That transaction left a small parcel of the blue land (the "communal site") still under requisition, and it so remained until after the issue of the writ in the action, and until after the joinder of the Air Ministry as a defendant. It was later conveyed to the Air Ministry but it was conceded that no relief could be granted in respect of the user of it in the present action. On August 6, 1955, the Air Ministry served on Mrs. Marten a notice to treat for the compulsory acquisition of part of the estate adjoining the blue land free from any restriction, and on January 11, 1961, that land was conveyed to the Ministry. The Air Ministry did not in fact use any of the land so conveyed to it as an aerodrome but the effective occupier continued to be Flight Refuelling Ltd., which admittedly carried on industrial activities there, which included certain work for the Air Ministry and the Services.

By this action the plaintiffs claimed (1) declarations (a) that the benefit of the restrictive covenant was vested in the first plaintiff or, alternatively, in the plaintiffs together; (b) that the defendants and each of them held and occupied the blue land subject to the covenant; (c) that the covenant forbade the user of the blue land by the defendants for any purposes but agricultural purposes without the previous written consent of the plaintiffs or their agent, and (d) that the present user of the blue land

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by the first defendants as and for the purposes of an aerodrome and an industrial undertaking was in breach of the covenant; (2) an injunction restraining the first defendants from causing or permitting (whether by their servants, agents or workmen or otherwise) the blue land or any part of it or any building or erection on it to be used in breach of the covenant.

G. H. Newsom Q.C., *W. L. Roots Q.C.* and *J. A. Gibson* for the plaintiffs.

Sir Milner Holland Q.C. and *Michael Browne* for the first defendants.

The Attorney-General (*Sir Reginald Manningham-Buller Q.C.*), *Peter Foster Q.C.* and *E. Blanshard Stamp* for the second defendant.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Ives* v. *Brown* [1]; *London County Council* v. *Allen* [2]; *Zetland* (*Marquess*) v. *Driver* [3]; *Kelly* v. *Barrett* [4]; *Harding* v. *Metropolitan Railway Co.* [5]; *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.* [6]; *Richards* v. *Revitt* [7]; *In re Higgs' and May's Contract* [8]; *Doherty* v. *Allman.* [9]

Cur. adv. vult.

May 4. WILBERFORCE J. read the following judgment: The plaintiffs in this case seek to establish the enforceability of, and so far as possible, to enforce a restrictive covenant said to affect certain land in the parish of Tarrant Rushton in the county of Dorset now owned by the Air Ministry on behalf of the Crown and occupied by Flight Refuelling Ltd.

Stated very briefly, the following is the nature of the dispute. The land in question, then forming part of the Crichel estate, was requisitioned by the Air Ministry under emergency powers in 1942, and no doubt the owners hoped that as soon as the war was finished it would be returned to them. In 1943 it was sold, with other land, by the estate owners, and a restrictive covenant was imposed against user for other than agricultural purposes. When the war came (factually) to an end, the owners, like other land owners whose land had been taken, were disappointed. The Air Ministry did not give up the land. On the contrary, in 1947 they permitted a commercial concern, Flight Refuelling Ltd., to come on to it, and that company has been there ever since.

[1] [1919] 2 Ch. 314.
[2] [1914] 3 K.B. 642, C.A.
[3] [1939] Ch. 1; 54 T.L.R. 594; [1938] 2 All E.R. 158, C.A.
[4] [1924] 2 Ch. 379; 40 T.L.R. 650, C.A.
[5] (1872) L.R. 7 Ch.App. 154.
[6] [1953] Ch. 149; [1953] 2 W.L.R. 58; [1953] 1 All E.R. 179, C.A.
[7] (1877) 7 Ch.D. 224.
[8] [1927] 2 Ch. 249.
[9] (1878) 3 App.Cas. 709, H.L.

In 1955 the Air Ministry took steps to acquire the land compulsorily for use as an aerodrome, and in 1958 it was conveyed to them. The Air Ministry does not in fact use it as an aerodrome, but it retains an interest in it as a reserve service airfield which can be used in an emergency. The effective occupier is Flight Refuelling Ltd., which is carrying on an industrial undertaking there of considerable size, while at the same time maintaining the airfield for the Air Ministry. The present owner of the Crichel estate, while now accepting that use and maintenance of the airfield for the defence of the realm cannot be interfered with, objects to the industrial activities of the company both on their present scale and such as are threatened for the future. She wishes to establish that the restrictive covenant still binds the land, even in the hands of the Crown, and seeks to enforce it against the company. That is the nature of the dispute, and it raises a number of questions of law and of fact.

I begin by stating the conveyancing facts relevant to the creation of the covenant. [His Lordship stated these facts as set out above and continued:] The points which arise for decision are the following: (1) Are the plaintiffs, or is one of them, entitled to the benefit of the restrictive covenant? (2) Is the blue land subject to the burden of the restrictive covenant? (3) Can the covenant be enforced to any and to what extent against either of the defendants? (4) What relief (if any) in equity should be granted to the plaintiffs?

First, are the plaintiffs, or is one of them, entitled to the benefit of the restrictive covenant? This involves several subsidiary questions, namely (a) whether the covenant was entered into for the benefit of any land of the covenantee; (b) whether that land is sufficiently defined or ascertainable by permissible inference or evidence; (c) whether that land is, or was, capable of being benefited by the covenant; (d) whether, since the first plaintiff is not the express assignee of the covenant, the action can be brought by the second plaintiff or by the two plaintiffs jointly.

(a) and (b). This would appear to be a simple point. The covenant is of the type considered in the leading case of *Tulk* v. *Moxhay*,[1] that is to say, a covenant imposed on land sold by a vendor and restricting its user—precisely the same kind of case to which the doctrine of restrictive covenants binding in equity has been developed. As to these, Lord Cottenham L.C. said[2]: "That this court has jurisdiction to enforce a contract between "the owner of land and his neighbour purchasing a part of it, "that the latter shall either use or abstain from using the land "purchased in a particular way, is what I never knew disputed." He held that such a covenant would be enforced in equity regardless of whether it runs with the land at law against any purchaser with notice. However, an elaborate argument was

[1] (1848) 2 Ph. 774.

[2] 2 Ph. 774, 777.

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addressed to me by the defendants to support a contention that the benefit of the covenant was not available to the plaintiffs. The conveyance, it was said, does not "annex" the benefit of the covenant to any land so that it would pass automatically on a conveyance of the land to a purchaser. Further, it does not indicate that it was made for the benefit of any land, and even supposing that it was so made, it does not identify or provide any material upon which to identify what that land is.

It is, however, well established by the authorities that the benefit of restrictive covenants can pass to persons other than the original covenantee, even in the absence of annexation, provided that certain conditions are fulfilled. There is, however, dispute as to the nature of these conditions.

The defendants' contentions are, first, that there must appear from the terms of the deed itself an intention to benefit some land, and, secondly, that the precise land to be benefited must also be stated in the deed, or at least must be capable of ascertainment from the terms of the deed by evidence which is admissible in accordance with the normal rules of interpretation of documents. They rely principally on *In re Union of London and Smiths Bank Ltd.'s Conveyance, Miles* v. *Easter*,[3] and submit that the decision of Upjohn J. in *Newton Abbot Co-operative Society Ltd.* v. *Williamson & Treadgold Ltd.*,[4] which appears to admit parole evidence for the purpose of identifying the land to be benefited, goes too far.

I proceed, therefore, first to examine *Miles* v. *Easter*.[5] The facts in the case were (briefly) that the defendant, who was the person seeking to enforce the covenant, was the owner of the greater part of certain land coloured green which had previously been owned by the Shoreham company. That company was possessed of certain lands of considerable but undefined extent including some foreshore land and some land coloured yellow. The conveyance of 1908 by which the covenant was imposed contained other covenants expressed to be made "with the "purchasers their heirs and assigns or other the owner or owners "for the time being of the land coloured pink or any part or "parts thereof," i.e., in language adapted and intended to annex the benefit of these other covenants to particular land. The covenant which the defendant was trying to enforce was not in this form at all; it used no language of annexation. In these circumstances the Court of Appeal, affirming Bennett J.,[6] held that it had not been shown that the covenant was taken for the benefit of the green land, and in doing so relied particularly upon the existence of the other land which might, for all that appeared from the document, have been intended to benefit from the restriction and upon the contrast in the conveyancing language used.

[3] [1933] Ch. 611, C.A.

[4] [1952] Ch. 286; [1952] 1 T.L.R. 283; [1952] 1 All E.R. 279.

[5] [1933] Ch. 611.

[6] Ibid. 619.

In the judgment of the Court of Appeal the following passage occurs [7]: "In the first place, the 'other land' must be land that "is capable of being benefited by the covenant—otherwise it "would be impossible to infer that the object of the covenant was "to enable the vendor to dispose of his land to greater advantage. "In the next place, this land must be 'ascertainable' or "'certain,' to use the words of Romer L.J.[8] and Scrutton L.J.[9] "respectively. For, although the court will readily infer the "intention to benefit the other land of the vendor where the exist-"ence and situation of such land are indicated in the conveyance "or have been otherwise shown with reasonable certainty, it is "impossible to do so from vague references in the conveyance or "in other documents laid before the court as to the existence of "other lands of the vendor, the extent and situation of which are "undefined." This passage is clearly and carefully expressed, and I resist the invitation of the Attorney-General to interpret it in the light of certain expressions (to my mind less clear) in the judgment of Bennett J.[10] at first instance. It shows that the court's opinion was that the existence and situation of the land to be benefited need not be indicated in the conveyance, provided that it can be otherwise shown with reasonable certainty, and the natural interpretation to place on these latter words is first that they may be so shown by evidence dehors the deed, and secondly, that a broad and reasonable view may be taken as to the proof of the identity of the lands. This general approach would, I think, be consistent with the equitable origin and character of the enforcement of restrictive covenants, which should not be constricted by technicalities derived from the common law of landlord and tenant.

Against this approach the Attorney-General relies strongly on a passage in the same judgment, where Romer L.J. said [11]: "the first question that has to be considered is whether or no an "intention is shown in the deed of October 23, 1908, that the "restrictive covenants should enure for the benefit of any par-"ticular land of the covenantees," and he argued that this showed that the court considered that only the deed of conveyance could be looked at. With all respect, I do not think that this consequence follows. In that particular case, reliance was placed on the deed and on the deed alone: the fact that the court confined its consideration to the terms of the deed does not, in the circumstances, carry any implication that no other evidence than the deed itself could be considered.

Before passing to the *Newton Abbot* case,[12] I should add that the rule as stated by the Court of Appeal in *Miles* v. *Easter* [13] seems to me to be clearly in line with other statements of

[7] [1933] Ch. 611, 631.
[8] In *Formby* v. *Barker* [1903] 2 Ch. 539, 554, C.A.
[9] In *London County Council* v. *Allen* [1914] 3 K.B. 642, 672, C.A.
[10] [1933] Ch. 611, 619.
[11] Ibid. 634.
[12] [1952] Ch. 286.
[13] [1933] Ch. 611.

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principle made by the courts. In *Rogers* v. *Hosegood*[14]—a leading case on annexation—Collins L.J. said[15]: "When, as in "*Renals* v. *Cowlishaw*,[16] there is no indication in the original "conveyance, or in the circumstances attending it, that the "burden of the restrictive covenant is imposed for the benefit of "the land reserved, or any particular part of it, then it becomes "necessary to examine the circumstances under which any part "of the land reserved is sold, in order to see whether a benefit, "not originally annexed to it, has become annexed to it on the "sale, so that the purchaser is deemed to have bought it with "the land, and this can hardly be the case when the purchaser "did not know of the existence of the restrictive covenant."

This seems to support the view that an intention to benefit may be found from surrounding or attending circumstances, as indeed is frequently done in practice in the case, mentioned by Collins L.J.[17], of building schemes.

In *Formby* v. *Barker*,[18] which is one of the authorities which show that unless the covenantee retains some land intended to be benefited he cannot sue any person except the original covenantor, Vaughan Williams L.J. said[19]: "I have not been "able to find any case in which, after the sale of the whole of an "estate in land, the benefit of a restrictive covenant has been "enforced by injunction against an assignee of the purchaser at "the instance of a plaintiff having no land retained by the vendor, "although there are cases in which restrictive covenants seem "to have been enforced at the instance of plaintiffs, other than "the vendor, for the benefit of whose land it appears from the "terms of the covenant, or can be inferred from surrounding "circumstances, that the covenant was intended to operate." A reference to these passages was made by Upjohn J. in the *Newton Abbot* case,[20] but I have thought it worth while to set them out here so that they can be compared with other citations.

I would add to these a reference to the facts in *Lord Northbourne* v. *Johnston & Son*,[21] where the covenant was expressed to be with the trustees of a settlement, their heirs and assigns, the deed containing no reference to any land at all. Sargant J. seems not to have doubted that it could be shown that the covenant was for the benefit of the unsold part of a particular building estate which in fact was vested in the trustees.

I pass now to the *Newton Abbot* case.[22] The facts were that the original covenantee was the owner of a property called Devonia, in Fore Street, Bovey Tracey, on which she carried on business as an ironmonger. The original covenantor was the purchaser from her of other properties in Fore Street opposite Devonia, and the covenant was (briefly) against carrying on the

[14] [1900] 2 Ch. 388; 16 T.L.R. 489, C.A.
[15] [1900] 2 Ch. 388, 407.
[16] (1879) 11 Ch.D. 866, C.A.
[17] [1900] 2 Ch. 388, 408.
[18] [1903] 2 Ch. 539, C.A.
[19] Ibid. 550.
[20] [1952] Ch. 286.
[21] [1922] 2 Ch. 309.
[22] [1952] Ch. 286.

business of an ironmonger. There was no reference in the conveyance by which the covenant was imposed to any land for whose benefit it was made, the only mention of Devonia being that the vendor was described as "of Devonia." The action was between assigns of the covenantee's son, who inherited her estate, and assigns of the covenantors.

Upjohn J. held that the benefit of the covenant was not annexed to Devonia, but held that, looking at the attendant circumstances, the land to be benefited was shown with reasonable certainty and that the land in question was Devonia.

This decision was attacked by the Attorney-General in a lively argument, and I was invited not to follow it. Of course, it relates to its own special facts, and no doubt I could leave it on one side. But I see nothing in it contrary to the principles which appear to be securely laid down. Here were two shops in common ownership facing each other in the same street, one of them, Devonia, an ironmonger's shop. The shops opposite are sold with a covenant against carrying on an ironmonger's business. What could be more obvious than that the covenant was intended for the protection or benefit of the vendor's property Devonia? To have rejected such a conclusion would, I venture to think, have involved not only an injustice but a departure from common sense. So far from declining the authority of this case, I welcome it as a useful guide. But it is only a guide, and I must ultimately reach my conclusion on the facts of the present case. These I now consider. They are not in dispute. I have the fact that the Crichel estate is, and for many years has been, not merely a conglomeration of separate farms and cottages, but a recognisable and recognised agricultural unit. Its identity in 1943 has been established by an agreed map: it has in fact hardly changed since 1928—the date of the vesting deed mentioned in the conveyance—or up to the present time. It has been managed as one for a number of years—thus, no doubt, acquiring its own character—is surrounded by its own ring-fence, has its mansion house, secondary residence, home farm, farm cottages, woodlands, ornamental water, all the indicia of an extremely valuable unit. Its character was entirely agricultural, with the single exception of the paper mill at Witchhampton, and it is surrounded by other similar or at least comparable estates in a district which is entirely agricultural—in the words of one witness "a rather unique area." The property sold in 1943, Crook Farm, was before the sale a part of the estate, the purchaser, Harding, being, as was his father before him, tenant of the farm from the estate: it was also a wholly agricultural property. The vendors of the farm were Hoare Trustees selling in the character of fiduciary owners of the Crichel estate as a whole: in taking any restrictive covenant they had, of course, no individual or personal interest, or any interest other than as owners of the estate as a whole.

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On these facts I consider that I should come to the conclusion that the covenant was taken for the benefit of land of the vendors, that land being the Crichel estate. In doing so I do not, so it seems to me, go outside such surrounding or attendant circumstances as, in accordance with the authorities, it is legitimate for the court to take into account. A decision based on the mere wording of clause 2 of the conveyance would, in my judgment, be unduly narrow and indeed technical, and would go far to undermine the usefulness of the rule which equity courts have evolved that the benefit of restrictive covenants may be capable of passing to assigns of the "dominant" land or of the covenant in cases other than those of annexation. I would add two observations: first, the rules in *Miles* v. *Easter* [23] properly relate to cases where the covenant is sought to be enforced by an assign from the original covenantee. In this case, however, the second plaintiff is the original covenantee and the first plaintiff is the person for whose benefit in equity the covenant was taken. To that important extent the plaintiffs' case is stronger than that of the defendant in *Miles* v. *Easter*.[23] Secondly, in holding that the covenant was for the benefit of the Crichel estate, I mean the Crichel estate as a whole—as a single agricultural estate which it was and is, and I express no opinion whether it enures for the benefit of each and every part, for example, if parts are separately sold off. That is not a question which arises in this case.

There remain certain specific arguments which were put forward, and I must shortly deal with them. (1) The plaintiffs relied to some extent upon the first recital in the conveyance of 1943, and the reference in it to the vesting deed of 1928. That vesting deed stated that the Crichel estate, there described in detail was vested, together with other estates, in the tenant for life upon the trusts of the settlement. It was suggested that this provided something within the four corners of the conveyance from which it was possible to identify the land for the benefit of which the covenant was taken. I do not accept this. The recital, as I read it, was inserted purely for the purpose of tracing the chain of title and not with reference to the restrictive covenant at all, and even if it can be related to the covenant, it merely states what land was vested in the life tenant in 1928 and does not, by itself, indicate what the vendors held in 1943. I do not consider that this recital advances the plaintiffs' argument.

(2) It was said that unless the identity of the land to be benefited was clearly stated in, or directly ascertainable from, the conveyance, a purchaser would be placed in an impossible position: he would never know by whom the covenant could be enforced, or whether it was enforceable at all. I am not impressed by this objection: the original covenantee is ascertainable from the document—and moreover appears on or can be

[23] [1933] Ch. 611, C.A.

ascertained from the land charges register. In a case where the covenant is sought to be enforced by an assign from him, such assign must always prove his right to sue, whether by virtue of annexation, by devolution, by assignment of the benefit of the covenant. The plaintiff may also (as in *Tulk* v. *Moxhay*[24]) have to show that he retains property for whose benefit the covenant was imposed. These are matters which arise in all cases where restrictive covenants are sought to be enforced otherwise than as between the original parties, and I see no greater difficulty in dealing with them in cases such as the present.

(3) On the assumption that some extrinsic evidence can be received as to the intention to benefit land, there was read some correspondence between Hoare Trustees and Harding or their respective representatives prior to the conveyance of 1943, consisting of letters between August 4 and October 29, 1942. This correspondence, which I need not read, appears to me to show two things: first, that the sale to Harding was, as to price, on the basis of agricultural user—a consideration strongly relied on by Lord Cottenham L.C. in *Tulk* v. *Moxhay*[25] as a reason for enforcing "user" covenants; and secondly, that the parties were perfectly aware, when negotiating about the restrictions, that part of the land was under requisition for use as an aerodrome, and that during that period it could not be enforced. They did, however, look forward to a period when the land might be given up and when, although aerodrome works had been carried out on it, it could still be used for agriculture.

(4) Arising out of the last point, a remarkable argument was put forward, namely, that the covenant was void for perpetuity. It was put in this way: in 1943 the covenant was ineffective because of the requisition: it could only be effective on derequisition: that event was wholly uncertain, the covenant is an interest in land, and is one which is to come into existence at an uncertain date: it is therefore void. The rule against perpetuities has been showing remarkable vitality recently, but, in my judgment, it fails to reach this covenant. The covenant became effective when it was entered into, and all that happened was that as regards the blue land it was incapable of being enforced. But it was there, binding the land, all the time. This is shown by *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Anderson*,[26] to which I return later. The defendants' argument seems to me to confuse right with remedy.

Question (c): Was the land capable of being benefited by the covenant? On this point, as on those last dealt with, the answer would appear to be simple. If an owner of land, on selling part of it, thinks fit to impose a restriction on user, and the restriction was imposed for the purpose of benefiting the land retained, the court would normally assume that it is capable of doing so.

[24] 2 Ph. 774.
[25] Ibid.
[26] [1898] 2 Ch. 394; 14 T.L.R. 489, C.A.

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There might, of course, be exceptional cases where the covenant was on the face of it taken capriciously or not bona fide, but a covenant taken by the owner of an agricultural estate not to use a sold-off portion for other than agricultural purposes could hardly fall within either of these categories. As Sargant J. said in *Lord Northbourne* v. *Johnston & Son*[27]: "Benefit or detriment is "often a question of opinion on which there may be the greatest "divergence of view, and the greatest difficulty in arriving at a "clear conclusion." Why, indeed, should the court seek to substitute its own standard for those of the parties—and on what basis can it do so? However, much argument was devoted to this point, and evidence was called as to it. These I must consider.

First it was said that a mere examination of the figures showed that the covenant could not benefit the estate: the Crichel estate extends to some 7,500 acres, and it was asked how such a covenant could benefit the estate as a whole. In my view, there is no such manifest impossibility about this. I have already referred to the character of the estate, and I can well imagine that, for the owner of it, whether he wished to retain it in his family or to sell it as a whole, it might be of very real benefit to be able to preserve a former outlying portion from development. This seems to me to be a question of fact to be determined on the evidence: and I note that when a similar argument was placed before the court in *In re Ballard's Conveyance*,[28] Clauson J., while accepting it in the absence of evidence, showed it to be his opinion that evidence could have been called.

Then it was said that as the blue land was already an aerodrome when the covenant was imposed, the covenant could be of no benefit, at least as regards that land. I reject this argument. The vendors may well have had to accept the prospect of user as an aerodrome, so long as the necessity continued, but to prevent the land thereafter being turned to other non-agricultural purposes may well have been a valued objective. I think it was in this case.

Next it is said that the covenant was useless because, in any event, there was plenty of other land in the same area in the vicinity of the estate which was free from restrictions. I have no difficulty in rejecting this argument. Why should not a vendor protect what he can, and is such protection useless because other land (at the relevant date itself all solidly agricultural) might be desecrated? Is a covenant against using premises for a certain trade useless because adjoining premises may be so used? (Compare the *Newton Abbot* case.[29]) This contention, in my judgment, fails.

Lastly, an argument was based on the first proviso to the covenant. This was, in effect, that if the vendors should sell any

[27] [1922] 2 Ch. 309, 319.
[28] [1937] Ch. 473; 53 T.L.R. 793; [1937] 2 All E.R. 691.
[29] [1952] Ch. 286.

adjoining or adjacent portion of the estate retained by them free from any obligation to use for agricultural purposes, the purchaser was likewise to be liberated from the covenant. This, it was suggested, showed that the purchaser's covenant could not be for the benefit of the retained land. The reason, so the argument ran, was that the obvious benefit, and possibly the sole benefit, of the covenant was to reserve any development value which land in the vicinity might have for the vendors: but the existence of the proviso—which enabled the purchaser to develop if the vendors did so—prevented this benefit from arising, and ergo there was no benefit in the covenant. I find this argument altogether too subtle. The purpose of the proviso seems to me to be a much simpler one, and to have been simply to anticipate the natural grievance which the purchaser might have if his land was confined for ever to agriculture while the vendors were free profitably to develop the immediately adjoining land. As such it is completely consistent with the vendors' overriding desire to preserve the agricultural character of their own estate and of the land sold off. There is another defence based on the proviso with which I will deal later, but this particular argument I reject.

I now examine the evidence as to the capability of the covenant to benefit the vendors' land. On this the plaintiffs called three witnesses. The first was Commander Marten, the first plaintiff's husband and the manager of the estate. Although he is an interested party, he gave his evidence on this point fairly and moderately. The others were two surveyors and land agents, one Pratt and one Eve. Neither of these gentlemen knew the estate in 1943, but they had acquaintance with it from about 1951, and their evidence was directed to showing what benefit an estate of the character of the Crichel estate could derive from a covenant in this form. I found their evidence clear and convincing. On the defendants' side evidence was given first by one Hayward, who for many years has been Chief Lands Officer in the Air Ministry. His evidence was mainly directed towards proof of the requisitioning and acquisition of the land, but there was a short passage in which he expressed his view on the covenant. He was a fair witness, but his experience in buying and selling agricultural estates such as the Crichel estate was naturally limited, and I do not attribute much weight to his evidence on this point. The other witness for the defendants was one Shallcross, a qualified surveyor who has known the neighbourhood for some 30 years. His evidence must be placed in the scale .

Taken as a whole, the evidence comes to this, that a restriction of this character, in relation to such an estate as the Crichel estate, was at the relevant date and is at the present time, of value in that it preserves a measure of control over adjoining land. In relation to that part of the adjoining land which, in 1943, was already being used as an aerodrome, so far from the covenant being useless, it was of positive value, because the departure from

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agricultural use which had already taken place inevitably gave rise to uncertainty as to the future of the land and opened the door to possible further development: the covenant prevented the door from being opened further. [His Lordship analysed the evidence and continued:] It is on this general approach that, in my view, the benefit of the covenant is to be assessed, rather than in relation to particular effects which the benefit of it might produce. Indeed, much of the evidence, particularly as to noise and effect on amenity, seemed to me to be more relevant to an action for nuisance, which this is not, than to the action as it is. There were a number of questions put about sporting rights, which, though no doubt agreeable to put and agreeable to answer, seemed to me to add up to little that was helpful. But in so far as it is relevant to take particular matters into account, I am prepared generally to accept Commander Marten's evidence that the installation of a substantial industrial undertaking on the edge of the estate might well have concrete detrimental effects on the management of the estate, making it more difficult to provide housing for estate employees and to get or retain labour, and causing the installation of increased services in the way of roads, electrical cables, etc., which would change the character of the place. On this line of evidence I found the evidence of a witness who came from the Blandford Rural District Council of very little assistance, in spite of, or perhaps because of, the wide range of subjects on which he was invited to testify.

Lastly, I should add that I reject a line of argument to the effect that development of the restricted land, by bringing with it development, or the possibility of development, of the Crichel estate, would actually raise land values rather than diminish them. The owners of the Crichel estate are surely entitled to set other values above those of this character of enrichment.

Question (d): Can the action be brought by the first plaintiff or by the two plaintiffs jointly?

I can deal with this point quite shortly. The second plaintiff is the original covenantee, and the first plaintiff is the person for whose benefit in equity the covenant was made. Taken together, the plaintiffs represent the whole legal and equitable interest in the covenant. The matter appears, therefore, to be completely covered by the judgment of Sargant J. in *Lord Northbourne* v. *Johnston & Son*,[30] the reasoning of which I adopt. So much was not really contested by the Attorney-General, who, however, reserved the right to challenge that judgment should this case go to a higher court.

This brings me to a conclusion on the first main point, and I accordingly hold that the plaintiffs are entitled to the benefit of the restrictive covenant.

The second main question is whether the blue land is subject to the burden of the restrictive covenant. Now the covenant was

[30] [1922] 2 Ch. 317.

duly (in April, 1943), registered against the land under section 10 (1) of the Land Charges Act, 1925, as a land charge class D (ii), and purchasers of the land, therefore, take with notice of it—Law of Property Act, 1925, s. 198 (1). The Air Ministry, having purchased the land in 1958, are not in the position of purchasers for value without notice, nor are the first defendants, who have no legal estate at all. It is not said that the covenant has been taken over or extinguished by any statutory procedure—as can be done under the Lands Clauses Consolidation Act, 1845. The covenant, therefore, binds the land in its present hands. This does not, of course, mean that it can necessarily be enforced at the present time against either defendant—that I will consider shortly—but conversely, even if it is not enforceable against either defendant, because of some statutory right which they or one of them may have to use the land for other than agricultural purposes, that does not prevent the covenant from continuing to bind the land. I refer to *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Anderson*,[31] where Chitty L.J. put it[32]: "The covenant in my "opinion is not gone; but the remedy by action has been taken "away"; and, as it was put by Luxmoore J. in the later case of *In re Simeon and Isle of Wight Rural District Council*[33]: "It is, "I think, settled law that in all cases where land is subject to a "burden which runs with it for the benefit of other land, a pur-"chaser taking under compulsory powers takes the land subject "to that burden like any other purchaser; but the covenant can-"not be enforced by injunction in the courts if the breach of it is "attributable to the execution of the works authorised by the "statute under which it was taken, or to the exercise of the statu-"tory powers thereby conferred on the purchaser."

The Attorney-General relied in this connection on the well-known case of *Baily* v. *de Crespigny*,[34] where a covenant was held to be unenforceable against the original covenantee after the land had been taken by a railway company. There it was held that the defendant was discharged from his covenant on the principle of the maxim "lex non cogit ad impossibilia." So here, argued the Attorney-General, the covenant could not be complied with and it is discharged. In my judgment, however, the position here is quite different. There is no question here of suing the original covenantee (namely, Harding) after an Act of Parliament has put it out of his power to comply with the covenant. The question here is a different one, namely, whether the covenant—which is of a continuing character—burdens the land even though it is for the time being in the hands of a person who may use it in whole or in part for statutory purposes. The *Manchester Railway* case[35] to which I have just referred shows that it does. The further case relied on by the Attorney-General, *Clark* v. *School*

[31] [1898] 2 Ch. 394.
[32] Ibid. 404.
[33] [1937] Ch. 525, 535; 53 T.L.R. 854; [1937] 3 All E.R. 149.
[34] (1869) L.R. 4 Q.B. 180.
[35] [1898] 2 Ch. 394.

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Board for London,[36] shows nothing more than that, by procedure in the Lands Clauses Consolidation Act, 1845, an easement can be got rid of. It has no relevance to the present case.

At this point I must notice a special defence of the first defendants based on the proviso to clause 2 of the conveyance of March 25, 1943, to which I have already referred. This proviso, in effect, states that should the vendor sell any part of its land immediately adjoining or adjacent to the land thereby conveyed free from any restriction as to user, the purchaser should be free from the restriction. The facts relied upon to bring this proviso into operation are that on August 6, 1955, the Air Ministry served on Mrs. Marten a notice to treat in respect of, inter alia, a portion of the Crichel estate which was immediately adjoining or adjacent to the land conveyed in 1943—land coloured pink on agreed plan No. 1—and this land was duly conveyed by Mrs. Marten to the Air Ministry on January 11, 1961, free from any restriction as to user. So, says the company, the covenant is gone. The argument is hardly an attractive one. For the owner of the land burdened with the restrictive covenant to use its statutory powers compulsorily to acquire adjacent land and to oblige the owner to sell free of any restriction, and then to rely on such a compulsory sale as discharging the covenant as regards the land it already held would be by any standards iniquitous, and I am not surprised that the Air Ministry itself forbore to take the point. But although the plea may look rather more respectable as coming from the company, it is in my view no more efficacious. The answer suggested by the plaintiffs is that the word "sell" does not include a compulsory taking, and they rely upon the decision of the House of Lords in *Kirkness* v. *John Hudson & Co. Ltd.*[37] a case upon certain fiscal statutes, which helps to the extent of showing that the word "sale" naturally imports a consensual sale. Here I am concerned with its use in a contractual context, and the real question is whether such a sale as this—a sale under compulsory powers to the successor in title of the original purchaser of the restricted land, as to the terms of which the vendors had no choice whatsoever—could conceivably have been such a sale as was contemplated by the proviso; and the answer can only be that it was not. The object of the proviso—as I have already said—was to ensure for the 1943 purchaser equality of treatment with subsequent purchasers of parts of the estate, and to rely upon it as the company seeks to do involves a perversion of its object.

As to this *Baily* v. *de Crespigny*[38] seems to me to help the plaintiffs—the present case is almost *Baily* v. *de Crespigny* in reverse. There the court said[39] "But where the event is of such "a character that it cannot reasonably be supposed to have been

[36] (1874) 9 Ch.App. 120.

[37] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345, H.L.

[38] L.R. 4 Q.B. 180.

[39] Ibid. 185.

"in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens"; and again[40]: "The defendant when he contracted used the general word 'assigns,' knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties." The same argument can well be applied here to the word "sell."

The result is that, whatever the position may be as regards enforceability, the plaintiffs are entitled to a declaration that the covenant binds the land.

I proceed now to consider the third and fourth main questions, the issues of enforcement and remedy, to my mind the most difficult part of the case. First I must endeavour to state the legal position of the Air Ministry and of the company under the legislation by which the Ministry acquired the land, and secondly I must find what activities precisely are now being carried on by the company on the land, and endeavour to relate those activities to the statutory purposes for which the land was acquired.

There is no doubt that until July 1, 1958 (later as regards the communal site), the title to the blue land remained in Harding, and that the Air Ministry had merely rights arising from requisition under various statutes and regulations commencing with the Emergency Powers (Defence) Act, 1939, and the Defence Regulations made under it. I need not go into this legislation because it is common ground that during the period of requisition, owing to the width of the powers conferred, in particular, by Defence Regulation 51, no action could have been taken by the plaintiffs to interfere with the user of the land by either defendant, whether or not that user was of an industrial character.

The requisition of the blue land (other than the communal site) ended on July 1, 1958, when it was acquired in fee simple by the Air Ministry under the Defence Acts, 1842 to 1935. The basic statute is the Defence Act, 1842; and by subsequent legislation the powers of this Act have been made available to the Secretary of State for Air. These powers may be used for the purposes of the air force or the defence of the realm. The Acts provide, as one would expect, for the acquisition of land by purchase, but do not, so it appears, provide for such acquisition to be free from any restrictive covenant formerly binding the land. In fact, the land was conveyed to the Air Ministry subject to the covenant,

[40] L.R. 4 Q.B. 180, 186.

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so far as valid and subsisting. This being the position as regards acquisition of the land, the Attorney-General claims that although the covenant may not actually be extinguished, the court cannot interfere with any user of the land for the purposes for which the land could be acquired; that is to say, the service of the Air Force or the defence of the realm. He relies, for authority to support this, on *Hawley* v. *Steele*,[41] where land had been acquired by the War Department under the powers of the Defence Act, 1842, and was being used as a rifle range. The action was for nuisance, and the case is reported on a motion for an interlocutory injunction. Sir George Jessel M.R. dismissed the motion because (inter alia) the land was being used for a purpose authorised by the Defence Act. In doing so he said[42]: "you cannot bring an "action against anybody who should so use the land which has "been authorised to be acquired, and therefore, if I should be of "opinion that the Acts of Parliament authorise the officers of the "Ordnance Department and their successor the Secretary of "State for War to acquire these lands for the purpose of general "instruction, and that the use made of them was a reasonable "use, it seems to me no action would lie against the individual "who, under the authority of the executive government, made "such a use of the land. That seems to me the general proposi-"tion." Then after examining the sections of the Act he said[43]: "Now, what does that mean? That must mean to be used for "reasonable purposes having regard to the nature of the require-"ments of the military departments of the government; and if "that is so, it appears to me that, except in the case of an out-"rageous departure from all reasonable use, it is not for a court "of justice to say what is the reasonable use of land for military "requirements, but it is for the departments to say that such "land is wanted as a camp for exercise and instruction, such "other land is wanted for a fortress, and such other land is "wanted for an arsenal. In other words, I think the discretion "is vested in the executive government having authority over "military matters to determine for which of these various mili-"tary purposes for which land may fairly be required the "particular land in question is to be appropriated. It is not for "the judge to say that they have made a bad selection, and that "they ought to have taken Blackacre for a camp instead of a "fort, that they ought to have taken Whiteacre for an arsenal "instead of a camp, or that they ought to have Greenacre for a "camp instead of a fortress. It appears to me that that would "be an invasion of the authority of the military department by "the judge if he interfered with such matters."

Although that decision was on motion, the judgment is a valuable statement as to the scope of the Act, and it has this result, when applied to the facts of the present case, that, the

[41] (1877) 6 Ch.D. 521.
[42] Ibid. 527.
[43] Ibid. 528.

Air Ministry having acquired this land for use as an aerodrome, the court cannot criticise the Ministry's choice and say that some other land might just as well, or better, have been chosen: nor can it interfere with any reasonable use of the land for that purpose. Further, Sir George Jessel M.R. appears to me to have decided that the protection of the Act applies not only to the Secretary of State himself but to individuals acting under his authority, certainly to his own officers, and possibly to other individuals, provided that they are carrying out for him those functions which the Act authorises him to carry out.

That case, therefore, gets me to this point, that the court cannot interfere with the use by the Air Ministry of the land as an aerodrome, or for any of the statutory purposes for which the land has been acquired; indeed, the plaintiffs, by their counsel, disclaimed any intention so to do.

I must now examine the position of Flight Refuelling Ltd. This company, as its name indicates, is a commercial undertaking formed to develop methods of refuelling aircraft in flight. It was incorporated in 1934, and its moving spirit from the start has been and still is Sir Alan Cobham, a well-known personality in the aviation world. The company's operations in its chosen field date from before the war 1939–45, and even at that stage they were of interest to the Government, but connections were also established with Imperial Airways in the field of civil aviation. During the war, the company worked closely with the Air Ministry and with its research establishment at Farnborough, and after the war it found itself at an aerodrome near Littlehampton. That aerodrome had to be reconstructed and the company was compelled to move, and after a short period at Tangmere it came to Tarrant Rushton. It first arrived there in the autumn of 1947, and found that the aerodrome had been evacuated by the R.A.F. but that there was a care and maintenance party left in charge: that was withdrawn in 1948 when Flight Refuelling Ltd. effectively took the aerodrome over. [His Lordship referred to the terms on which the company accepted the land, and continued:] The position may be summed up by saying that the company was given rights over the airfield in the nature of a tenancy, paying a very substantial rent: that the company was left free to carry on its own business: that it undertook the maintenance of the airfield, and that the Air Ministry was empowered to resume occupation in an emergency. The company was in a position to, and no doubt it expected to, carry out work—for reward—for the Air Ministry and other Government Departments while it was there, but the carrying out of this work, other than the maintenance of the airfield, was not part of the terms of occupation; nor was it something which the company was bound to do.

What, in fact, did the company's activities consist of? Broadly they fell, at all material times, under four headings: (1) maintaining the airfield and its facilities; (2) design and development of

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flight refuelling equipment and the fitting of this equipment to R.A.F. aircraft; (3) work on "Meteor drones"; (4) miscellaneous. I must say something about each of these activities. [His Lordship considered each heading in detail, and continued:] On these facts I have now to consider the position of Flight Refuelling Ltd. in relation to the restrictive covenant. The activities of Flight Refuelling Ltd.—taken as a whole—are quite clearly industrial activities and are admitted to be such in their defence. They are undertaken by the company in the normal course of carrying out the purposes for which it exists. They are equally clearly activities in breach of the restrictive covenant. But a number of arguments are put forward on their behalf why the covenant should not be enforceable against them. By the Attorney-General it was said that Flight Refuelling Ltd. were on the airfield to do work of national importance, and work for the service of the Air Force and the defence of the realm: that it was essential that they should be kept there in the national interest: that their work does not cease to be for these purposes if they manage also to find outlets for their products in industry: that applying the test laid down in *Hawley* v. *Steele*,[44] it should be found that the company was not doing anything outrageous, and that their activities should not be interfered with in any way. For the company it was argued that, the Crown having acquired the land under the Defence Acts, for the service of the Air Force and the defence of the realm, user for those purposes should be considered as permitted by the Acts, both by the Crown itself and also by its licensees or its contractors: that the bulk of the company's work was for defence purposes, that is to say, the maintenance of the airfield, the flight refuelling work and the conversion of the Meteor drones: that the rest of the company's activities fits in with the statutorily protected activity and cannot easily be distinguished from it. Any attempted distinction between the statutory activity and outside activity would involve, it was said, inquiries and investigations which would be troublesome in practice and possibly contrary to the public interest. For the plaintiffs, on the other hand, it was said that although the Air Ministry had acquired the land under statutory powers, it had in effect, or in any event such was its intention as soon as this action was out of the way, put Flight Refuelling Ltd. into effective occupation of the airfield for the purpose of enabling that company to pursue its own ends: that no doubt the company would seek and do work for the Air Ministry, and other departments, but that the company was in this respect no different from any other commercial undertaking which accepts or solicits Government contracts. The mere fact that industrial work is carried out under contract from the Government, or a service department, does not alter the character of work and does not

[44] 6 Ch.D. 521.

make it work for the statutory purposes for which the land was acquired so as to be protected by statutory authority.

The task of choosing between these approaches to the facts is evidently not an easy one: the difficulty in doing so derives from the lack of clarity and sharpness in the action taken by the Air Ministry over the years. From the initial period when possession of the airfield was taken for indisputably defence purposes, one passes gradually over 15 years, to a stage when the Air Ministry, no longer needing the airfield for immediate operational purposes, desires to have it available for any emergency, and decides that the most economical method of so doing is to make use of a commercial company which is willing to pay a substantial rent for the right to use the airfield and its facilities for its own purposes, some of those purposes being of direct and others of indirect interest to the Ministry itself. But considering the position as it now stands, I am of opinion, that none of the three alternative contentions ought to be wholly accepted, and that the true position is an intermediate one. I cannot accept the general argument that it is enough to show that the presence of Flight Refuelling Ltd. on the airfield is in the national interest. That may be so, but it does not follow that its activities should not be circumscribed even if to do so might involve, for the company or even for the Air Ministry, a less economical method of operation. I see no legal basis upon which a mere plea of national interest can be an answer to a claim to enforce a restrictive covenant. Nor do I accept the company's argument that once it is shown that the bulk of its work is within the statutory authority, I should take no notice of other activities which are outside it. Both of these arguments, in my judgment, seek to extend the statutory protection too far.

On the other hand, I think that the plaintiffs go too far the other way when they invite me to deal with the case as if the company were merely occupying the site under a lease and carrying out contracts for a government department. That seems to me to overlook the point that the airfield has been acquired under statutory powers and must be taken to have been so acquired to enable certain statutory purposes to be fulfilled. In the ultimate analysis the question for the court appears to me to be this: How much of the company's activity should be treated as done for the purposes for which the airfield may be considered to have been acquired? And in answering this question, the court must, as was said in *Hawley* v. *Steele*,[45] adopt a broad approach, and must take great care not to embark upon inquiries or to make distinctions in a matter which is essentially for the administrative discretion of the Government.

Applying these tests, and accepting, as I think I must accept, the evidence of the Ministry's witnesses as to the needs of the service and the requirements of defence, I have already said that

[45] 6 Ch.D. 521.

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the company's work in maintaining the airfield and keeping it ready for operational use is clearly and immediately within the statutory purposes. The work on flight refuelling of service aircraft and on Meteor drones appears on balance to me to be equally so. No doubt this work could be done elsewhere: possibly the work on the Meteor drones could be done by other firms (though, in fact, none do it), but given the fact, which again I accept, that an airfield on the spot is necessary to enable each of these categories of work to be done, the Secretary of State would have been justified in acquiring under the Defence Acts an airfield to enable them to be done, and he must equally, in my judgment, be entitled, having acquired an airfield, to authorise them to be done on the airfield so acquired. It cannot, in my view, make any difference that, instead of doing this type of work himself, he commits it to an individual or a company, nor that, having chosen his instrument, he uses the latter as an independent contractor rather than as an agent, nor that, to enable the contractor to do the job, he grants him a lease or a licence. In all cases the land is being used for the statutory purposes for which it is acquired and such user is protected from attack.

The protection of the statute therefore, in my judgment, extends to the company's work on flight refuelling for the Air Force and to the work on Meteor drones. Moreover, I think that in so far as the company manufactures and sells flight refuelling equipment for other users, it should not be deprived of the protection so long as this activity represents but a reasonable concomitant of its work for the services. It would be unreasonable, in my judgment, and not in accordance with the principles stated so clearly in *Hawley* v. *Steele*,[46] to permit the company to store any products made surplus to the requirements of the services while forbidding it to sell them to other consumers. It is a question of degree, no doubt, at what point the company's production assumes the dimensions of a separate activity, but I am content to hold that on its present scale that portion of the flight refuelling activity which is beyond what is needed for service purposes ought not to be prohibited.

That leaves the nuclear work and that done for the Belgian Air Force. Neither of these, in my judgment, falls within the statutory protection, even when extended as generously as I have thought right to extend it: the first obviously is not, the second because there is not a sufficient connection, on the evidence, between it and the purposes for which the airfield was acquired: it is simply a case of the company, by its independent initiative, going out and securing a contract which it is profitable to acquire. As to these two activities, therefore, I have seriously to consider whether the plaintiffs should be granted an injunction to restrain them.

[46] 6 Ch.D. 521.

Before I do so, I must consider what are the company's intentions with regard to the future. Is there a real and substantial threat to extend the company's industrial activities, or, as was submitted to me by the defendants, is there no real risk of their doing so? The answer to this question may well have an effect upon the action which the court may take with regard to the company's present work.

There is a good deal of material in the massive volumes of disclosed correspondence which bears upon this point, but I do not consider that I need go through it in detail.

[His Lordship examined that evidence, and continued:] There exists, in my judgment, a perfectly definite threat that what I may call "non-statutory activities" at Tarrant Rushton will be extended and greatly extended. I think that the plaintiffs are entitled to be protected against this threat and indeed that it is for the sake of this protection that this action has mainly been brought.

That brings me to the question of relief which I have now to consider in relation (a) to the existing non-statutory activities and (b) to the future. Unfortunately, there are issues left even at this stage. There is raised in the company's defence a plea of laches—an analogous plea in the Air Ministry's defence has been abandoned. If this means what it says, it is not made out: it is common ground that no action could have been taken by the plaintiffs to enforce the covenant during the period of requisition. This expired in July, 1958, and the writ was issued on April 1, 1959. The interval is quite insufficient to support the plea. But a more substantial defence was raised on the facts, and, even though it is not specifically pleaded, it may go to the right to obtain equitable relief. The plaintiffs, it is said—and Commander Marten admitted as much—never drew the attention of the company to the existence of the restrictive covenant and the first they knew about it was on the issue of the writ. It was, of course, upon the land charges register, and section 198 of the Law of Property Act, 1925, provides that entry on the register is to be notice to all the world: nevertheless, I think that I must take the plaintiffs' silence into account. It cannot be said that this silence amounts to acquiescence, because the plaintiffs were consistently opposing the continuance of the airfield and of the company's industrial activities, though this opposition was not based upon the covenant; but it is claimed that had the covenant been mentioned the company's action might have taken a different course at some points.

Three matters were referred to: First, the company's general expenditure which over 10 years amounted to some £285,000. This expenditure was not, as I understand it, mainly capital expenditure, but maintenance or repairing expenditure undertaken year by year and no doubt offset by earnings, and I am not persuaded that it would have been any different if the company

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had been aware of the covenant—if only because during the greater part of the period the company was immune from it. Secondly, a faint suggestion was made that the company would not have sold a factory it possessed at Bournemouth if it had known of the covenant. The facts, however, with regard to this were that the company received an advantageous offer for the factory which it felt it could accept because it had acquired a superior site at Wimborne. Sir Alan did not commit himself to a statement that he would not have sold had he known of the covenant. Thirdly, it was said that had the company known of the covenant it would have taken care to place its non-protected activities—or even all its activities—on the white land where they could not be touched. I think that there is substance in this contention, but limited substance. The two non-statutory activities which may have been affected are the nuclear work, the main part of which is on the blue land in hut No. 1000, and the work for the Belgian Air Force which is done in hangar No. 4 also on blue land. The hangar could not be moved, but the work could have been transferred, and still can be, no doubt with some dislocation. Hut No. 1000 could also be moved or its installations transferred, probably with more dislocation, In respect to both of these activities I am reluctant, in the circumstances, to grant an injunction which would compel their immediate removal. I go further, and say that I am not willing, on the basis of the use to which these buildings are being put at the present time, to order their removal at all. The only effect of such an order would be to cause another hangar or hut, as the case may be, to be used on unrestricted land, and nothing whatever would be gained from the plaintiffs' point of view by so doing. The weapon of an injunction should not be used where no practical purpose would be served. On the other hand, I think that the plaintiffs are entitled to be protected against any extension of these uses and against any further development of purely industrial activities on the restricted land.

The conclusions to which I have come, therefore, are: (1) That the plaintiffs are entitled to the benefit of the covenant and that the covenant burdens the blue land. The plaintiffs are entitled to a declaration accordingly against both defendants. (2) To the declaration to be granted there should be added two provisos, (a) as regards the blue land other than the communal site that nothing therein shall be taken to prevent the user of this land by either defendant for the service of the R.A.F. or the defence of the realm, (b) as regards the communal site that nothing therein shall be taken to prevent the user of this land for any purpose for which it may lawfully be used in accordance with such statutes and regulations relating to the requisitioning of land as were in force at the date of the writ. (3) An injunction will be granted against the first defendants restraining them from using the blue land other than the communal site otherwise than for agricultural

purposes. To this will be added two provisos, one corresponding to that referred to under (2) (a) above, that is to say that nothing shall be taken to prevent the user of this land for the service of the Royal Air Force or the defence of the realm, the other to the effect that nothing herein shall be taken to prevent the use of hangar No. 4 or of hut No. 1000 for the purposes for which those buildings respectively were in fact used at the date of the writ.

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Declarations and injunction accordingly.
No order as to costs.

Solicitors: *Lewis & Lewis and Gisborne & Co. for Preston & Redman, Bournemouth; Lovell, Son & Pitfield for J. & W. H. Druitt, Bournemouth; Treasury Solicitor.*

M. G. T.

[QUEEN'S BENCH DIVISION.]

YORKSHIRE INSURANCE CO. LTD. *v.* NISBET SHIPPING CO. LTD.

1961 *April* 11, 12, 13, 14.

Diplock J.

[1960 Y. No. 977.]

Insurance—Marine—Subrogation—Applicability of general doctrine—Total loss payment—Damages in excess of payment subsequently recovered by assured—Valued policy—Whether assured entitled to retain excess—Whether insurer's rights limited to recovery of amount in fact paid—"Subrogated"—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79 (1).

Insurance—Subrogation—Total loss payment by insurer—Damages in excess of payments subsequently recovered by assured—Rights of insurer—Implied term—Valued policy—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79 (1).

Insurance—Valued policy—Valuation conclusive inter partes—Subrogation.

Statute—Construction—Codifying Act—Whether changing common law—Subrogation—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79 (1).

Ships' Names—Blairnevis.

Words and Phrases—"Subrogated"—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79 (1).

The assured, the owners of the s.s. *Blairnevis,* were insured against loss of or damage to the vessel by marine risks in valued policies of marine insurance in the common form of hull policy of the Institute of London Underwriters for the sum of £72,000. On February 13, 1945, the *Blairnevis* was damaged in a collision with *H.M.C.S. Orkney* and became an actual total loss with no salvage value. On April 20, 1945, the insurer paid to the assured the £72,000 for the total loss of the vessel. In September, 1946, the assured, with the approval of the insurer, brought proceedings against the Canadian Government for damages for the loss of the *Blairnevis,* as a result of which the Canadian Government ultimately paid to the assured in Canada $336,039.52 Canadian dollars,

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the agreed actual value of the *Blairnevis* at the time of the loss—£75,514 19s. 11d., converted into Canadian dollars at the rate of exchange current at that time. Meanwhile, the £ had been devalued so that when the $333,039.52 paid to the assured were transmitted to London they were converted in £s at the new rate of exchange and in fact realised £126,971 14s. 11d., nearly £55,000 more than the insurer had paid for the total loss. The assured accounted to the insurer for the sums received on the basis that it was entitled to retain all moneys in excess of the £72,000 paid to it under the policies.

On a claim by the insurer based, inter alia, on section 79 (1) of the Marine Insurance Act, 1906,[1] to recover the full amount received by the assured:—

Held, (1) that (subject to the Act of 1906) a term was to be implied in marine or fire policies that the assured should not recover from the insurer an amount greater than the loss which he had sustained; but if the assured recovered from a third party a sum in excess of that loss the insurer's rights were limited to recovering from the assured any sum paid by the insurer to the assured.

(2) That the word "subrogated" in section 79 (1) of the Act of 1906 referred to such implied terms; and the second part of the subsection meant that the insurer, as against the assured, was entitled to the benefit of his rights and remedies against third parties to the extent of his (the insurer's) rights under such implied terms.

(3) That, accordingly, the insurer could not recover under the doctrine of subrogation as embodied in section 79 anything more than he had paid, and the plaintiff insurer was entitled to be repaid £72,000 and no more.

Castellain v. *Preston* (1883) 11 Q.B.D. 380, C.A. applied.

North of England Iron Steamship Insurance Association v. *Armstrong* (1870) L.R. 5 Q.B. 244 considered.

Action.

The following statement of facts is taken from the judgment of Diplock J. The defendant company, The Nisbet Shipping Co. Ltd., the assured, was at all material times the owner of the *S.S. Blairnevis*. The plaintiff company, The Yorkshire Insurance Co. Ltd., and other insurers, insured the defendant company against loss of or damage to the *Blairnevis* by marine risks for a period of 12 months from June 27, 1944, in a policy of marine insurance, in the common form of hull policy of the Institute of London Underwriters. The policy was for the sum of £36,888, of which the amount underwritten by the plaintiff company was £2,523. The *Blairnevis* was valued in the policy at £72,000. The balance of the sum of £72,000 was fully covered by other policies of marine insurance in similar terms to the policy. The plaintiffs and the other subscribers to the policy and the other policies are hereinafter collectively referred to as the insurer.

On February 13, 1945, during the currency of the policy, the

[1] Marine Insurance Act, 1906, s. 79 (1): "Where the insurer pays for a "total loss, either of the whole, or in "the case of goods of any apportion-"able part, of the subject-matter in-"sured, he thereupon becomes entitled "to take over the interest of the "assured in whatever may remain of "the subject-matter so paid for, and "he is thereby subrogated to all the "rights and remedies of the assured "in and in respect of that subject-"matter as from the time of the "casualty causing the loss."

Blairnevis was damaged in a collision with *H.M.C.S. Orkney* in the Irish Sea, and later on the same day she was beached near the mouth of the River Mersey. On February 15, 1945, the assured gave notice of abandonment of its interest in the *Blairnevis* and claimed payment for a total loss. The notice of abandonment was not accepted.

The *Blairnevis* became an actual total loss with no salvage value, and on April 20, 1945, the insurer paid the assured the £72,000 for the total loss of the vessel. The plaintiff company paid the full amount of its subscription to the policy. On September 19, 1946, the assured, with the approval of the insurer, commenced proceedings in Canada against the Canadian Government for damages for the loss of the *Blairnevis*. Its claim was quantified in Canadian dollars. The proceedings went to the Privy Council,[2] and on July 25, 1955, the Privy Council restored the judgment of the Exchequer Court of Canada of July 20, 1951, which held that *H.M.C.S. Orkney* was solely to blame, and set aside the judgment of the Supreme Court of Canada, who had varied the judgment of the Exchequer Court on appeal, on an issue of limitation of liability only.

Negotiations then took place as to quantum of damages, in the course of which it was agreed that the actual value of the *Blairnevis* at the time of loss was £75,514 9s. 11d. Applying the principle laid down in the House of Lords in *S.S. Celia* v. *S.S Volturno*[3] that sum was converted into dollars at the rate of exchange of $4.45 to the pound, current at the date of the collision in 1945, giving a sum in Canadian dollars of $336,039.52. That sum was paid to the assured in Canada in May, 1958. But in 1949 the pound had been devalued. Consequently, when the $336,039.52 were transmitted to England in June, 1958, they were converted into £s at the new rate of exchange and, in fact, realised £126,971 14s. 11d.; that was nearly £55,000 more than the £72,000 which the insurer had paid for the total loss in April, 1945, and some £51,000 more than the sterling value of the *Blairnevis* at the date of the loss.

The assured claimed that it was entitled to retain all moneys received by it in excess of the £72,000 paid to it under the policies by the insurer; on that basis, it admitted that it was bound to account to the plaintiffs out of the sums recovered as damages from the Canadian Government for the amount of the plaintiffs' subscription to the policy and paid to the plaintiffs their proportion of the £72,000. The plaintiffs, relying on section 79 (1) of the Marine Insurance Act, 1906, contended that, on paying the amount of their subscription to the policy for the total loss of the *Blairnevis*, they became entitled to take over pro tanto the interest of the assured in the subject-matter insured, alternatively, that they were thereupon subrogated to all the rights and remedies of the assured in and

[2] [1955] 1 W.L.R. 1031; [1955] 3 All E.R. 161, P.C.

[3] [1921] 2 A.C. 544; 37 T.L.R. 969, H.L.

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in respect of the subject-matter, and further or alternatively, that the assured in recovering damages from the Canadian Government was acting pro tanto as their agents and/or on their instructions and/or with their agreement or approval, and was bound to account to them for the sums so recovered, and they claimed that they were entitled to recover their proportion of the full amount received by the assured.

A. A. Mocatta Q.C. and *C. T. Bailhache* for the plaintiff insurers.

Eustace Roskill Q.C. and *Anthony Lloyd* for the defendant assured.

The following cases were cited in argument, in addition to the cases referred to in the judgment: *Randal* v. *Cockran*[4]; *Phoenix Assurance Co.* v. *Spooner*[5]; *Morley* v. *Moore*[6]; *In re Miller, Gibb & Co. Ltd.*[7]; *Stearns* v. *Village Main Reef Gold Mining Co.*[8]; *The Commonwealth*[9]; *Attorney-General* v. *Glen Line Ltd. and Liverpool and London War Risks Insurance Association Ltd.*[10]; *Yates* v. *Whyte*[11]; *Young* v. *Merchants' Marine Insurance Co. Ltd.*[12]

Cur. adv. vult.

April 14. Diplock J. stated the facts as set out above and continued: This action raises the neat point as to who is entitled to this windfall. The assured has accounted to the insurer for the sums received upon the basis that it is entitled to retain all moneys in excess of the £72,000 in fact paid to the assured under the policies by the insurer. The insurer claims to be entitled to the full amount received by the assured. By agreement between the parties I can ignore for the purposes of this judgment the costs incurred in the litigation between the assured and the Canadian Government. They have agreed between themselves as to the way in which these will be dealt with, depending upon the ultimate decision in this action upon the question of principle involved. I therefore will deal with the matter on the basis that the assured, in 1958, received from the Canadian Government, the tortfeasor responsible for the loss of the *Blairnevis*, the net sum of £126,971 14s. 11d., and repaid to the insurer the sum of £72,000, which was paid to the assured by the insurer for the total loss of the vessel in 1945.

[4] (1748) 1 Ves.Sen. 98; 27 E.R. 916.

[5] [1905] 2 K.B. 753; 21 T.L.R. 577.

[6] [1936] 2 K.B. 359; 52 T.L.R. 510; [1936] 2 All E.R. 79, C.A.

[7] [1957] 1 W.L.R. 703; [1957] 2 All E.R. 266.

[8] (1905) 21 T.L.R. 236; 10 Com. Cas. 89, C.A.

[9] [1907] P. 216; 23 T.L.R. 420, C.A.

[10] (1929) 34 Com.Cas. 309, C.A.

[11] (1838) 4 Bing.N.C. 272; 132 E.R. 793.

[12] [1932] 2 K.B. 705; 48 T.L.R. 579; 43 Ll.L.Rep. 277, C.A.

The question of principle involved can, I think, be stated thus: Where an insurer pays for a total loss of the subject-matter insured and the assured, in the exercise of his remedies in respect of that subject-matter, recovers from a third party an amount which exceeds the sum so paid by the insurer, can the insurer recover from the assured the amount of such excess?

I turn first, as is my duty, to the Marine Insurance Act, 1906, section 79 of which deals with the rights of the insurer on payment. Subsection (1) is in the following terms: "Where the "insurer pays for a total loss, either of the whole, or in the case "of goods of any apportionable part, of the subject-matter "insured, he thereupon becomes entitled to take over the "interest of the assured in whatever may remain of the subject-"matter so paid for, and he is thereby subrogated to all the rights "and remedies of the assured in and in respect of that subject-"matter as from the time of the casualty causing the loss."

It is to be noted that the subsection, which comes into operation only upon payment for the total loss by the insurer, deals with two distinct matters: (1) the interest of the assured in the subject-matter insured, and (2) the rights and remedies of the assured in and in respect of that subject-matter. The former the insurer is entitled, although not bound, to take over; if he does, the whole interest of the assured in the subject-matter insured is transferred to him. To the rights and remedies of the assured in respect of the subject-matter insured, with which alone I am concerned in this case, the insurer is "subrogated as from the "time of the casualty causing the loss." In my view, this case turns upon what is meant by the word "subrogated" in this context. The doctrine of subrogation is not restricted to the law of insurance. Although often referred to as an "equity" it is not an exclusively equitable doctrine. It was applied by the common law courts in insurance cases long before the fusion of law and equity, although the powers of the common law courts might in some cases require to be supplemented by those of a court of equity in order to give full effect to the doctrine; for example, by compelling an assured to allow his name to be used by the insurer for the purpose of enforcing the assured's remedies against third parties in respect of the subject-matter of the loss.

In his classic judgment in *Castellain* v. *Preston* [1] Brett L.J. was dealing with an unvalued policy, but for the purpose of analysing the principle I can at the present stage ignore the complication which arises when the policy is a valued one. Brett L.J.[2] based the application of the doctrine of subrogation to policies of insurance upon the fundamental principle "that the "contract of insurance contained in a marine or fire policy is "a contract of indemnity, and of indemnity only, and that this "contract means that the assured, in case of a loss against which

[1] (1883) 11 Q.B.D. 380, C.A. [2] Ibid. 386.

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"the policy has been made, shall be fully indemnified, but shall "never be more than fully indemnified."

The expression "subrogation" in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy to an agreement whereby the assured in the case of a loss against which the policy has been made shall be fully indemnified, and never more than fully indemnified.

Two consequences flow from this: first, "subrogation" is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. It confers no rights and imposes no liabilities upon third parties who are strangers to that contract. It vests in the insurer who has paid a loss no direct rights or remedies against anyone other than the assured. He cannot sue such parties in his own name (see *Simpson* v. *Thomson*[3]); he is bound by any release given by the assured to a third party (see *West of England Fire Insurance Co.* v. *Isaacs*[4]). The insurer's rights against the assured cannot be affected by any subsequent contract, or dealings between the assured and a third party. (*Boag* v. *Standard Marine Insurance Co. Ltd.*[5]) (*West of Engand Fire Insurance Co. Ltd.* v. *Isaacs.*[6])

It seems to me to follow that the only terms to be implied to give business efficacy to the contract between the parties are those necessary to secure that the assured shall not recover from the insurer an amount greater than the loss which he has actually sustained. The insurer has contracted to pay to the assured the amount of his actual loss. If, before the insurer has paid under the policy, the assured recovers from some third party a sum in excess of the actual amount of the loss, he can recover nothing from the insurer because he has sustained no loss, but it has never been suggested that the insurer can recover from the assured the amount of the excess.

It is difficult to see why a term should be implied in a contract of insurance which would involve a fundamentally different result merely because the insurer had already paid for the loss under the policy before the assured had recovered any sum from the third party.

In my view the doctrine of subrogation in insurance law requires one to imply in contracts of marine insurance only such terms as are necessary to ensure that, notwithstanding that the insurer has made a payment under the policy, the assured shall not be entitled to retain, as against the insurer, a greater sum than what is ultimately shown to be his actual loss. As Cotton L.J. said in *Castellain* v. *Preston*[7]: "if there is a money or any "other benefit received which ought to be taken into account in

[3] (1877) 3 App.Cas. 279, H.L.
[4] [1897] 1 Q.B. 226, C.A.
[5] [1937] 2 K.B. 113; 53 T.L.R. 414; [1937] 1 All E.R. 714, C.A.
[6] [1897] 1 Q.B. 226.
[7] 11 Q.B.D. 380, 395.

"diminishing the loss or in ascertaining what the real loss is "against which the contract of indemnity is given, the indem-"nifier ought to be allowed to take advantage of it in order to "calculate what the real loss is."

Thus, if after payment by the insurer of a loss that loss, as a result of an act of a third party, is reduced, the insurer can recover from the assured the amount of the reduction because that is the amount which he, the insurer, has overpaid under the contract of insurance. This sum he can recover at common law without recourse to equity, as money had and received (see Bullen & Leake, 3rd ed., p. 187). It is immaterial in what way the loss has been reduced, or whether it has been reduced after the casualty but before the actual date of payment; if the insurer has paid more than the actual loss he can recover from the assured as money had and received the amount of the overpayment.

It is also an implied term of the contract that if it is within the power of the assured to reduce the amount of the loss for which he had received payment from the insurer, by exercising remedies against third parties, he must do so upon being indemnified by the insurer against the costs involved. Since such remedies are personal to the assured they must be exercised in his own name. As the common law provides no method by which a person can be compelled to bring legal proceedings against another, recourse was needed by the insurer before the Judicature Acts to Chancery to compel the assured to allow his name to be used for legal proceedings against third parties in order to reduce the loss. But the duty of the assured to take proceedings to reduce his loss and the correlative right of the insurer to require him to do so was a contractual duty. The remedy for its breach, by compelling the assured to allow an action to be brought in his name, was an equitable remedy in aid of rights at common law, and was alternative to the common law remedy of recovering damages for breach of the duty: see *West of England Fire Insurance Co.* v. *Isaacs*.[8] But in the action brought in the name of the assured, pursuant to the equitable remedy, it is the assured who recovers judgment against the third party, and the judgment can be satisfied only by payment to him. When he receives it, the insurer can recover from him at common law, as money had and received, such sum as he has overpaid to the assured under the contract of insurance.

In my opinion the words "he is thereby subrogated to all "the rights and remedies of the assured in and in respect of that "subject-matter as from the time of the casualty causing the "loss" mean that he is entitled, as against the assured, to the benefit of the assured's rights and remedies against third parties to the extent which I have indicated above as constituting the rights of the insurer under those implied terms of the contract of

[8] [1897] 1 Q.B. 226.

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insurance which are connoted by the expression "subrogation" in the law applicable to policies of insurance. This seems to me to be the natural meaning of the words. If it be right, the insurer's rights under the second part of the subsection with which I am alone concerned are limited to recovering any sum which he has overpaid; he cannot recover more than he has in fact paid.

It has, however, been argued that if this meaning is to be given to the expression "subrogated" the words at the end of subsection (2) (which relates to partial loss)—"in so far as the "assured has been indemnified, according to this Act, by such "payment for the loss"—would be unnecessary since on the view which I have expressed this is implicit in the use of the word "subrogated" itself. It may well be that the effect of subsection (2) would be the same if those words were omitted; but it is in relation to partial loss that questions normally arise as to the quantum of the insurer's right of subrogation. It can be very rarely—the present is indeed the first recorded case—that it can arise in cases of total loss. It may well be that Parliament inserted those words in subsection (2) per majorem cautelam, dealing with a situation in which the problem was likely to arise. Their absence in a subsection dealing with a situation in which the problem had never arisen before 1906 and has not in fact arisen until 1961 does not seem to me to justify my construing the expression "subrogated" in a sense which in my view involves a fundamental departure from the principles of "subrogation" as applied in insurance law at the time of the passing of the Act.

Mr. Mocatta, for the insurers, however, relies strongly upon *North of England Iron Steamship Insurance Association* v. *Armstrong*.[9] This case, he contends, shows that under the law as it was in 1906 an insurer was entitled to recover from the assured an amount greater than the sum that he had paid to the assured upon a total loss; and since the Marine Insurance Act, 1906, was a consolidation Act it should be construed, at least in case of ambiguity, as declaratory of the existing law: see *Bank of England* v. *Vagliano Brothers*[10]; *British and Foreign Marine Insurance Co. Ltd.* v. *Samuel Sanday & Co.*[11]; *per* Lord Wrenbury.[12]

It is necessary, therefore, to see what *Armstrong's* case[13] did decide. In that case there was a valued policy in which the policy value of the hull was £6,000; its actual value was £9,000. The assured subsequently recovered £5,000 in respect of the loss from a third party tortfeasor partly to blame. The assured contended that the sum of £5,000 should be apportioned between him and the insurer in the same proportions as £3,000 to £6,000; that is to say, he sought to be treated as his own insurer in respect of the difference between the real value and the policy value. This contention was rejected by the Court of Queen's Bench upon the

[9] (1870) 5 Q.B.D. 244.

[10] [1891] A.C. 107, 145; 7 T.L.R. 333, H.L.

[11] [1916] 1 A.C. 650; 32 T.L.R. 266, H.L.

[12] [1916] 1 A.C. 650, 673.

[13] 5 Q.B.D. 244.

ground that the parties were estopped from alleging that the value was other than that agreed in the policy. No questions arose in that case as to whether the insurer was entitled to recover from the assured more than the £6,000 which he had himself paid to the assured, but there are certainly passages in the judgment of Cockburn C.J.[14] and Lush J.[15] which lead to the conclusion that that they would have held that the insurer was so entitled. The case was decided in 1870. Valued policies were clearly regarded by the court as new-fangled devices whose use was to be deprecated; no distinction was drawn by the members of the court between the insurer's rights in the subject-matter of the insurance and his rights of subrogation to the remedies of the assured.

It was not, indeed, until Lord Blackburn's judgment seven years later in *Simpson* v. *Thomson*,[16] that this distinction was clearly appreciated by the courts. The word "subrogation" is not even used in any of the judgments in *Armstrong's* case.[17] *Armstrong's* case [17] was decided before *Castallain* v. *Preston*,[18] the locus classicus of subrogation in insurance, and in so far as its reasoning leads to the conclusion that an insurer can recover from an assured by subrogation a sum greater than he has paid, it is in my view inconsistent with the reasoning of the Court of Appeal in *Castellain* v. *Preston*.[18] For what it actually decided, namely, that an insurer who pays a total loss under a valued policy can recover from the assured up to the amount of his payment notwithstanding that the real value is greater, it is an authority which has frequently been followed, but it has consistently been treated as an authority for no more than that.

Thus in *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.*[19] Scrutton J.[20] refers critically to that part of the reasoning of the court in *Armstrong's* case [21] upon which Mr. Mocatta relies, and points out that it was unnecessary to the decision. He treats *Armstrong's* case [21] as an authority only for the limited proposition which I have stated. In the same case, on appeal from Scrutton J., Swinfen Eady L.J., professing to apply *Armstrong's* case,[21] says [22]: "the plaintiffs are entitled "to recover from the shipowners all the sums which the ship-"owners received in respect of the ship up to the £45,000, the "amount of the insurance."

In *Goole and Hull Steam Towing Co. Ltd.* v. *Ocean Marine Insurance Co. Ltd.*[23] MacKinnon J.[24] suggests that the reasoning of Cockburn C.J. in *Armstrong's* case [25] can only be right if it rests upon the "cession of property to the underwriter upon "payment for a total loss."

[14] 5 Q.B.D. 244, 248.
[15] Ibid. 250.
[16] (1877) 3 App.Cas. 279, 292, H.L.
[17] 5 Q.B.D. 244.
[18] 11 Q.B.D. 380.
[19] [1915] 2 K.B. 214; [1916] 1 K.B. 30; 32 T.L.R. 89; 21 Com.Cas. 150, C.A.
[20] [1915] 2 K.B. 214, 220, 221.
[21] 5 Q.B.D. 244.
[22] (1915) 21 Com.Cas. 150, 153; [1916] 1 K.B. 30, C.A.
[23] [1928] 1 K.B. 589; 44 T.L.R. 133.
[24] [1928] 1 K.B. 589, 598.
[25] 5 Q.B.D. 244.

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Finally, in *Boag* v. *Standard Marine Insurance Co. Ltd.*[26] Lord Wright M.R., citing the above-mentioned judgment of Swinfen Eady L.J.[27] says[28]: "Applying that here, the plaintiffs, "the underwriters, are entitled to recover all the sums which the "shipowners received in respect of cargo up to the £685, which "is the amount of the insurance."

Mr. Mocatta has been unable to point to any passage in any judgment other than that in the *Armstrong* case[29] itself which supports the proposition that an insurer under the doctrine of subrogation can recover from the assured any sum in excess of the payment which he has actually made, and there are many passages in the cases which are inconsistent with it. Since this case will no doubt go further I need not burden this judgment with more than a few examples. In *Burnand* v. *Rodocanachi, Sons & Co.*[30] Lord Blackburn, in a speech in which he commented critically upon *Armstrong's* case,[31] said[32]: "The general rule of law (and "it is obvious justice) is that where there is a contract of indem-"nity (it matters not whether it is a marine policy, or a policy "against fire on land, or any other contract of indemnity) and a "loss happens, anything which reduces or diminishes that loss "reduces or diminishes the amount which the indemnifier is "bound to pay; and if the indemnifier has already paid it, then, "if anything which diminishes the loss comes into the hands of "the person to whom he has paid it, it becomes an equity that "the person who has already paid the full indemnity is entitled "to be recouped by having that amount back."

In *King* v. *Victoria Insurance Co. Ltd.*[33] Lord Hobhouse,[34] made it quite clear that, in their Lordships' view, under the doctrine of subrogation an insurer was entitled to recover from the assured only "to the extent of the payment" made to the assured by the insurer under the policy.

Finally, in *Glen Line* v. *Attorney-General*[35] Lord Atkin, drawing the distinction between the rights of abandonment and the rights of subrogation, said[36]: "it is to be noted that in "respect of abandonment the rights exist on a valid abandon-"ment, whereas in respect of a subrogation they only arise on "payment; and that subrogation will only give the insurer rights "up to 20s. in the £ on what he has paid."

In the light of these authorities I am not satisfied that at the date of the passing of the Marine Insurance Act, 1906, the law as to subrogation was as Mr. Mocatta—relying upon the reasoning of *Armstrong's* case[37]—contends. Indeed, I am satisfied that it was not, but was as I have stated. I am fortified in this view

[26] [1937] 2 K.B. 113.
[27] 21 Com.Cas. 150, 153.
[28] [1937] 2 K.B. 113, 123.
[29] 5 Q.B.D. 244.
[30] (1882) 7 App.Cas. 333, H.L.
[31] 5 Q.B.D. 244.
[32] 7 App.Cas. 333, 339.
[33] [1896] A.C. 250; 12 T.L.R. 285, P.C.
[34] [1896] A.C. 250, 255, 256.
[35] (1930) 36 Com.Cas. 1, H.L.
[36] Ibid. 1, 13, 14.
[37] 5 Q.B.D. 244.

by the fact that the law apparently is, and has for many years been, the same in the United States. See *The St. Johns*,[38] decided in 1900, where Justice Brown says [39]: "If the amount recoverable "from the wrongdoer, after payment of the damage-claims of "third parties, were in excess of the amount paid by the under-"writers to the assured, no doubt that excess would belong to "the latter, since the insurer's right of subrogation in equity "could not extend beyond recoupment or indemnity for the actual "payments to the assured." See also *The Livingstone*.[40]

It follows that, in my view, the insurer's rights in this case were limited to recovering from the assured the amount overpaid, that is to say, £72,000. He is entitled to no more. The principle, I think, is a simple one. It renders irrelevant any consideration of the particular concatenation of circumstances which enable the assured to recover from the Canadian Government a sum in sterling in excess of the value of the ship at the time of the casualty. The fact that the policy was a valued policy, with, as it transpired, a policy value somewhat less than the real value is also irrelevant. The simple principle which I apply is that the insurer cannot recover under the doctrine of subrogation now embodied in section 79 of the Marine Insurance Act, 1906, anything more than he has paid.

As I said at the outset, I have, by agreement of the parties, left out of consideration all questions relating to the costs of the Canadian proceedings. It is conceded for the purposes of my decision that the defendant company have already accounted to the plaintiff company on the basis that the plaintiff company was entitled to be repaid £72,000. It is entitled, in my view, to no more, and the defendant company is accordingly entitled to judgment.

Judgment for the defendants with costs.

Solicitors: *Ince & Co.; Holman, Fenwick & Willan.*

J. D. P.

[38] (1900) 101 Fed.Rep. 469.
[39] Ibid. 474.
[40] (1904) 130 Fed.Rep. 746.

[QUEEN'S BENCH DIVISION.]

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Apr. 11, 12, 13, 14, 17, 18, 19.

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RIDGE *v.* BALDWIN AND OTHERS.

Police—Dismissal of constable—Power of watch committee to dismiss for misconduct—Whether power exercisable under Municipal Corporations Act, 1882, *or Police Act,* 1919*—Power to be exercised in accordance with natural justice—Appeal to Home Secretary—Home Secretary's decision final—Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *s.* 191 (4)*—Police Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 46), *and regulations made thereunder—Police (Appeals) Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 19).

Natural Justice—Opportunity to meet charge—Dismissal of public servant—Chief constable dismissed by watch committee after acquittal on criminal charge—Censure of conduct at trial—No hearing—Power of dismissal to be exercised in accordance with natural justice.

Crown—Minister, determination by—Whether subject to review by courts—Minister's decision "shall be final"—Dismissal of chief constable by watch committee—Dismissal of appeal to Minister—Watch committee's decision alleged void—Police (Appeals) Act, 1927.

In 1958 there were criminal proceedings against the plaintiff, then chief constable of Brighton, (a) against him and two other police officers and two civilians alleging conspiracy to obstruct the course of public justice, and (b) against him alone alleging corruption. On the first charge, the plaintiff was acquitted by the jury. On February 28, Donovan J. in passing sentence on the two police officers who were convicted, said that facts admitted in the course of the trial "establish that neither of you had that professional and moral leadership which both of you should have had and were entitled to expect from the chief constable of Brighton." On the second indictment, on March 6, no evidence was offered against the plaintiff. Before the plaintiff left the court the judge referred to the Brighton Police Force and remarked on its need for a leader "who will be a new influence and who will set a different example from that which it has lately obtained."

On March 7, the defendants, who constituted the watch committee of Brighton, decided that the plaintiff had been negligent in the discharge of his duties as chief constable and, in purported exercise of the powers conferred on them by section 191 (4) of the Municipal Corporations Act, 1882,[1] dismissed him from that office. The plaintiff's subsequent appeal from that decision to the Home Secretary was dismissed.

In an action by the plaintiff against the defendants claiming damages for wrongful dismissal and seeking a declaration that his dismissal was illegal, ultra vires and void:—

Held, (1) that section 191 of the Municipal Corporations Act, 1882, had not been repealed by the Police Act, 1919, and the Police (Discipline) Regulations, 1952, and that, accordingly, as there were

[Reported by MISS SHEILA COBON, Barrister-at-Law.]

[1] Municipal Corporations Act, 1882, s. 191: "(1) The watch committee shall from time to time appoint a sufficient number of fit men to be borough constables.

"(4) The watch committee . . . may at any time suspend, and . . . dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same."

grounds, based on evidence given at the plaintiff's trial, for holding that the plaintiff was unfit to remain chief constable, the defendants had power under the Act of 1882 to dismiss him (post, p. 1065).

Cooper v. *Wilson* [1937] 2 K.B. 309; 53 T.L.R. 623; [1937] 2 All E.R. 726, C.A. applied.

Hogg v. *Scott* [1947] K.B. 759; 63 T.L.R. 320; [1947] 1 All E.R. 768 considered.

(2) That it was a power which must be exercised fairly and in accordance with the principles of natural justice and that the defendants had acted in that manner (post, p. 1068).

Cooper v. *Wilson* [1937] 2 K.B. 309 applied.

(3) That the Police (Appeals) Act, 1927, gave a right of appeal to the Home Secretary from dismissal under section 191 of the Act of 1882 (post, p. 1069).

(4) That by appealing to the Home Secretary, whose decision on an appeal by virtue of the Police (Appeals) Act, 1927, was stated to be final, the plaintiff, even if he were correct in saying that his dismissal was invalid, had waived his right to bring an action in the courts alleging that invalidity (post, p. 1069).

ACTION.

The following history of the plaintiff and statement of facts are taken from the judgment of Streatfeild J. The plaintiff, Charles Feild Williams Ridge, first became a police officer in the Burnley Police Force in 1924, and the following year joined the Brighton Police Force. Thereafter, he had had a long and distinguished career in that police force, rising through all the ranks, until in July, 1956, he became chief constable.

In 1957, criminal proceedings were brought against the plaintiff, who after his arrest was suspended from his duties as chief constable. In 1958 he came before Donovan J. at the Central Criminal Court on two indictments, the first against him and two other police officers and two civilians alleging conspiracy to obstruct the course of public justice, and the second, against him alone, charging him with corruption. The conspiracy charge was proceeded with first and the plaintiff gave evidence on his own behalf and was cross-examined. After a trial of some 19 days he was acquitted by the jury. On February 28, Donovan J. passed sentence on the two police officers who were convicted, and addressing them, the judge said: "I am not going to prolong "your ordeal, but there is this also to be said, and it is based "not on disputed allegations but on facts admitted in the course "of this trial. Those facts establish that neither of you had "that professional and moral leadership which both of you should "have had and were entitled to expect from the Chief Constable "of Brighton, now acquitted, for if he could contrive, as he "did, to go to a suspected briber of the police in private and "alone it is small wonder that you, Heath, followed that example "in the case of Mrs. Brabiner; and if he could admit, as he did, to "his private room a much convicted and hectoring bookmaker and "there discuss with him, almost as a colleague, the policy of the "police in certain matters, well then, it is small wonder that "you, Hammersley, saw little or no wrong in going off on

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"holiday with a local man with a serious criminal record"; and it was for those reasons that the judge passed upon those two police officers a lesser sentence, albeit still a severe one, than otherwise he might have felt it his duty to pass.

On March 6, the plaintiff again appeared at the Central Criminal Court to face the second indictment, when no evidence was offered against him. Before he left the dock the judge, referring to the Brighton Police Force and to the need for a leader for it, said: "It is not difficult now, however, to foresee the "use to which the incidents I have mentioned, and others like "them to be found in the case, will or may be put for the purpose "of discrediting the officers of that force when they give evidence "in future prosecutions, and the results in some cases may be "unfortunate. This prospect and this risk will remain until a "leader is given to that force who will be a new influence, and "who will set a different example from that which has lately "obtained. I realise that this is a matter which is about to "engage the attention of those persons whose responsibility it is, "and I have no desire to trespass upon their domain, but since "the matter will also affect the administration of justice in the "courts I felt it right to make these observations."

There could be no doubt on the admitted facts which emerged from the evidence of the plaintiff himself that, although he was acquitted, his conduct indicated that he was failing in those qualities of leadership and the capacity to show a good example to his subordinates.

On the next day, March 7, 1958, the watch committee met and considered, inter alia, the length of the plaintiff's service, the trial, the statements of Donovan J., and the statements made by the plaintiff in evidence at his trial. The plaintiff was not present at that meeting nor had he been given notice of any specific charges. The committee came to the conclusion that the plaintiff had been negligent in the discharge of his duty and was unfit for the same, and in exercise of the powers conferred upon them by section 191 of the Municipal Corporations Act, 1882, they dismissed him forthwith. They also decided, as they had to, to refund him his police pension contribution.

As a result of correspondence, on March 18, the plaintiff's solicitor was allowed to address the committee, although he was in the difficulty that he himself did not know the specific charges, and the watch committee adhered to their previous decision. In due course the plaintiff appealed against his dismissal to the Secretary of State under the Police (Appeals) Act, 1927, and the regulations of 1943 [S.R. & O., 1943, No. 473]. The Home Secretary found that there were sufficient materials before the committee to justify the plaintiff's dismissal, and he dismissed the plaintiff's appeal.

The plaintiff brought an action against the defendants, who substantially form the watch committee, claiming against them first, a declaration that his purported dismissal was illegal, ultra

vires and void; and secondly, damages for wrongful dismissal under different heads.

The defendants admitted that they did dismiss the plaintiff, but they contended, inter alia, that by virtue of the provisions of section 191 (4) of the Municipal Corporations Act, 1882, they had power to do so and that as the plaintiff's appeal was dismissed by the Home Secretary it was not open to review by the court, alternatively, that the plaintiff was estopped from alleging that his dismissal was illegal, ultra vires or void or that there was any failure of natural justice.

Stanley Rees Q.C. and *John MacManus* for the plaintiff.

Neville Faulks Q.C. and *Anthony Harmsworth* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *General Medical Council* v. *Spackman*[2]; *Ceylon University* v. *Fernando*[3]; *Vine* v. *National Dock Labour Board*[4]; *Liversidge* v. *Sir John Anderson & Another*[5]; *R.* v. *Manchester Legal Aid Committee, ex parte R. A. Brand & Co. Ltd.*[6]; *Franklin & Others* v. *Minister of Town and Country Planning*[7]; *Nakkuda Ali* v. *M. F. De S. Jayaratne*[8]; *R.* v. *Brighton and Area Rent Tribunal, ex parte Marine Parade Estates (1936) Ltd.*[9]; *Fisher* v. *Oldham Corporation*[10]; *Tomlinson* v. *The London Midland & Scottish Railway Co.*[11]; *Barber* v. *Manchester Regional Hospital Board*[12]; *H. Tolputt & Co. Ltd.* v. *Mole.*[13]

April 19. STREATFEILD J. summarised the history of the plaintiff and the relevant facts of the case and continued: It was contended on behalf of the plaintiff that the power of dismissal might be construed as a dismissal by the Crown of its servant under its common law powers, the Crown having the right to dismiss at pleasure with no reasons stated. Mr. Faulks merely mentioned it to me, and almost invited me to reject it; and I do reject it because it is quite obvious, it being expressly a dismissal under section 191 of the Municipal Corporations Act, that it cannot possibly be construed as a dismissal by the Crown at common law.

In order to follow and decide upon the matters which have

[2] [1943] A.C. 627; [1943] 2 All E.R. 337; 59 T.L.R. 412, H.L.

[3] [1960] 1 W.L.R. 223; 104 S.J. 230; [1960] 1 All E.R. 631.

[4] [1956] 1 Q.B. 658; [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939.

[5] [1942] A.C. 206; [1941] 3 All E.R. 338; 58 T.L.R. 35, H.L.

[6] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.

[7] [1948] A.C. 87; 63 T.L.R. 446; [1947] 2 All E.R. 289, H.L.

[8] [1951] A.C. 66; 66 T.L.R. (Pt. 2) 214; 94 S.J. 516.

[9] [1950] 2 K.B. 410; 66 T.L.R. (Pt. 2) 9; [1950] 1 All E.R. 946, D.C.

[10] [1930] 2 K.B. 364; 46 T.L.R. 390.

[11] [1944] 1 All E.R. 537, C.A.

[12] [1958] 1 W.L.R. 181; [1958] 1 All E.R. 322.

[13] [1911] 1 K.B. 836, C.A.

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been submitted to me, it is necessary to go back to the springboard of this matter and to consider first of all the appointment of the plaintiff as the Chief Constable of Brighton and under what terms and conditions it was. First of all, so far as this case is concerned, the fountain head of this matter is section 191 of the Municipal Corporations Act, 1882, under which the watch committee are appointed by virtue of section 190 and have a power to decide matters by a majority. Under section 191, the watch committee "shall from time to time appoint a sufficient "number of fit men to be borough constables"—and that includes the chief constable. Under section 191 (4), the watch committee, "or any two justices having jurisdiction in the "borough, may at any time suspend, and the watch committee "may at any time dismiss, any borough constable whom they "think negligent in the discharge of his duty, or otherwise unfit "for the same." That is a statutory power given to the watch committee to dismiss any borough constable who is either negligent in the discharge of his duties or otherwise unfit for the same; it is a power which was not new in 1882; indeed I think it first arose from the Municipal Corporations Act, 1835, which was re-enacted.

The power there is a purely arbitrary power although, as I shall point out, it is a power which in my view must be exercised fairly and in accordance with the principles of natural justice. There is no appeal from it. That is the beginning of things so far as this case is concerned.

The next step so far as the statutory law is concerned was the passing of the Police Act, 1919, which amongst others things set up police federations throughout the country. Section 4 of that Act made it lawful for the Secretary of State "to make regula-"tions as to the government, mutual aid, pay, allowances, "[pensions], clothing, expenses and conditions of service of the "members of all police forces within England and Wales, and every "police authority shall comply with the regulations so made." I shall come presently to the regulations which were in fact made, but while I am dealing with the Act I draw attention to section 7 of the Act which reads: "So much of section 23 of the Metro-"politan Police Act, 1829, as amended by any subsequent enact-"ment, as limits the annual sum to be provided for the purposes "of the Metropolitan Police, and so much of section 197 of the "Municipal Corporations Act, 1882, as limits the amount of the "watch rate, and so much of any other Act, whether public, "general, or local, as limits any rate which may be raised for the "purposes of the police, shall cease to have effect."

As Mr. Neville Faulks pointed out, there is a section of this Act dealing with financial matters which specifically repeals, or causes the cesser of their effect, of certain sections of other Acts of Parliament including the Municipal Corporations Act, 1882; and he points out that had it been intended by Parliament to repeal completely section 191 (4) of the Municipal Corporations

Act, 1882, then Parliament could quite easily have said so expressly in the Act of 1919, but that nothing whatever is said about section 191 (4) of the Act of 1882.

Under that Act certain regulations have been made. The appointment of the plaintiff as chief constable took the form of an application to the watch committee dated January 10, 1956; it was on a printed form, and it is headed "Terms and Conditions "of Appointment." So that when his appointment was made and confirmed by the Home Office, the terms and conditions set out in his application became the terms and conditions of his appointment, and condition 4 of such conditions is: "The con-"ditions of service will be in accordance with the Police "Regulations for the time being in force and the successful "applicant will be required to pay pension contributions in ac-"cordance with the Police Pension Regulations for the time "being in force." Then No. 5 reads: "The appointment may be "terminated by three months' notice on the part of the successful "applicant"—nothing so far has been said as to how it may be terminated by the watch committee, but it goes on: "and will "be subject to the Police Acts and Regulations and to the success-"ful candidate passing a medical examination."

It is submitted by Mr. Stanley Rees that in this contract the words "Police Acts and Regulations" can only refer to something which is called in terms a "Police Act," and he says there is no ground for the construction of importing into the contract any reference to the Municipal Corporations Act, 1882.

I am quite unable to take that narrow view; it is quite clear that what is intended is that the terms and conditions of the appointment of the chief constable shall be subject to the statutory enactments, whatever they may be called, which govern the police force. If I were to put that narrow construction on this contract, I should be obliged to exclude, in London, the Metropolitan Police Act, because although it has the words "Police "Act" in it, it is called the "Metropolitan Police Act"; I should have to exclude in certain cases other Acts which govern the police force which import other words as well, and if the legislature had ever thought of enacting an Act of Parliament called "The Chief Constables Act"—which it has not—I suppose it could be argued that that would not apply to the appointment of a chief constable because it talks about the Police Act. When one looks at the Municipal Corporations Act, 1882, one finds that Part 9 is specifically headed "watch committee; constables"; by section 190 a watch committee is set up, and then follows section 191 which governs the appointment, dismissal and suspension of borough constables. To my mind it is quite impossible to say that the wording of this contract excludes the operation of the Municipal Corporations Act, 1882, which in this part of it is certainly a Police Act; and I am not prepared to give such a narrow construction as was submitted by Mr. Stanley Rees.

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It is argued that quite apart from the terms of the contract, the Police Act, 1919, followed by its regulations, in effect repeals section 191 (4) of the Act of 1882, and for that purpose it is necessary to consider first of all the regulations which have in fact been made pursuant to the powers conferred on the Secretary of State by section 4 of the Act of 1919. Those statutory instruments, the regulations, are first of all the Police (Discipline) Regulations, 1952; there have, of course, been other similar regulations intervening, but those were the regulations which were in force at the time. The Police (Discipline) Regulations, 1952, concern the position of constables and other police officers other than chief constables, assistant chief constables and deputy chief constables. They do not fall at this stage for any particular comment by the court, except to point out that in the schedule there is set out what is called the discipline code; and under the discipline code, which may be the subject of proceedings under the regulations for various forms of punishment from dismissal downwards, there is first of all what is called: "Discreditable conduct, that is to say, if a "member of a police force acts in a disorderly manner or in any "manner prejudicial to discipline or reasonably likely to "bring discredit on the reputation of the force or of the "police service." Then there is "Insubordinate or oppressive conduct"—none of which appears to fit the facts of this case. Then there is, under paragraph 4, "Neglect of duty," and again, although it is true that the watch committee appears to have come to the conclusion that the plaintiff had been guilty of negligence, there do not appear to be any items there which affect this case. Under paragraph 5 there is "Falsehood or prevarica-"tion"; but inasmuch as the Home Secretary came to the conclusion, without the allegations of falsehood, that there was ample evidence, it does not seem that that is applicable either. Then there is a section dealing with "Breach of confidence"; again, none of that seems to be appropriate here. Then, under paragraph 7, there is "Corrupt practice"—the plaintiff was acquitted of any corruption. There are also other items of conduct which are quite outside this case.

The nearest breach which could come within the four corners of the plaintiff's conduct here would be the first one, called "dis-"creditable conduct," that is to say, behaving in a manner prejudicial to discipline or reasonably likely to bring discredit on the reputation on the police force. The only materiality of those regulations is that they have been imported into the regulations which concern chief constables, deputy chief constables and assistant chief constables. Separate regulations were brought into force under S.I., 1952, No. 1706, and those regulations state: "1. Where a report or allegation is received"—and that must mean by the watch committee—"from which it appears that a "deputy chief constable or assistant chief constable of a borough

"police force"—that phrase by a later provision includes the chief constable as well—"may have committed an offence, the police "authority shall, unless they are satisfied that he has not com- "mitted an offence, inform him in writing of the report or allega- "tion and ask him whether or not he admits that he has committed "an offence and give him an opportunity, if he so desires, of "making to the police authority any oral or written statement he "may wish to make concerning the matter."

Then there are regulations providing for the procedure for formulating the charges for the tribunal to hear; the tribunal is to consist, inter alia, of not more than five members of the police authority. There is provision for the procedure at the hearing; and then, as affecting the chief constable, there is regulation 11 (1) (*b*), which lays down that the punishment in the case of the chief constable may be either dismissal or requirement to resign forthwith, as an alternative to dismissal, or a reprimand.

Then, by an amending Statutory Instrument, S.I. 1954, No. 1688, there is a substituted regulation 15, which, dealing with suspension, reads as follows: "Where a report or allegation is "received from which it appears that a deputy chief constable or "assistant chief constable of a borough police force may have "committed an offence against discipline or a criminal offence, "the police authority may suspend him from duty until such "time as either—(*a*) it is decided that he shall not be charged "with an offence against discipline, or (*b*) the disciplinary pro- "ceedings referred to in these regulations are concluded." There follows provision under sub-regulation (2) as to what happens when he returns to duty.

Those are the regulations which came into force by virtue of the Police Act, 1919, and as it seems to me the governing requirement is that a report or allegation is received from which it appears that a chief constable may have committed an offence, and if such a report or allegation is received there is, under the amending regulation, merely a power to suspend him from duty. When the plaintiff was suspended from duty following his arrest it was, of course, by virtue of that regulation that he was so suspended because at that time there was obviously a report or allegation which showed that he might have committed a criminal offence, and it was for such criminal offence that he was prosecuted at the Old Bailey, so no difficulty arises under that regulation with regard to the power of suspension. As it seems to me, the governing requirement is that the report of an allegation is received by the watch committee from which it is shown that he may have committed an offence. It is submitted by the plaintiff that the Act of 1919 with its regulations in effect repeals the Municipal Corporations Act, 1882; if there is any question of dismissing a chief constable, so it is submitted, it can only be done by virtue of those regulations and by following out the procedure under them.

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The argument is based in the first instance on *Wallwork* v. *Fielding and Others*.[1] It was a case which did not concern the power of dismissal under the Act of 1882; it concerned the power of suspension, and the ratio decidendi is that inasmuch as in the regulations then in force before the regulations of 1952 there was no reference to the power of suspension, it could not possibly be said that the Act of 1919 had repealed the provisions of the Municipal Corporations Act, 1882; and it is said, therefore, that now that those regulations of 1952 and, indeed, earlier regulations as well, do deal with the power of suspension, then the decision of the Court of Appeal in *Wallwork* v. *Fielding and Others*[1] would have been different because the Court of Appeal would have said that, at any rate, the power of suspension under section 191 (4) of the Act of 1882 was supplemented by new regulations. I am not prepared to come to any conclusion upon that matter, and it would certainly not be necessary for me to do so for the purposes of this judgment. It may very well be that the Court of Appeal on any future occasion, on such an argument, might adopt the same line of reasoning as the Home Office in the present case, in which a distinction has been drawn between the power to suspend a police officer generally under the Act of 1882, and the power to suspend him from duty under the regulations. It does not follow, therefore, that these regulations concerning suspension would have the effect for which Mr. Stanley Rees has contended. I do not think that *Wallwork* v. *Fielding and Others*[1] is any authority at all for saying that the Act of 1919 in fact repeals section 191 of the Act of 1882.

The next case, to which I was referred, which gets nearer to the present one, and is of more assistance to this court—great reliance was placed upon it—is that of *Cooper* v. *Wilson and Others*.[2] That case did concern a question of the power of dismissal and, very properly, great reliance was placed by Mr. Stanley Rees upon the words of Greer L.J.[3]: "These observations seem to me to "show that the power to make regulations under section 4 (1) of "the Police Act, 1919, does not impliedly repeal section 191 (4) "of the Act of 1882. The regulations, in my judgment, must "be read as applying to the way in which the watch committee "are to exercise their powers in a borough, and to the way in "which the chief constable is to exercise his similar powers in a "county. They cannot be used to repeal a provision which "Parliament has expressly left applicable to boroughs."

The case, of course, does not support Mr. Stanley Rees's argument that the Act of 1882 is repealed by the regulations under the Act of 1919; Greer L.J. in terms says that they do no such thing—"They cannot be used to repeal a provision which Parliament has "expressly left applicable to boroughs." Scott L.J. expresses

[1] [1922] 2 K.B. 66; 38 T.L.R. 441, C.A.

[2] [1937] 2 K.B. 309; 53 T.L.R. 623; [1937] 2 All E.R. 726, C.A.

[3] Ibid. 316.

this view[4]: "Substantially the same provisions were repeated in "sections 190 and 191 of the Municipal Corporations Act, 1882, "which are still in force today, with the exception that the "power of dismissal was taken from the justices and reposed "solely in the watch committee." So therefore one could, on that authority only, come to the conclusion that the Act of 1882 has not been repealed by the Act of 1919 and its regulations.

Nothing daunted, however, Mr. Rees says that it does have the effect that the power of dismissal under the Act of 1882 can now only be exercised under the procedure laid down by those regulations under the Act of 1919; it can only be carried out by charging what he called a "code offence" by giving notice of it to the accused, by giving him an opportunity of being heard and then adjudicating on the matter as though it were a full inquiry under those regulations; that is his submission.

Mr. Neville Faulks, on the other hand, used what I thought was a happy phrase which illustrated very clearly his meaning, that inasmuch as the Act of 1882 is still in force, there may well be a state of "peaceful co-existence" between the power of suspension or the power of dismissal under the Act of 1882, and the power of dismissal under the regulations under the Act of 1919. He concedes that in cases where those regulations obviously and clearly apply, then the Act itself states that the police authority shall observe them; but he suggests and submits that there are cases where a power of dismissal may be exercised not as a code offence but by virtue of the original 1882 offence. He points out that just as there is a duty in the watch committee to appoint fit persons to be borough constables, so there is a corresponding power in them to dismiss people who in their opinion are unfit. It does not always follow that a person is guilty of the code offence of behaving in a discreditable manner such as is calculated to bring disrespect to the police and is prejudicial to discipline; it may well amount to such offence, but there may equally be cases where conduct may be obviously such as to make a person unfit to hold office. Mr. Faulks submitted that where a police officer is convicted, it would be a pure farce if one had to formulate a code charge against him when he is actually in prison undergoing sentence, so as to give him an opportunity of being heard in respect of an offence against discipline; he submits that quite clearly there still survives a power in such a case under the Act of 1882 to dismiss an officer who has been convicted because, quite obviously, he is unfit to hold office.

Indeed, that was the fate which at once overtook the two convicted police officers following their convictions at the Old Bailey. No code charges were made against them; no notice was given to them, but in the words of Mr Faulks, the watch committee simply said to them: "Out you go," and nobody could suggest that the watch committee were not perfectly entitled to

[4] [1937] 2 K.B. 309, 338.

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take that course in circumstances where, because it was not a case where the matter had been set in train by any report or allegation received by them, the conviction simply spoke for itself and cried aloud for instant action; and the plaintiff conceded in evidence that had he unhappily likewise been convicted he would not have expected to be served with a notice under the regulations; he would not have expected anything other than being turned out. Mr. Faulks's submission, therefore, is that the regulations can only apply where the matter has been supported, so far as the watch committee is concerned, by a report or allegation from which it appears that an officer may have committed one of the offences in the code. As I have pointed out, there may be conduct which amounts to discreditable conduct within paragraph 1 of the Schedule of the Code, but the same conduct may well amount to an allegation that a person is unfit for office, and that is not a code offence. So Mr. Faulks conceded that if there was from some outside source, quite independently of these criminal proceedings, some allegation that the chief constable might have committed a code offence, then it might have been necessary to go through the procedure laid down by these regulations; but having regard to the criminal proceedings, when it came to the knowledge of the watch committee and, indeed, of the country as a whole, not as the result of any report or allegation, that these admitted matters were such that the plaintiff was no longer fit to be chief constable, Mr. Faulks submits that the committee were perfectly entitled to exercise their power under the Act of 1882.

One more authority which is important from this point of view is *Hogg* v. *Scott*,[5] which, although it is not binding upon me, being a decision of the court in temporary jurisdiction, is one which was decided by Cassels J., and one which is bound to command the utmost respect. In my judgment, having read this report more than once, there is only one matter which is different in effect from the present case; that is that the police officer in *Hogg* v. *Scott*[5] was in fact convicted of a criminal offence and sentenced to a month's imprisonment and, he having been so sentenced, the watch committee, like the watch committee of Brighton in the cases of the two convicted police officers, at once dismissed him and did not go through the procedure laid down by the regulations.

Cassels J., having carefully analysed the powers of the different kinds of police forces throughout the country, said[6]: "The con-
"tention of the plaintiff that his dismissal is a nullity because
"the procedural requirements were not complied with does not
"prevail. I find that he was regularly and legally, and on good
"and proper grounds, dismissed. If it were otherwise discipline
"would be difficult to maintain. Splendid as the police force is,
"it is a fact that occasionally, though very rarely, a member of

[5] [1947] K.B. 759; 63 T.L.R. 320; [1947] 1 All E.R. 788.

[6] [1947] K.B. 759, 766.

"it is convicted of a criminal offence and sentenced to a "term of imprisonment. It would amount almost to a farce to "say that in such circumstances the commissioner was powerless "to dismiss unless he had set in motion the procedure applicable "to a case of insubordination. In this case the commissioner "had the Act of 1829 and the General Orders to support him in "his action"—that was a case where the police officer had been dismissed.

Cassels J., although the case before him was under a different Act of Parliament, the Act of 1829, mentions the corresponding provision of the Act of 1882; there was quite clearly power in the police authority to dismiss that police officer. The question is: does it make any difference that the plaintiff in the present case was not convicted of a criminal offence? If there were grounds, based on evidence given at the Central Criminal Court, for the watch committee to come to the conclusion that the plaintiff was unfit to remain chief constable of Brighton, then in my judgment they had power under the Act of 1882 to dismiss, and that is a different power from the power which is originated by a report or allegation received from outside and independently of any criminal proceedings. I think that they had power to do it and I accept the submission of Mr. Neville Faulks that that power exists still and survives under the Act of 1882, which is not repealed by the Act of 1919 and its regulations.

Having said that, however, the next question which arises is as to how that power is to be exercised. As I have already indicated, and I repeat, in my view it is a power which must be exercised fairly and in accordance with the principles of natural justice. That was strongly submitted to me by Mr. Stanley Rees and it was equally strongly opposed by Mr. Neville Faulks, who said that in effect the power under the Act of 1882 is completely unfettered; that the principles of natural justice do not apply at all; that in effect the watch committee can do whatever seems right to them so long as they can act bona fide—and in this case it is conceded that the watch committee did so act.

I agree with the submissions of Mr. Stanley Rees about that matter; I think he is right when he submits that one has to consider what it is that the watch committee are doing. It is not merely an administrative matter as a result of which some person may be prejudiced or may be deprived of the right of property and so on; the committee were here taking a very serious step under an Act of Parliament which of itself gave no right of appeal: they were exercising their right to dismiss a man, to deprive him at the age of 58, I thing it was, of his living and to deprive him of his accumulated pension rights, although they would be obliged to return the contributions to him. Because of all that I think one must have regard to the seriousness of what has been contemplated.

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Reliance was placed on *Local Government Board* v. *Arlidge* [7] where Lord Haldane L.C. said this [8]: "My Lords, when the duty "of deciding an appeal is imposed"—that was an appeal under the Local Government Act—"those whose duty it is to decide "it must act judicially. They must deal with the question "referred to them without bias, and they must give to each of "the parties the opportunity of adequately presenting the case "made. The decision must be come to in the spirit and with the "sense of responsibility of a tribunal whose duty it is to mete "out justice. But it does not follow that the procedure of every "such tribunal must be the same. In the case of a court of "law tradition in this country has described certain principles "to which in the main the procedure must conform. But what "that procedure is to be in detail must depend on the nature of "the tribunal. In modern times it has become increasingly "common for Parliament to give an appeal in matters which "really pertain to administration, rather than to the exercise of "the judicial functions of an ordinary court, to authorities whose "functions are administrative and not in the ordinary sense "judicial. Such a body as the Local Government Board has the "duty of enforcing obligations on the individual which are "imposed in the interests of the community. Its character is "that of an organisation with executive functions. In this it "resembles other great departments of the State. When, there-"fore, Parliament entrusts it with judicial duties, Parliament "must be taken, in the absence of any declaration to the con-"trary, to have intended it to follow the procedure which is its "own, and is necessary if it is to be capable of doing its work "efficiently. I agree with the view expressed in an analogous "case by my noble and learned friend Lord Loreburn. In "*Board of Education* v. *Rice* [9] he laid down that, in disposing "of a question which was the subject of an appeal to it, the "Board of Education was under a duty to act in good faith, and "to listen fairly to both sides, inasmuch as that was a duty "which lay on everyone who decided anything. But he went on to "say that he did not think it was bound to treat such a question "as though it were a trial. The board had no power to administer "an oath, and need not examine witnesses. It could, he thought, "obtain information in any way it thought best, always giving a "fair opportunity to those who were parties in the controversy "to correct or contradict any relevant statement prejudicial to "their view."

That is the general principle, that a tribunal need not follow the ordinary procedure of a court of justice; but there are cases where it must act judicially and it must give parties the opportunity to be heard.

A number of cases which I do not think it is necessary for me

[7] [1915] A.C. 120; 30 T.L.R. 672, H.L.

[8] Ibid. 132.

[9] [1911] A.C. 179, H.L.

to cite were quoted showing that the question of acting in accordance with the principles of natural justice might depend upon whether there was a controversy between the parties. I think probably the most helpful guide to whether the rules of natural justice apply to such a case as this is *Cooper* v. *Wilson*.[10]; the other cases to which reference has been made concern detention under rule 18 (*b*) of the Defence of the Realm Regulation, cases concerning members of the medical profession, and a case concerning a student at a university. None of those cases helps me very much; but in *Cooper* v. *Wilson*,[10] brought as it was under the Police Act, Greer L.J. said [11]: "An application "to the watch committee to discharge a constable by reason of "the regulations takes the form of an application for confirma-"tion of the chief constable's decision, but it is none the less an "application to the watch committee to dismiss, and must be "heard and determined by the watch committee acting judicially "or quasi-judicially. Until the preliminary decision of the chief "constable comes before the watch committee for confirmation "it cannot have the effect of operating as a dismissal"; and Scott L.J. analysed the position with regard to dismissals under the regulations and came to the same conclusion that the committee should be acting in a quasi judicial capacity.

It is true that both of those Lords Justices were dealing with dismissal under the regulations under the Act of 1919; but I cannot bring myself to the conclusion that the position with regard to the power of dismissal under the Act of 1882—which, as I have already said, I think still survives—is different from that which obtained under the regulations themselves, particularly when there is no right of appeal; so I have come to the conclusion for those reasons that Mr. Stanley Rees is right in saying that the exercise of a power of dismissal under the Act of 1882 must be exercised fairly and bona fide, as he has submitted, in accordance with the principles of natural justice.

Mr. Neville Faulks, however, submits that even so the plaintiff has in fact had natural justice; he says that this is a case of res ipsa loquitur; that out of his own mouth at the Old Bailey for the purposes of his trial for all the world as well as the watch committee to hear, he convicted himself of unfitness to hold the office of chief constable. In those circumstances, just as if he had been convicted of a criminal offence, I have come to the conclusion that, although he now complains that he ought to have been heard, that he ought to have had specific charges formulated against him and particulars of this unfitness for office; and that he ought to have been given the opportunity of being heard and to call witnesses, on the evidence which he himself gave at the Old Bailey there was no need for the watch committee to do other than they in fact did. It is true that if they had desired to be

[10] [1937] 2 K.B. 309. [11] Ibid. 317.

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particularly punctilious, they might have taken the opposite procedure; but I have come to the conclusion that under their surviving power under the Act of 1882 they did in fact act in a manner which was in accordance with the principles of natural justice, whatever else they might have done to be on the safe side.

For those reasons, therefore, I have come to the conclusion, unfortunately for the plaintiff, that he has failed to make out that there was any illegality in his dismissal or that it was in fact a nullity. Even if I am wrong as to that and even if the regulations apply, there is one further difficulty which seems to me to be quite unsurmountable, and that is in relation to the Police (Appeals) Act, 1927. By that Act, which is headed: "An "Act to provide for a right of appeal by members of police forces "who are dismissed or required to resign"—it does not say "who "are dismissed under the regulations," but simply generally "are dismissed"—section 1 (1) provides: "A member of a police "force who after the passing of this Act is dismissed or required "to resign as an alternative to dismissal may appeal to the "Secretary of State in accordance with this Act and the rules "made thereunder, if he gives notice of appeal in the prescribed "manner and within the prescribed time."

It was argued that those words "A member of a police force "who after the passing of this Act is dismissed," can only apply to an officer who has been dismissed by virtue of the regulations, because the rules made under the Police (Appeals) Act, S.R. & O. 1943, No. 473, lay down the following provisions: "These "rules shall apply to all appeals by a member of a police force "in England or Wales under the Police (Appeals) Act, 1927, as "amended by the Police (Appeals) Act, 1943, . . ." and then: "2 (1) A person who desires to appeal under the provisions of the "Act shall send to the Secretary of State a notice of appeal in "the form set out in the schedule to these rules and shall annex "to the said notice the statements and lists specified in the "said form. (2) The notice of appeal shall be sent to the "Secretary of State within ten days from the date when the "appellant received on the misconduct form the notification of "the decision against which he desires to appeal."

It is argued by Mr. Stanley Rees that that cannot be carried out because there was no misconduct form served upon the plaintiff. He cannot, it is contended, serve the appropriate notice of appeal because in the form of notice of appeal laid down in the schedule there appears this: "I desire to submit additional evi-"dence not taken into consideration at the hearing of the charge "against me." He says that if there was no hearing, he cannot fill in that part of the notice of appeal. Then: "I annex . . . "(2) a list marked (B) of the documents, if any (other than docu-"ments produced at the hearing of the charge) which I desire to "submit"—he submits that he cannot fill in that part appropriately. Regulation 8 states: "Unless the tribunal otherwise

"determines, the inquiry shall be conducted by way of re-"hearing the charge and the evidence in support thereof shall "be given first"—and he asks how there can be a rehearing by the Secretary of State if there has not in the first instance been a hearing by the watch committee.

In my view that is a somewhat flimsy argument when one considers alongside it not only the words of the Act itself which refer to "a member of a police force who . . . is dismissed"—it does not say whether under the Act of 1882 or under the Act of 1919—but also regulation 12 which provides: "If any question "arises as to the proper compliance with any provision of these "rules it shall be determined by the Secretary of State whose "decision shall be final." In other words there is that "get "out," if I may use the phrase, that if in any given case the precise wording or requirements of the formal notice of appeal cannot be carried out, there is that power of dispensation of the Home Secretary, and it seems to me that these words are specifically put in so as to make it applicable to a dismissal under the Act of 1882 as well as under the Act of 1919.

The difficulty about that point is this, that by section 2 (3) of the Police (Appeals) Act "An order made by the Secretary of State "under this section shall as soon as it is made be sent to the "appellant and the respondent together with, if an inquiry was "held, a copy of the report of the person holding the inquiry, and "the order shall be final and binding upon all parties." In other words, the Police (Appeals) Act gives what the Act of 1882 did not give, namely, a right of appeal from a dismissal and it states in terms that the order of the Home Secretary shall be final and binding on the parties.

It is quite true that in correspondence as well as in the statement to the Secretary of State the plaintiff's solicitor stated categorically that he reserved the right to contend that the dismissal was invalid and was a nullity; that in effect his appeal was without prejudice to his right of testing the matter in the Queen's Courts. But in the face of the provision of the Act of Parliament which says that the Home Secretary's decision shall be final and binding on all parties, it cannot be circumvented by any reservations of that kind, and it is noticeable that in *Hogg* v. *Scott* [12] Cassels J. disposed of a similar question in one sentence, and I think I can do the same thing: "I think the plaintiff may "be said to have waived his right to take these proceedings by "appealing to the Home Secretary and accepting and acting upon "his decision for three years." With the exception of the words "acting upon his decision for three years," this case is just the same. I think that the plaintiff is in the appalling difficulty that although he was dismissed, and even if he were right in saying that he ought to have been dismissed under the regulations themselves, he has waived his right to go to the courts. It is said that

[12] [1947] K.B. 759.

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the Home Secretary's decision cannot be effective because the decision by the watch committee was a nullity, and therefore one cannot afterwards add another nullity; that the Home Secretary's decision was in fact a nullity, because it purported to confirm what in itself is a nullity. But I have already stated that in my view what was done by the watch committee was not a nullity. The plaintiff then availed himself of the right of appeal under the Act of 1927, and under that Act the decision of the Home Secretary is final and binding.

A number of other authorities were cited to me, dealing with the plaintiff's remedies either by way of damages or a declaration, or both; but on the conclusion at which I have arrived, on either ground—either that the dismissal was valid under the Act of 1882, or that by taking the course he did the plaintiff has waived his rights in these courts—it is unnecessary for me at this stage to review those decisions.

In the result, and for the reasons I have given, in my view the action must fail and there must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *Bosley & Co., Brighton; W. O. Dodd, Town Hall, Brighton.*

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